JUSTICE 2 COMMITTEE

Tuesday 15 May 2001
(*Morning*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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JUSTICE 2 COMMITTEE
12th 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

Gerry Brown (Law Society of Scotland)
Sherman Carroll (Medical Foundation for the Care of Victims of Torture)
Alastair Duff (Law Society of Scotland)
Iain Gray (Deputy Minister for Justice)
Christopher Hall (Amnesty International UK)
Tim Hancock (Amnesty International UK)
Anne Keenan (Law Society of Scotland)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

ACTING ASSISTANT CLERK

Graeme Elliott

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Tuesday 15 May 2001

(*Morning*)

[THE CONVENER *opened the meeting at 09:47*]

The Convener (Pauline McNeill): I welcome everyone to the 12th meeting in 2001 of the Justice 2 Committee and remind members to turn off mobile phones and pagers. We have received apologies from Tavish Scott, who is attending a meeting of the Transport and the Environment Committee.

I point out to members that the committee clerks are participating in the Parliament's open week, which provides an opportunity for members of staff to find out more about the work of their colleagues in other directorates. Therefore, five members of staff are viewing the committee's proceedings from inside the chamber.

Christine Grahame (South of Scotland) (SNP): May I raise a point, convener? This is no reflection on the official reporters, but I am unhappy that we have yet to receive the *Official Report* of our previous meeting. Members need to read previous witnesses' evidence in order to be able to prepare questions for the next meeting.

I advise the committee that I have lodged a written parliamentary question to the Scottish Parliamentary Corporate Body on the subject of the delay in the production of *Official Reports* of committee meetings.

The Convener: I am happy to acknowledge the point that you raise, Christine. However, I should point out that the situation is not the fault of the official reporters. That office is increasing its number of staff, but it takes time to train official reporters. I should also advise members that the conveners liaison group agreed priorities for the production of official reports of committee meetings, with stage 2 proceedings at the top of the pecking order. However, I will pursue the matter at the conveners liaison group, if members are in agreement.

Christine Grahame: Thank you, convener.

The Convener: Members have been circulated with a note prepared by the clerks on questions and answers from our previous meeting. However, it is certainly a hindrance to the work of the committee that the *Official Report* of our previous meeting is not yet available.

Items in Private

The Convener: The next item is whether the committee agrees to discuss its stage 1 report on the International Criminal Court (Scotland) Bill in private at our next meeting. Are members agreed?

Members *indicated agreement*.

The Convener: Do members agree to take item 6 of today's meeting, which is a discussion of the content of our stage 1 report, in private?

Members *indicated agreement*.

The Convener: I advise members that we must finish discussion of item 4, on subordinate legislation, by 12.30 pm, as the minister has to leave.

Scott Barrie (Dunfermline West) (Lab): My agenda says that item 4 is discussion of a petition.

Mrs Lyndsay McIntosh (Central Scotland) (Con): Item 3 is the item on subordinate legislation.

The Convener: I advise members that the clerks issued a revised agenda.

At our previous meeting, the committee agreed to discuss item 2, on lines of questioning, in private. Therefore, we now move into private session.

09:51

Meeting continued in private.

10:08

Meeting continued in public.

International Criminal Court (Scotland) Bill: Stage 1

The Convener: Our first witnesses are from the Law Society of Scotland. I understand that Michael Clancy will not be here this morning, so I pass the committee's best wishes to him. I invite Anne Keenan to lead off by introducing her team.

Anne Keenan (Law Society of Scotland): On my left is Alastair Duff, who is a member of the society's criminal law committee. On my right is Gerry Brown, whom I am sure you are all familiar with, as he has given evidence to the committee on a number of occasions. He is a member of our criminal law committee and convener of the legal aid committee.

The Convener: You submitted a helpful paper, for which I thank you. Would you like to make some brief comments on that paper before we ask questions about it?

Anne Keenan: You will see that our comments are concerned with the drafting of the bill. We have said from the outset that we are happy with and support the general principle of the bill. We have focused on the drafting in specific areas where we think there has to be further consideration; I will be happy to answer questions on those aspects that we have highlighted in our submission. I am aware that there may be questions arising from other submissions that the committee has received; we are also happy to give our views on those.

Christine Grahame: It is unfortunate that you have not had access to last week's evidence from Dr Scobbie. In fact, that hinders you much more than it does us, because my questions for you follow from questions that I put to him. I took the general view that I wanted an assurance that the international criminal court will be watertight and that its provisions will not, through the operation of international or Scottish criminal cases, seep out and change, quickly or in due course, existing criminal case law and common-law principles in Scotland. Can you give me a general overview? It is a huge question, but do you think that any of the provisions will have an impact on existing Scots criminal law? Perhaps you could start with the age of criminal responsibility.

Anne Keenan: We considered that the age of criminal responsibility would remain, as it is at present under common law, at eight. In fact, I believe that that is enshrined in the Criminal Procedure (Scotland) Act 1995. The Rome statute makes specific provision for the age of criminal responsibility before the international criminal court at 18, so there would be a difference between the application of the law in Scotland and the application of the law before the international criminal court.

That is not necessarily problematic, as the discretion of the prosecutor in Scotland would still apply. The prosecutor would still have the discretion to prosecute those who were aged over eight in Scotland for matters that are contained in the International Criminal Court (Scotland) Bill. Only in cases where the Scottish courts were unwilling or unable to act under their own statute would the international criminal court come in, and it would be able to prosecute only those who are over 18. However, the Scottish courts would have a wider discretion to consider the applicability of the law to all people over the age of eight.

Alastair Duff (Law Society of Scotland): It is certainly anomalous and, in one view, undesirable that the Scottish courts should be able to prosecute persons aged over eight, whereas the ICC would not be able to prosecute persons until they were 18 or over in relation to such offences. However, although that may be undesirable, it is not within the power of the Scottish Parliament to change it.

If your question is whether the anomaly would be somehow liable to have an effect by osmosis on our domestic law, it is fair to say that the Law Society of Scotland would not regard that outcome as helpful. However, there is no basis for thinking that it is likely to happen. The age of criminal responsibility in Scotland has a long tradition. It clearly impacts on children's panels and the ability to prosecute children along with adults in our courts, especially for serious offences. The Law Society of Scotland would not welcome any erosion of that principle.

10:15

Christine Grahame: Can I clarify this? I think that you are saying—I may have got this wrong—that the current Scots law position takes primacy and that the ICC only kicks in if, under domestic Scots law, we are unable or unwilling to pursue the proceedings. I had been under the misapprehension that specific statutory crimes were defined within the International Criminal Court (Scotland) Bill—matters such as hostage taking and the idea of rape being a war crime when it is used as a weapon of war—and that Scots common law would not have a role in those matters, but you are telling me that people could be prosecuted under domestic Scots common law to start with. Is that correct?

Gerry Brown (Law Society of Scotland): Yes.

As I understand it, that would be the case, because certain statutes already deal with the commission of a crime by people over certain ages. Common law disregards age in relation to certain behaviour, as long as the person is above the minimum age. As Alastair Duff and Anne Keenan have indicated, that approach has been developed over many years. It is important that it is not interfered with in any way, so that consistency is maintained.

Christine Grahame: I want to be clear about this. Prosecutions for what are defined as war crimes within the bill would, in the first instance, be brought under Scots domestic criminal law, which would take primacy. Is that right?

Anne Keenan: Prosecutions could be brought under the terms of the International Criminal Court (Scotland) Bill, because a provision in the bill says that the ordinary principles of Scots law will apply. That means that the provision of Scots law in relation to criminal responsibility would apply. In the first instance, the prosecutor would consider the facts and the evidence and determine whether, in their view, the acts constituted a crime under the bill.

Alastair Duff: As long as the accused was aged over eight, they could be prosecuted in Scotland under the bill. If the Scottish authorities were, for some reason, unable or unwilling to take proceedings against a person aged under 18 and therefore declined jurisdiction, as far as I can see from the Rome statute, the ICC would not be able to prosecute that individual unless they were over 18.

The Convener: Can I clarify that? I understood that point, but are you saying that, with the new offences incorporated into Scots law through our signing up to the international criminal court, we could use the new offences but still prosecute those under 18? If that is the case, it is quite anomalous.

Alastair Duff: I agree that it is anomalous, but it is not necessarily undesirable. What would be undesirable—I think that this was Christine Grahame's point—is if, because of the anomaly, there was a creeping erosion of the Scottish age of criminal responsibility. It would be undesirable if a view was taken that the age of criminal responsibility in Scotland should start to sneak upwards in order to create a pan-global common playing field.

Christine Grahame: I am slightly muddled again. I thought that I had clarity, but now I do not have clarity.

Alastair Duff: I did not think that I was helping.

Christine Grahame: If, on the indictment, somebody is charged specifically under the bill with one of the offences that is defined in it, are you saying that that does not mean that the criminal age of responsibility is the criminal age as defined in the bill and that the bill's provisions could still relate to somebody under the age of 18? Can the two be mixed?

Gerry Brown: Yes.

Christine Grahame: That is fine.

Anne Keenan: If Christine Grahame looks at section 9(1), she will find:

> "In determining whether an offence under this Part of this Act has been committed, the court shall apply the principles of the law of Scotland."

The age of criminal responsibility under the law of Scotland is eight. That means that, if an offence was being prosecuted under this statute in Scotland, it would be possible to prosecute someone over the age of eight.

Christine Grahame: That is clear.

The Convener: We are keen to follow through the theme of the impact of Scots law. We also want to draw out what we can about the rules of the international criminal court. Christine Grahame has a question on that point.

Christine Grahame: One of our concerns is that there should be a level playing field for the rules of procedure in courts. When we took evidence from Dr Ian Scobbie, I asked him whether the decisions of the ICC will set precedents and therefore have a persuasive effect on state judicial systems. Dr Scobbie said that they will have a more persuasive effect on international than domestic cases, although the effect on domestic cases is not without interest. If we start to have a bank of cases, under the ICC operating in domestic legislation or elsewhere, how will we use those precedents, given that different rules apply to court procedure, fairness to the accused, representation, evidence taking and fingerprinting?

Gerry Brown: What you describe has already developed to some extent with the introduction of the Human Rights Act 1998. As a general principle, European and Commonwealth case law is being interpreted in Scottish cases, but it is limited to the framework of the Scottish system and has to reflect what we are doing in practice. The most recent cases are delay cases. Many of the recent delay cases in criminal procedure at this early stage reflect the interests of justice, the seriousness of the crime and the pressures on the criminal justice system. As a general first statement, I think that ICC case law will be reflected in the context of any party to the treaty.

Christine Grahame: However, other jurisdictions may have different standards. I appreciate that the international criminal court can

take proceedings away from a nation state at any stage and even redo cases if it feels that a proper attempt has not been made to run the case. We know that there is a different standard of justice in some jurisdictions—this is mixed in with politics. I take it that that will be taken into account in Scots law in determining the persuasiveness of a decision. Perhaps I should not say so, but politics will have been mixed with justice in previous decisions.

Gerry Brown: I try desperately to stay clear of politics.

Christine Grahame: Not for the next two weeks.

Gerry Brown: To depart from the question, one issue that applies across the board is previous convictions. Various discussions are continuing on that point. For example, could one take into account a previous conviction from France or Germany, which have different systems?

As you are aware, there is a movement towards compatibility and a unified approach. However, there will be anomalies. I am afraid that the only answer that I can give at this stage—although I am sure that you will get better answers—is that one must trust the courts in Scotland to interpret the case law in a way that reflects our system. You should also bear in mind the fact that if a decision is taken in the Scottish court in such proceedings, avenues of appeal are open throughout the various procedures.

Alastair Duff: As you know, section 9(4) of the bill says:

"In interpreting and applying the provisions of"—

various sections of the act, the Scottish court—

"(a) shall take into account any relevant judgment or decision of the ICC; and

(b) may take into account any other relevant international jurisprudence."

It is obvious that that section contains some debatable phrases, but I do not know whether it also contains hostages to fortune. Does "shall take into account" mean that decisions of the ICC are binding, or is the court simply required to take account of them? In other words, is the court required simply to consider those decisions and can it reject them?

I suppose that it would be undesirable to have different frameworks for applying the statute in different jurisdictions, but that may be inevitable to some extent, as it may arise out of the fact that different, local legal systems are involved.

Gerry Brown is absolutely right to say that, under the European convention on human rights, Scottish courts are becoming familiar with decisions from other jurisdictions. They seem to be coping with that without difficulty and, at least thus far, without any insidious interpretation of Scottish law being required.

Ms Margo MacDonald (Lothians) (SNP): I apologise for arriving late.

This point may be terribly esoteric, but does the bill have implications for the Scottish verdict of not proven?

Alastair Duff: No such implications occur to me immediately, but, given time, I might think of some. I cannot envisage why it would—the not proven verdict is a domestic verdict that will remain—

Ms MacDonald: Is it purely domestic?

Alastair Duff: Yes, subject to interference from politicians, with all due respect.

Ms MacDonald: I think that the not proven verdict is a great idea.

Alastair Duff: I think that it is a great idea as well.

Ms MacDonald: I just thought that perhaps we could spread the word that it might be a good idea.

Anne Keenan: Section 9(1) refers to the court applying

"the principles of the law of Scotland."

That would ensure that the not proven verdict could continue to be used.

Alastair Duff: Not every Scottish politician thinks that the not proven verdict is a good idea.

Ms MacDonald: Those politicians are wrong.

Alastair Duff: I agree.

The Convener: The committee has a general interest on which we are trying to press you. We can live with the anomalies because we think that, in many respects, we have the right system in Scots law. However, if we sign up to the statute, we do not want the system being changed by default. It is common sense to say that the statute will have some impact on Scots law because, if one accepts that the ICC will have its own case law and that Scottish courts will be asked to take that case law into account in their judgments, eventually there will be a slight change in the approach of the Scottish courts. That is the general issue that we are concerned about. Both Margo MacDonald and Christine Grahame mentioned it to draw out one or two obvious issues. Later, we want to talk about whether we will be required to implement standards on imprisonment, fingerprinting and the way in which we do things.

Anne Keenan: I know from our experience of dealing with the ECHR that there has been a tradition of allowing a margin of appreciation,

which means that each jurisdiction can operate within the confines of its own law to various limited degrees, so that the way in which it operates can be taken into account. Therefore the core principle of a decision can be extracted with a certain margin allowed for how that legal system operates within its own procedures. I envisage that dealing with this area of law will be no different. There will be a margin of appreciation for each individual state as to how it deals with particular issues. That should be taken into account when one is looking at the decisions of the courts of states that have ratified the treaty that establishes the international criminal court.

10:30

Ms MacDonald: I am extremely interested in that area. I have to face up to the fact that it was me who said we should look at this issue—we are now beginning to wonder why. We feel a sense of responsibility because Scots law will play a part in what is supposedly a new international order of justice. If we think about what Anne Keenan has just said about this area of toleration—what was it called?

Anne Keenan: Margin of appreciation.

Ms MacDonald: Aye, margin of appreciation. We should think about how the Turkish courts might operate within that margin of appreciation in relation to the human rights of Kurdish people. They would be operating within their own law, but would we still sanction that margin of appreciation in terms of international justice?

Anne Keenan: Article 55 of the Rome statute states some core values, such as the right to legal representation and the right to have an interpreter during questioning. As those have been put down in the statute, I imagine that when it is acceded to, the core standards should be applied to domestic law so that there is at least a basic level of human rights protection in the domestic framework.

The Convener: Would the Law Society of Scotland regard it as important for Scotland to have an input into the judiciary of the international criminal court? The committee has examined how judges will be appointed or selected—although there may be differing opinions among members as to whether that is right. What kind of input should the Scottish judiciary have to ensure that we have some belts and braces on the other side?

Anne Keenan: The system that will be operated will be election. Because the UK is a unitary state, it is likely that there will be only one judge from the whole of the UK. I think everyone would agree that it would be great if that was someone from Scotland. I know that Alastair Brown, who gave evidence to the committee, has referred to Judge Edward's role in international affairs. The Law Society would welcome the appointment of a Scottish judge as a UK representative, but we could not say anything beyond that. The procedure is specified in the Rome statute and is, as I understand it, incapable of amendment. We are working within the terms of the procedure that is laid down within that statute.

Gerry Brown: I agree totally with what Anne Keenan has said, but it is quite clear from our information that there are a number of very eligible candidates for such a position.

The Convener: I am sure. We will move on from that topic to the definition of residence.

Mrs McIntosh: Mr Duff pointed out that the language of the bill might sometimes be confusing. The definition of residence is another example of that. Will the fact that universal jurisdiction has not been adopted leave us open to protracted challenges?

Alastair Duff: I certainly agree that the use of the term "residence" is a bit of a moveable feast. In our legislation, residence is defined in different ways for different purposes. As far as I can see, the bill does not go any way towards helping us appreciate what residence means or how transient the connection with the UK—it is the UK, not Scotland—will have to be to constitute residence. In the absence of some assistance being provided in the legislation, accused persons who find themselves on the wrong end of an arrest or prosecution that is based on residence could seek to challenge it. There is no doubt that, through precedent in the courts, the term will become clearer.

Are you inviting me to pontificate on the issue of universal jurisdiction?

Mrs McIntosh: That was exactly what I was going to do. I was going to invite you to give us a definition.

Alastair Duff: A definition of residence? That is the length of a piece of string. I am not sure that I am any better placed to provide a definition of residence than anyone else.

The Convener: Do we have a definition of residence that applies to Scots law?

Mrs McIntosh: There are many different definitions.

Alastair Duff: Anne Keenan tells me that there are various definitions. I think that I may have seen them somewhere in the evidence or submissions that have been made by other bodies.

Gerry Brown: I agree with Alastair Duff that it would be difficult to give a definition that would assist the committee. For example, the meaning of "possession" in terms of the Misuse of Drugs Act

1971 has developed in numerous cases over the years. As practitioners, we can only expect that residence will depend on the facts and circumstances of each case. Residence is interpreted differently in different legislation already—for example, for the purposes of tax, VAT and other things.

Alastair Duff: Frankly, the concept of residence is not particularly common in criminal law. I am a criminal lawyer; one seldom wrestles with issues of residence, which seem to feature much more in our fiscal arrangements. As far as I know, the courts and the Inland Revenue have between them worked out what, for their purposes, residence means in certain situations.

Mrs McIntosh: I think that it is 40 days over the year.

The Convener: It has been suggested to the committee by other witnesses that we should consider the question of universal jurisdiction, which I suppose would neutralise the reason for having a definition of residence. Do you have a view on universal jurisdiction? When they were pressed last week, some of the witnesses suggested that although there is a precedent—other countries have done it—Scotland should take the lead.

Alastair Duff: Universal jurisdiction is much more a matter of policy than a fine matter of drafting. It is quite a big issue to embrace but, as you say, other countries have done it. The Law Society's view is that it is a matter of policy, but we should not be shy about embracing it if there is the political will.

We were especially exercised by the anomaly that was pointed out by Amnesty International UK and others, of the person who commits offences abroad and is liable to prosecution in Scotland because he is a UK national or because he has become resident in the UK—whatever definition we want to use for residence, let us assume that the person is either a national or is resident. However, his commander is a national of another country, who does not satisfy the residence requirements. The Scottish courts could prosecute one but not the other, unless there is universal jurisdiction. Under the general principles of Scots law, that is undesirable. It is generally recognised in our system that, where people are charged with the same or a closely related offence, they ought to be tried together.

Arguably, injustice can arise where there are separate prosecutions. There is the potential that the accused in one trial might try to offload responsibility on to somebody who ought to be his co-accused. He might have been shy about doing so had he been on trial with that individual, but because that is not the case he feels free to point the finger at him and is thereby acquitted. The other character is then put on trial and does the same thing in reverse. Each tribunal of fact finds itself hampered by its inability to consider the case against both accused at the same time. That can happen, and I am troubled by that example. However, I retreat behind the cosy screen of it being a broad issue of policy and therefore not for the Law Society to determine or to seek to influence dramatically.

The issue of competence has to be considered. Section 29 of the Scotland Act 1998 makes provision for the legislative competence of the Scottish Parliament. In the absence of a similar provision in the Westminster act, a person present for the Scottish courts' purposes in England could be prosecuted in Scotland—assuming that presence in the UK was the criterion—but not in England. I am not saying that there is anything inherently wrong—I am a keen supporter of the notion that we should have our own jurisdiction—and there is nothing inherently wrong with our having a different system from that in England. Nevertheless, the legislation that brought about that scenario would potentially be outwith the Scottish Parliament's legislative competence, although we are not trying to decide that.

Ms MacDonald: I realise that it is a question of policy, not of law, that the United States will not opt for universal jurisdiction because it thinks that under the Rome statute and following everything that has been said since, American nationals would be sitting ducks in many countries where the US has performed peace-keeping operations, or whatever. Does the Americans' saying, "We're not playing," with regard to universal jurisdiction, diminish the feasibility of that whole notion? Witnesses have told us that universal jurisdiction does not really depend on the Americans.

Alastair Duff: I must say that I do not think that universal jurisdiction depends on the Americans. Taking off my Law Society hat and speaking as a citizen of Scotland, I think that we should do what is right.

Ms MacDonald: If that is the case, you should not bother much about the competence of the bill. We should pass it and have it tested.

Alastair Duff: It would be a potential embarrassment if the first person to be arrested under the regime successfully challenged the competence of the legislation. It would be better to get it right than recklessly to get it wrong and be told later that we had got it wrong.

Ms MacDonald: Sometimes that can happen; but legislation sometimes just has to be passed and tested.

Alastair Duff: The Law Society's view is that it is a matter of policy, and we highlight the question

of legislative competence. We are not in a position to give a definitive view on the matter, but I am sure that members have access to people who could guide the committee appropriately. Once you get over the questions of competence and policy—of political will—you might find that the practical questions do not matter so much.

One wonders how feasible it would be for the Crown Office to ingather evidence from foreign jurisdictions in relation to a case with which—until the point at which the accused was arrested—Scotland had no connection. The Rome statute does not envisage such a situation, but that is not to say that it could not happen. Bearing in mind the time limits that apply to a Scottish prosecution and the need to bring the accused to trial within 110 days—a time limit that some say the Crown sometimes struggles to meet in domestic cases—one wonders how feasible it would be to gather the evidence in the time that is available.

The time limit is more like 80 days than 110 days, because the Crown must serve an indictment on the accused at least 80 days after full committal, and must give the accused 29 days' notice of the trial. The Crown in Scotland must operate to very strict time limits, and might struggle to do so in a situation in which it had quickly to ingather evidence from foreign parts—perhaps exclusively from foreign parts.

10:45

On the other hand, I refer again to the situation in which there are two accused, one of whom has connections with Scotland. We would probably have been involved with the international criminal court in such cases, and the Crown would probably have been involved with the authorities in investigating the case prior to the arrest of the accused. However, in such a situation, the accused has a friend—potentially a co-accused—with whom there is no connection beyond presence.

The practical issue is likely to be much less daunting, because the Scottish authorities will already be involved. Is it better for the Scottish courts to have the power to deal with that anomaly, rather than having no power at all, in which case we would be unable to prosecute both accused people together? Are the practical problems more imaginary than real? It is unlikely that Scotland would be called upon to prosecute somebody with whom we have no connection whatever but, if we do not have universal jurisdiction, we will not be able to deal with the two-accused scenario. We could prosecute one, but not both, of the accused.

The Convener: I signal to members that we need soon to draw to a close on this matter.

Christine Grahame: I am very much warming to universal jurisdiction, following what Mr Duff has said. I am not in the least concerned that there would be problems in connection with the Scotland Act 1998; it is our duty at stage 1 to report what we feel about the principles of the bill, and any difficulties that we foresee. One of the reasons why universal jurisdiction is not in the International Criminal Court Act 2001 is that it would be difficult—with regard to evidential matters and so on—to investigate and effectively to prosecute in UK courts crimes that were committed overseas by non-British citizens.

With universal jurisdiction, would it be possible for a Scottish court to decide to secede jurisdiction over a case to another national court because of evidential difficulties? That would build in the flexibility of being able to prosecute those who might evade prosecution in Scotland because of the rules here and the matter of having two co-accused people together—a matter that I have been following. On the other hand, if it was matter of having universal jurisdiction, but of the evidence not making that proper, could we just secede that jurisdiction? That is perhaps a stupid question.

Alastair Duff: The ICC could take over the prosecution in a case in which Scottish authorities were unable or unwilling to prosecute, and—

Christine Grahame: That is the answer, is it not?

Alastair Duff: I suppose—although I am talking on the hoof—that, forgetting the ICC for a moment, there would also be the possibility of normal extradition to another country where the crime took place and where the evidence exists.

Christine Grahame: Could that be agreed to?

Alastair Duff: It could—subject to extradition issues.

Christine Grahame: I understand that. If one felt that it would not be appropriate for a person who was resident here—there is the current example of Antanas Gecas—to be prosecuted here because the evidence was elsewhere, we could secede jurisdiction to the appropriate other country. Would that then be a matter for the ICC to determine?

Anne Keenan: Article 14 of the Rome statute probably provides the answer to that. A state party can refer to the prosecutor of the ICC for further investigation, where he has concerns that a crime has been committed that falls within the ICC's jurisdiction. The prosecutor could then determine whether proceedings were appropriate. That would be one way around the matter. If there was concern about somebody in the same country as the court, over whom jurisdiction could not be exercised, it would be possible to refer that person

to the ICC for investigation, if that person fell within the jurisdiction of the ICC.

Christine Grahame: It appears that universal jurisdiction includes flexibility, and that its use is not merely a matter of policy, but of justice. The example that Mr Duff gave us was one in which it would be proper to prosecute certain people in Scotland, because of their co-relations with another person, who was accused.

Alastair Duff: Timing issues would also have to be considered. It seems to me that universal jurisdiction was designed not only to deal with that anomaly, but to deal with whether the Scottish authorities should be able to arrest a wanted war criminal—to use that loose expression—if he came to Princes Street to do his shopping in Jenners. Informing the ICC and getting it to investigate becomes a lot more problematic if we are talking about somebody who is in Scotland fleetingly and then disappears. Timing might make that completely impossible. The question is whether it is worth having the power to deal with situations in which ICC investigation is appropriate.

The Convener: We will have to wind up the questioning on universal jurisdiction because we have other witnesses to hear from this morning.

I will ask two final questions for quick responses. There are arrest and surrender provisions in the International Criminal Court Act 2001, but not in the International Criminal Court (Scotland) Bill. Are you satisfied that that is where those provisions should be?

Anne Keenan: I understand that the provisions were put in the International Criminal Court Act 2001 because they relate to extradition. There was some concern that there could be challenges if such provisions were included in the Scottish bill. In order to ensure that the powers are properly exercised, I am happy for them to be included in the United Kingdom statute—I have no difficulty with that. We have examined the drafting of the sections in the International Criminal Court Act 2001 and, during its passage through Parliament, the Law Society made various proposals, which—I am happy to say—were accepted by the UK Government, to try to ensure that the provisions are at least consistent with Scottish procedure.

The Convener: Lastly, you draw attention in your submission to section 14 of the bill, which is entitled

"Taking or production of evidence: further provisions".

Can you clarify what you are getting at? I think that you mean that, in the investigation process, it is not clear whether precognitions can be used further down the line when the ICC intends to prosecute. Is that right?

Anne Keenan: My difficulty with the drafting of section 14 was that I was not clear as to its purpose. Precognition on oath is generally used in situations in which a witness refuses to attend at a procurator fiscal's office to give a statement or a precognition. The usual course is to obtain a warrant of citation through which the witness's attendance at court would be enforced. In that situation, the witness is not normally entitled to be accompanied by a solicitor when the precognition is taken in front of the court, and the accused is not entitled to be present or represented at the examination.

If section 14 is designed to do that, I am confused about why it includes procedures for making a record of who was present. I am also confused by the reference to somebody being

"denied the opportunity of cross-examining a witness".

Ordinarily there would be no opportunity to cross-examine at the stage of a precognition on oath, because the accused would not be present, nor would he or she have the right to be represented.

I cannot quite see what the provisions of section 14 are designed to do. Is it really to take a statement under oath? The second possibility is that they might be there to enable the Scottish courts to take evidence that could be used in front of the ICC. If that is the case, I am still concerned about the drafting of the section because, if such a statement were to be used in proceedings before the ICC, why would the accused person in any circumstances be denied the opportunity of cross-examining a witness on such an important matter? I am just not clear about what the Executive is driving at with section 14 of the bill. Is it precognition on oath, or is it the possibility of taking evidence? In either case, the Executive must do a wee bit of work on the procedures.

Gerry Brown: We already have in our system a procedure for taking evidence on commission in connection with foreign nationals or from somebody who is too ill to attend. Safeguards for the accused are built into those provisions. We are looking for clarity about the purpose of section 14.

Christine Grahame: Are you saying that it might be necessary to amend existing court rules?

Anne Keenan: No. We are saying that section 14 has to be amended to make clear what its intention is and so that it complies with the existing court rules.

Alistair Duff: There are two principal circumstances in which a procedure like that may occur. One is a precognition on oath, which one party does and which the other party does not attend. That is done privately for the purposes of the party seeking the precognition of oath. The second circumstance is one in which evidence is

taken on commission, where both or all parties are present and have the right to cross-examine. It is not clear which scenario section 14 is designed to deal with.

The Convener: Thank you.

We will now take evidence from the Medical Foundation for the Care of Victims of Torture, and from Amnesty International UK. From the Medical Foundation for the Care of Victims of Torture, we have Sherman Carroll, who is the director of public affairs. From Amnesty International UK, we have Tim Hancock, who is the parliamentary officer, and Christopher Hall, who is the legal adviser.

Sherman Carroll (Medical Foundation for the Care of Victims of Torture): The Medical Foundation for the Care of Victims of Torture was set up to give rehabilitation and care to survivors of torture and atrocity. Our interest in the bill goes back to studies that we have made into the Mobuto regime in the former Zaïre and, more recently, the Pinochet case.

Tim Hancock (Amnesty International UK): Amnesty International is a worldwide human rights organisation that works for the protection of human rights, the prevention of human rights abuses and the promotion of all the rights in the Universal Declaration of Human Rights.

The Convener: We are pleased to have the witnesses here today. I am aware that you have travelled a long way to be here.

Mrs McIntosh: Over a number of evidence-taking meetings, we have been puzzled by the refusal of countries such as the United States of America to ratify the Rome statute. Is there a danger that Scotland's adoption of universal jurisdiction might cause us some political turmoil in future?

Sherman Carroll: I would not want to get into the politics of Scottish-American relations—especially as I have an American accent.

Mrs McIntosh: And also because it is so close to tartan day.

Sherman Carroll: I will address the issue from a different perspective. The gaps in jurisdiction are important when we consider the issue of universal jurisdiction. The Scottish bill and the International Criminal Court Act 2001 contain gaps of at least two kinds. If a crime is committed in the territory of a non-state party, or by a national of a non-state party on that territory, there will be a gap in the jurisdiction because the international criminal court will not have jurisdiction over that individual. Another kind of gap concerns the situation in which a low-level official—even one from a state party over whom the ICC has jurisdiction—who has committed horrendous crimes, but who is not the commander in charge, comes to Scotland.

I can think of an example from my area of north London, which has a Cameroonian pub and a Somali community organisation, where refugees and asylum seekers might go and see the person who tortured them or committed an atrocity in their village. I will be frank—like all human rights institutions in the United Nations network and other networks, the ICC will be under-resourced. I have no doubt about that. I have 25 years' experience of working in those networks, and they are always under-resourced. Given that, the ICC will rightly concentrate on the higher-level officials, just like the tribunal at The Hague—including the present tribunal on the former Yugoslavia.

If a Cameroonian who walks into a Cameroonian pub—whether it is in Glasgow or north London—sees the person who tortured him or her, and the ICC has concentrated on higher-level officials and has not indicted the lower-level official because of its priorities or a lack of resources, it will come down to Scots or UK law to deal with indictment of that lower-level officer.

I see two gaps in the jurisdiction. First, where the ICC is unable to take jurisdiction because of the non-state party, and secondly, where the ICC is unwilling to take jurisdiction because of its resources and priorities. That is perfectly justifiable, but it means that another court might be unwilling to take that jurisdiction. That is the way in which I approach the question.

11:00

Christopher Hall (Amnesty International UK): I will follow up on the point about the United States and universal jurisdiction. At present, there is under United States legislation universal jurisdiction over the crime of torture and over grave breaches of the Geneva convention and protocol I of the Geneva convention. Therefore, if there is any concern, such provision already exists.

The United States accepts universal jurisdiction over the crime of torture. It has recognised that. It has pushed several other states on the arrest of Pol Pot and continues to push on the arrest of several senior Iraqi officials. The United States has urged other states to exercise universal jurisdiction over people who are suspected of crimes in Cambodia or Iraq, or has said that it would be willing to assist those other countries. The United States recognises that universal jurisdiction is fully consistent with international law.

Ms MacDonald: Do I take it from the witnesses' remarks that although legal gaps or gaps in the equality of the jurisdiction exist, they still see value in the measure, because of its deterrent effect?

Tim Hancock: Do you mean in relation to the bill as it is?

Ms MacDonald: Yes.

Tim Hancock: We see value in it. We want the UK to ratify the international criminal court statute; there is no doubt about that. We urge MSPs to support the bill, but we have identified ways in which the bill could and should be enhanced.

Ms MacDonald: Let us take the case of the Cameroonian people who are in London or taking refuge elsewhere. They will feel let down if the international criminal court cannot prosecute the people who tortured them. Even given what you say, it should theoretically remain possible to indict people, but because of the lack of resourcing, that will not be possible. The introduction of the international criminal court will not improve that situation. Are we selling short the people who turn up at the Medical Foundation for the Care of Victims of Torture's door? Is there a serious gap in the provision of improved justice?

Sherman Carroll: Like other non-governmental organisations in the UK, the Medical Foundation is part of a coalition for the international criminal court. We make it clear that we support the bill and the court. We want the court to be established and we hope that the UK will be among the first 60 ratifying states—that the UK will be a charter member of the court. Gaps remain in jurisdiction, but we hope that the loopholes can be closed. That is why the bill is being discussed in Scotland. There is an opportunity to close the loopholes.

Other tests have been considered and the Westminster Government has moved on the issue. In August 2000, it published a draft consultation document in which it said that it would not take universal jurisdiction. It has moved since then to take extra-territorial jurisdiction and residential jurisdiction over people who are resident. I heard the discussion with Mr Duff; there are serious definitional questions about residency. However, we—as organisations—believe that it would be worth replacing the word "resident" by the word "present". That would give the opportunity to close one of the serious loopholes in the bill as drafted.

Tim Hancock: The jurisdiction of the ICC is the product of international negotiation. It has been decided that the ICC should take jurisdiction only over state parties and crimes that are committed on state parties' territories or by their nationals, so there are gaps in the international crimes that the ICC can consider. Scotland can help to close the gap as far as UK jurisdiction is concerned.

Ms MacDonald: Mr Duff said that perhaps the legal profession in Scotland would feel that, were parliamentarians to push ahead in an attempt to close that gap, we would be going into a policy area, rather than a legal area. Folk from Cameroon could be told, "Hop up to Scotland and see what can be done there."

Sherman Carroll: There are different types of universal jurisdiction. One is a pure form of universal jurisdiction, which some legislatures have adopted—New Zealand is one such example of a common-law jurisdiction. The culprit, perpetrator or the alleged perpetrator can be sought anywhere. We do not recommend that. We recommend something along the lines of the Canadian model of using the presence test, which is still a form of universal jurisdiction. Somebody must be present in the country before they are arrested, investigated or prosecuted.

Ms MacDonald: That would be very interesting.

The Convener: Do you foresee any problems internationally in respect of diplomatic relations with other countries if Scotland was one of the few countries to sign up to universal jurisdiction? I am struggling with that problem. If a French national were to be arrested in Scotland and tried for an international crime, but France was not signed up to the Rome statute, would that cause problems between Scotland and France?

Christopher Hall: Amnesty International is completing a two-and-a-half-year study of universal jurisdiction around the world, which it began during the litigation in the Pinochet case. At least 120 countries—about three fifths of the countries that are members of the United Nations—have universal jurisdiction over one or more crimes. The Commonwealth has been a leader in the field from the Geneva convention acts of the 1950s. Those are virtually identical acts that provide for universal jurisdiction over grave breaches of the Geneva convention.

With the possible exception of the Dominican Republic—whose legislation we have not been able to locate—I think that every country in Latin America has universal jurisdiction over ordinary crimes, and not just the crimes that would be the subject of the bill. In only one example—possibly two—that has led to diplomatic issues. One such case was the Pinochet case, of course. The second case is pending in the International Court of Justice. In each case, the countries concerned have not resolved the issue through diplomacy, but through the courts. In the Pinochet case, it was left to the national courts, and in the Democratic Republic of the Congo v Belgium case, they sought to use the International Court of Justice.

Such differences would not lead to a major diplomatic breakdown. Although there might have been a few diplomatic protests, the governments of Chile and the DRC have left matters to the courts to decide. They are legal, not political or diplomatic issues.

Tim Hancock: For example, there might be diplomatic difficulty if a Canadian or New Zealand soldier was involved instead of a French soldier,

but both Canada and New Zealand have opted for a form of universal jurisdiction in their ICC-implementing legislation. It is not as if Scotland would be out there on its own; other countries have taken the first step.

Sherman Carroll: What if a Scottish aid worker or churchman—or UK citizen—were the victim of an atrocity committed abroad and, because of gaps and loopholes in the jurisdiction, the perpetrator could not be prosecuted if they came to this country? That would set up an internal, not international, embarrassment problem within that jurisdiction and is why various loopholes need to be closed.

Christine Grahame: I have three points. First, does the presence test include the residency test? In other words, if someone is resident, but not present, in Scotland, can they be brought back to the country and prosecuted?

Tim Hancock: We do not have trials in absentia, so the person would need to be physically present in the country.

Christine Grahame: But, because they were resident in Scotland, we would have jurisdictional priority and so would be entitled to bring them back to be prosecuted. That would be in addition to the more pragmatic "You're in the country so I can arrest and try you" aspect.

Tim Hancock: As far as I understand it, if we felt that we had such jurisdiction, we could seek the person's extradition from another state.

Christine Grahame: The example of the Scottish aid worker seems a better argument for universal jurisdiction in the pure New Zealand model. In the Canadian model, if the perpetrator were a low-level culprit, we could catch him only if he entered Scotland. With pure universal jurisdiction, we would at least have the appropriate flexibility to bring him to this country and try him.

Tim Hancock: I agree. In an ideal world, there would be pure universal jurisdiction; that was certainly our starting point. By asserting that the presence test is politically more feasible than pure universal jurisdiction, we have engaged in a little bit of self-censorship. If I have underestimated what might be the case north of the border, I am happy.

Christine Grahame: I think that you have—we are much more international.

You raised the spectre of ICC financing. Where will the funds for the ICC come from? Furthermore, if a domestic legislature took on the prosecution of a substantially long trial, would the ICC assist in meeting the costs? I have in mind the costs of the Lockerbie trial, although that is a different case as it concerned terrorism instead of war crimes.

Christopher Hall: The Rome statute makes it clear that the court funds will come from three sources: the United Nations; the states parties; and voluntary contributions, whether from organisations, individuals or states. One key issue that is pending in the preparatory commission, which is preparing the supplementary instruments for the Rome statute under which the court will be set up, we hope, next year, is resolving the remaining financial issues. The bulk of the financing of the court will come from either the United Nations General Assembly, which will allocate some funds from the United Nations' regular budget, or state parties themselves.

11.15

As for national prosecutions, it is instructive that many of the countries that have prosecuted Nazi crimes, since the second world war, have been small—for example, Denmark, Austria, Switzerland, Belgium and the Netherlands. That shows that states are willing to shoulder the expense of such cases. Some cases will be relatively inexpensive, because they will be based on an individual being accused of torturing another, and will involve primarily eye-witness testimony. Others will be more complex and costly. For example, cases in Austria, Switzerland and Denmark have been relatively inexpensive. One trial that is pending in Belgium involves four Rwandans and will be held at substantial cost. International litigation—both civil and criminal—is becoming more a part of the docket of national courts throughout the world. That is part of life.

It will be the responsibility of states to shoulder the burden of funding. Given that extensive co-operation is required between states when evidence is being gathered, states may agree on methods to share such expense.

Mrs Mary Mulligan (Linlithgow) (Lab): In a couple of your responses, you referred to the practice of extradition. What effect would the introduction of the ICC have on extradition? Do you envisage circumstances in which it would refuse the surrender or extradition of suspects?

Tim Hancock: Are you asking whether the ICC would refuse?

Mrs Mulligan: Sorry, I meant do you envisage circumstances in which a country could refuse the ICC's wish for it to take such action?

Tim Hancock: Section 23(4) of the Westminster act—the International Criminal Court Act 2001—covers people with state and diplomatic immunity in circumstances in which their own country has said that those immunities do not apply. The secretary of state has retained the discretion to interfere in domestic proceedings and to say to the ICC that we would not surrender. That is

extremely worrying. Such provisions are not subject to Scottish legislation, as the result of the Sewell motion.

Christopher Hall: On extradition, the system of international justice is three-legged. One part of it is the territorial state—the state in which the crime occurred. One reason for our discussing the ICC is that many states have failed to fulfil their obligations under national law to bring perpetrators to justice. The second line of defence is other states to which such people flee or travel and, thirdly, there is the ICC. However, as has been said this morning, the ICC will have only limited jurisdiction and funds.

The ICC will not try every case—it is not intended to replace national jurisdictions. Other states can exercise universal jurisdiction, either because the perpetrator has entered their country or because they have been extradited. We will see vast expansion in the use of extradition to deal with situations such as the one that was mentioned earlier, whereby the country in which the suspect is located is having difficulty in locating witnesses or evidence, and another state is investigating the crime and is willing to take the person. That is exactly what happened with Pinochet. Four countries were lining up to take on the case, because they had done substantial work and they were ready to extradite.

Tim Hancock: Having criticised the secretary of state, I should also praise him—I am forever even-handed—for the fact that part of the International Criminal Court Act 2001 did away with the double criminality rule. That will make it easier to extradite people for the crimes that are listed in the International Criminal Court Act 2001. That is a positive move, which will alleviate some of the problems that were faced with Pinochet.

Sherman Carroll: I have a point to make on executive discretion, which is not included in the International Criminal Court (Scotland) Bill, but is covered in section 23 of the International Criminal Court Act 2001. The greater the executive discretion that is allowed in the judicial process, the more diplomatic rows—a subject that was raised earlier—will be caused. The less executive discretion there is, the less manoeuvrability there is and the less there will be room for diplomatic rows. We saw that in the Pinochet case. All sorts of political pressure from different countries was put on the Home Secretary to make decisions. The Home Secretary has a quasi-judicial role to play, which is unusual, in the UK system. I do not criticise him for that, but it leaves open a door, which we would like to see closed, to diplomatic and political pressure.

Ms MacDonald: I have a quick question on funding, because it is important. Should the committee take it that, although you have expressed reservations about funding, you consider the UN to be the most suitable and effective means of disbursement? I am sorry to go on about America again, but I am thinking in particular about the attitude that has been taken towards the Commission on Human Rights in the past week, because America was voted off the commission. Do you think that although there are objections, because of the reciprocal arrangements between—let us call them consenting—states, you can get round the fact that there may be blockage at the UN level, as regards the continuity of funding?

Christopher Hall: One of the reasons that we have always supported—beginning with our first submission to the International Law Commission in 1994—the funding of the international criminal court from the regular UN budget was that we felt that that funding was more secure. If you look at the history of the funding of one of the four UN courts—the International Court of Justice—and the funding for the tribunals for the former Yugoslavia and Rwanda, the General Assembly has not played politics with funding. Obviously, the total amount of funding is subject to various constraints, but it is not used as a political weapon. With regard to contentious decisions, the states that have lost in the International Court of Justice have not gone on a rampage attacking the budget. That has never happened.

The Commission on Human Rights is a political body and there was a political reaction. Unfortunately, I do not think that the United States will become a signatory to the Rome statute in the immediate future, although in the long term it will. If we consider the history of the United States as part of the international community, we see that it learned its lessons with the League of Nations and that that took a long time. Franklin D Roosevelt was a major opponent of the League of Nations, but he came round and realised that a stronger institution was essential. Of course, he was one of the key people behind setting up the United Nations. The same thing happened with the genocide convention—it took 40 years before the US came on board. It took 20 years for the US to come on board with the International Covenant on Civil and Political Rights, and 10 years for it to come on board with the convention against torture.

In the long run, the US will become party to the Rome statute. Obviously, that will not happen under the current Administration. It may take a generation, but it will happen, sooner rather than later. Membership is very much in the interests of the US—and of China, the other permanent member that is not a supporter of the statute. They want to avoid ad hoc criminal tribunals in future. We have seen how difficult it has been to set up such tribunals with Iraq, Cambodia and Sierra Leone. The US wants a permanent court. It wants

to be able to refer situations to that court. When the next Iraq, Cambodia, Liberia or Sierra Leone happens, the US will say, "Aha—we have the mechanism. Let us use the international court. Let us support it—just on this one occasion." Then, of course, a comfort factor will build up.

In Amnesty, we leave our passports at home; but, leaving that aside for the moment, I am an American. I have looked at this issue for 11 years now from outside the country and, taking the long view, I have the greatest confidence that that US will become a member in due time.

Christine Grahame: In the summary to your submission, you recommend that:

"MSPs explore why the Scottish Executive has chosen to omit a provision from the ICC (Scotland) Bill providing that until the Elements of Crimes are adopted, the draft Elements of Crimes reported on 30th June 2000 may be taken into account by courts".

I do not know what "Elements of Crimes" is. Is this English law on elements of crimes? Could you give us some guidance?

Tim Hancock: The ICC statute establishes and defines the crimes, and there have been a number of meetings of the preparatory commission and a number of international negotiations to establish what the elements of those crimes are, as a further embellishment. In the Westminster bill, it was suggested that, when courts are taking action domestically on ICC crimes, and when they are trying to interpret the crimes and decide whether crimes have been committed, they look at the document called "Elements of Crimes". However, "Elements of Crimes" will be adopted only once the ICC is up and running. At the moment, it exists only in draft form. At Westminster, people said, "Okay—the courts can look at the draft 'Elements of Crimes'." Clearly, it is envisaged that courts in England, Wales and Northern Ireland will be able to prosecute the crimes that are set out in the International Criminal Court Act 2001 before "Elements of Crimes" becomes an official document—in other words, before the ICC is up and running.

As far I can tell, the word "draft" does not appear in the Scottish bill, so I am concerned that, when Scottish courts begin to exercise jurisdiction, it may be suggested that the Scottish ICC act will become effective only once the ICC is effective and once "Elements of Crimes" is effective. That would be undesirable. We would want everything, including the establishment of jurisdiction, to be up and running as soon as possible and we would want courts to be able to refer to the draft "Elements of Crimes" before it becomes a formal document. I am sorry if that is a convoluted explanation.

Christine Grahame: I would not have thought that it was necessary to import anything into the bill. It is always open to Scottish courts, when considering interpretation, to look at parliamentary reports, previous reports, guidance in bills, or whatever. They may well do that. Judges may well do that in considering whether a crime falls within the definition. Would it be wise to import the provision into the bill? Would not it be better to leave the judiciary with the flexibility that it has in any event?

Tim Hancock: Parliamentary reports are published in Scotland; "Elements of Crimes" is an international document. I do not know whether the issue is important; I am just highlighting it, because there is a difference, as far as I can tell, between what was adopted at Westminster and what has been introduced in Scotland. I do not know whether that difference is important; I suggest that you probe the Executive on why the wording might be a problem.

Mrs McIntosh: I have a question on the UN trust fund for victims. Can you give us evidence, from your experience, that might guide us in dealing with the long-term needs of survivors of ICC crimes?

11:30

Sherman Carroll: The Medical Foundation sees thousands of victims and survivors of torture and atrocity from different parts of the world. Those people have long-term needs that are sometimes psychological, sometimes physical. I am not a clinician; I am here as the foundation's director of public affairs. Nevertheless, I meet many of our clients and I have, over the years, dealt with clients who have long-term needs who have come to us physically disabled and in need of physiotherapy or in need of long-term psychotherapy and counselling.

We believe that there is a need to have a UN trust fund for victims, which would collect through the payment of fines, as the bill allows. Article 79 of the ICC statute refers to the future creation of a trust fund for victims, which we believe is terribly important. We are glad that the British delegation to the Rome conference played such a vital role in securing the parts of the statute that focused on the fund and reparations to victims. The delegation made some strong interventions back in 1998. We are a little disappointed that the trust fund of article 79 is not mentioned in the Westminster act or the Scottish bill.

On the final day of the committee stage at Westminster—we were in a rush there—the minister responsible, Mr John Battle, gave some assurances that we welcomed, concerning the generosity that a future British Government would want to show. The Medical Foundation cannot see

why it would not be possible to mention the fund in the bill, and we hope that you will consider doing so.

Tim Hancock: Canada has set up its own national crimes against humanity fund, which will apply not only to crimes against humanity, but to all crimes that the ICC covers. We mention that in our submission because it is an attractive idea. As well as the international dimension, there is the national aspect. What grabbed my attention was the idea that such a fund might facilitate contributions to the ICC from private citizens in Scotland. They could contribute to a national fund and the money could be disbursed to the ICC.

The other aspect, which is more important, is the situation of victims of cases that are brought under domestic law and in domestic courts. I would want to be certain that the courts were able to award those people some kind of rehabilitation money. It may not always be possible to get those funds through fining the perpetrator, as perpetrators may be in straitened financial circumstances themselves or their funds may be unobtainable. In such cases, a trust fund might be attractive.

I read the pages of the Criminal Injuries Compensation Authority website that relate to England, Wales and Northern Ireland. My initial impression was that, for a victim to receive rehabilitation funds, the crime would have to have been committed within those jurisdictions. I would want to be certain that, no matter where victims were from—we could be talking about an international crime—they could receive those rehabilitation funds.

The Convener: I thank Sherman Carroll, Tim Hancock and their team for giving evidence. It has been most interesting.

Sherman Carroll: Thank you very much for having us. I have with me a couple of papers that you might not have seen, which are not from organisations, but from individual barristers—QCs in England—on universal jurisdiction and the residency test. The papers are from Michael Birnbaum QC and Peter Carter QC. Would the committee be interested in receiving copies of those papers?

The Convener: We would be very interested. If you give the papers to the clerks, they will circulate copies to committee members.

We will now have a brief comfort break. The minister has to leave by 12:30, so we will resume at 11:40 on the dot.

11:34

Meeting adjourned.

11:41

On resuming—

The Convener: I welcome the Deputy Minister for Justice, Iain Gray, to the second half of the meeting. You might have heard some of this morning's evidence—and that of the previous meeting—on the International Criminal Court (Scotland) Bill and wish to address what has been said.

The Deputy Minister for Justice (Iain Gray): I am glad to have the opportunity to discuss the general principles of the International Criminal Court (Scotland) Bill. Together with the counterpart legislation at Westminster, the bill, in enabling the UK to ratify the Rome statute, will mark an important step forward in the development of international justice. On a personal note, having spent about 12 years prior to being elected campaigning for such a development and having seen the impact of the sort of crimes that we are discussing jurisdiction over in countries such as Cambodia and Rwanda, the bill is a step that only recently would have been considered almost inconceivable and is therefore an important development. The committee may wish to note that the UK bill received royal assent last Friday and is now the International Criminal Court Act 2001.

In the course of the evidence and discussion, there has been some criticism that the Rome statute does not go far enough. Some have criticised this bill and the Westminster bill in that light. It has been argued that the legislation should go further in terms of jurisdiction, while others have suggested that the legislation may hand over too much jurisdiction to the ICC. However, we believe that the bill strikes the right balance. The Executive wishes to play its full part in ensuring that the international criminal court is established as soon as possible and that it has effective means at its disposal to pursue those who commit terrible crimes. That is what the bill does. As the committee will already have noted, the bill also reproduces the crimes that can be tried by the ICC as crimes in Scots law. That is important, as it is our intention that any such crimes committed by UK nationals and residents will be vigorously pursued in the UK courts.

The International Criminal Court Act 2001 and the bill that we are discussing today share many common provisions. That is because both pieces of legislation seek to achieve similar ends, in particular to incorporate ICC crimes into domestic law and to provide for assistance to be given to the ICC in pursuing its investigations.

However, the International Criminal Court Act 2001 contains some important provisions that are not in the Scottish bill, that is, those concerned

with arrest and surrender of suspects to the ICC. The committee will recall that we discussed those aspects when we debated the Sewel motion on 18 January. We agreed then that, because of the potential for those accused of those crimes to argue that such arrest and surrender was akin to extradition, and therefore reserved under the Scotland Act 1998, it would be sensible to include those provisions in the UK legislation. That approach reflects the Executive's wider view of the issue. We are conscious that we have a duty to ensure that robust legislation is in place to support the ICC in dealing with war crimes and other crimes against humanity. That, of course, is the intention of the bill.

11:45

The Convener: We have a number of issues and questions to put to the minister. I know that he has to be away by about 12.30 pm, so we shall do our best to see that that happens.

Christine Grahame: I do not know whether you had the opportunity to follow the evidence that we heard this morning from the Law Society of Scotland.

Iain Gray: I heard some of it, but not all.

Christine Grahame: I think that I am now content that the International Criminal Court (Scotland) Bill will not seep into and change existing Scots common law with regard to crimes, which will take primacy. For instance, I understand that the age of criminal responsibility in Scotland will remain at eight, and that crimes could be prosecuted under the bill for those from the age of eight upwards, subject to the discretion of the Lord Advocate. Is that correct?

Iain Gray: That is a correct understanding. If someone aged eight, nine or 10 were to be prosecuted for the crimes covered by the bill, it would be possible for a prosecution to take place here in Scotland.

Christine Grahame: That is fine, because we were not clear about that until today. I know that it sounds a simple thing, but it certainly did not come over. I have no further questions at the moment.

Mrs McIntosh: You will have heard that we have questioned quite a number of people about the difficulties of the residence definition. I am quite taken by the suggestion that we heard this morning about presence, rather than residence. What definition will be used, and why does the Executive prefer residence to universal jurisdiction?

Iain Gray: Although I agree that, on the face of it, the definition of resident seems a vague concept, it is one that is already used in, for example, the War Crimes Act 1991 and the Sex Offenders Act 1997, some aspects of which we will consider later this morning. In neither case is the concept defined any further. We have a concern that to try to define residence further in the bill would cast doubts on the definitions under those acts. Residence is not a hard-and-fast status like nationality, which is defined on paper. It depends on a variety of criteria. It is the courts that have responsibility for deciding residency, and that seems to us quite a proper way forward and, as I say, it is one that the courts are used to dealing with in other contexts.

One of the concerns about the definition of resident is that it will allow a loophole in that someone can argue that they are present but not a resident. However, were we to attempt to define residency, that approach would undermine the argument. There is an element of deterrence around the definition of residence having to be tested in the courts. In other words, if someone is guilty, or believes themselves to be guilty of international crimes and is looking to go somewhere where they think they will escape prosecution, they will certainly not know what would be required here in Scotland. There is therefore an element of deterrence.

It is also worth saying that the shift of the International Criminal Court Act 2001 towards the potential prosecution of those who are resident was an amendment to the original draft bill, which we have reflected in the International Criminal Court (Scotland) Bill. The bill therefore already represents some movement towards the concerns that have been expressed in the evidence that the committee has heard.

Mrs McIntosh: You probably have more up-to-date information than we have. How many other countries have ratified with a provision for universal jurisdiction?

Iain Gray: My understanding is that about 30 countries have ratified, but not all have passed legislation in order to do that. They take a different approach and a varied one. I guess that much will depend on the tradition and structure of their legal system. For example, Canada has legislated—I think that the committee knows that—and has taken universal jurisdiction, but I understand that France and Australia will not take universal jurisdiction. There is a connection between universal jurisdiction and the argument about residency or presence, because to replace residency with presence would, de facto, be to take universal jurisdiction.

The key issue is our responsibilities under the statute and the treaty. The Rome statute does not require us to take universal jurisdiction; that is not the case with some other international conventions and treaties to which we are signed up, which carry that requirement. The tradition in the Scottish

criminal justice system has been to work on the principle of territoriality in common law and to take universal jurisdiction only when that is an obligation under an international agreement. That is not the case in this circumstance.

The Convener: I should say that the evidence that the committee has received has, almost without exception, asked us to consider recommending universal jurisdiction in our stage 1 report. It is important that we examine the issue in detail.

Several scenarios have been put to the committee as to why universal jurisdiction should be considered. The most prominent one has been the case when there is a soldier of a lesser command whom we can prosecute and a more senior officer whom we cannot. That is against the nature of Scots law. Can you see the difficulties that the committee has having on that?

Iain Gray: The fundamental issue on universal jurisdiction is whether a loophole is being created on the pursuit of those who should be indicted for these crimes or are alleged to have committed these crimes. I do not believe that the lack of universal jurisdiction creates that loophole. The ICC will be there to take action, as a powerful and independent body, so the issue of universal jurisdiction seems to come down to our traditional approach, which—as I have described—would be not to take universal jurisdiction, as we do not do over domestic crimes. Some other legal systems have different traditions.

The fundamental issue is whether the bill creates a loophole. It does not, as the ICC would certainly have the ability to prosecute in those circumstances. We would consider an extradition request for somebody who was present and had an extradition request from the ICC out against them.

Christine Grahame: I am very much moving towards pure universality, as described by previous witnesses, because of the flexibility that it would give.

In response to the example that the convener gave of a junior member of a squad who was in Scotland and met the residence test, but his senior officer was elsewhere, you mentioned that you would have to go through extradition procedures and do certain things. It would be easier for us if we had universal jurisdiction.

The Law Society gave an example of prosecuting people who should be co-accused in a matter at the same time, rather than pursuing one accused person and determining that one, and, after the Scottish court has already made a decision, then pursuing the other accused person. The timing would be very difficult.

Another example that was given was about the ability of the Scottish court to pursue in Scotland the case of a Scottish aid worker who was murdered abroad, no matter where the alleged guilty party resided.

I cannot see why there is this resistance to universality, which seems to be common sense and flexible. It requires the co-operation of other states, but it is difficult to try to resolve the matter through definitions—with all their inherent problems—of residence and presence. Presumably presence, as the previous witnesses said, also means residence. One gets rid of those problems by having universality of jurisdiction.

Iain Gray: The case of the Scottish aid worker who was murdered abroad is a good example of the point that I was trying to make about the traditional approach that we take in the Scottish criminal justice system. We would not take universal jurisdiction over such a crime. We would expect that crime to be prosecuted in the country in which it was committed. That would be our approach in domestic law. Our argument is that not to take universal jurisdiction is very much in line with Scots domestic law.

Christine Grahame: Perhaps I have misunderstood what would happen, but surely the Scottish courts would have an option as to whether to exercise universal jurisdiction in Scotland. The ICC could intervene and take a different view. I do not want to be difficult, but that seems to be a more flexible approach. It means that some of the anomalies, which the minister referred to as loopholes, could not happen.

Iain Gray: Perhaps I have misunderstood the point put by Christine Grahame. In previous years, we could have developed a tradition whereby we could take universal jurisdiction over domestic crime, including murder. If that had been the case, we could have tried to prosecute the murder of the Scottish aid worker in the Scottish criminal justice system. However, that has not been our traditional approach.

Christine Grahame: I am talking not about a murder, but about a specific thing called war crimes. Those are very different kinds of offences. The crimes are not committed in Scotland as, by their very nature, they take place in foreign jurisdictions. To include universal jurisdiction would appear to build flexibility into the bill, which is not there at the moment. There are problems with residency that are not simply definitional, as they arise from the co-accused or potential co-accused. There are also problems with presence. If we want to do something about this, we have to grab war criminals while they are in Scotland. I do not see why there is resistance to the idea.

Iain Gray: My argument for resistance is

twofold, and I can add a third. First, it is not a tradition of the Scottish criminal justice system. I agree that we are dealing with particularly serious crimes of genocide, war crimes and so on. We are integrating those crimes into the Scottish criminal justice system. The purpose of the legislation is to enable us to play our full role in the international criminal court. It seems reasonable to take account of the Scottish criminal justice tradition in doing that: that has been not to take universal jurisdiction.

Secondly, in the past, our approach to such international agreements, treaties and conventions has been to take universal jurisdiction where that is an obligation of the treaty or convention. That is not in the case in the Rome statute. Thirdly, with the legislation, we do not seek to take up the role of global prosecutor. That could be a possibility with universal jurisdiction.

That might be a different interpretation from that of Christine Grahame, who seeks flexibility. However, that is not the purpose of the legislation. For me, the most powerful argument against our position would be that it created a loophole that meant that those who should be indicted for war crimes went free. The possibility of extradition exists at the ICC. That means that there is not a loophole.

Christine Grahame: In the meantime, they could abscond.

Iain Gray: As an international body, the ICC's purpose is to exert its jurisdiction territorially.

Christine Grahame: Someone in Scotland, shopping in Princes Street, might be recognised as a possible war criminal. If they were not resident in Scotland, we would not have jurisdiction over them. Once we went through all the palaver of doing something to get a warrant issued for their arrest, they could be gone.

If Scotland is not a signatory to the treaty, we are not bound by it. If there is not universality in the founding treaty, countries are not required to adopt it. However, there is flexibility to do so, as other nations have done it.

Iain Gray: Yes. I want to be clear that I did not say that that was disallowed under the treaty. I said that it was not required under the Rome statute.

Christine Grahame: We can adopt universal jurisdiction in Scotland if we wish.

Iain Gray: The position that has always been taken in the past is that universal jurisdiction is adopted only when it is an obligation of international agreement to which we are party. That is not the circumstance in this case.

Christine Grahame: We could adopt it if we wished.

Iain Gray: The position does not disallow us from adopting international jurisdiction.

12:00

The Convener: I have a question about a matter that the Medical Foundation for the Care of Victims of Torture raised. Its submission talks at great length about universal jurisdiction and all the reasons why we should have it. The Medical Foundation raises a concern that, behind the aims of the ICC is an intention to concentrate only on senior politicians or senior commanders. Do you have any comments on that?

Iain Gray: The part of the bill that refers to that is partly at least a reflection of the seriousness of the crimes. Having been in Rwanda, the principle of seniority seems to me to be important. One of the problems in Rwanda is that literally millions were apparently or fairly clearly complicit in genocide. Very difficult decisions had to be made as to how far down the chain of responsibility justice should take its course. In Rwanda, that has not been resolved. In one case, there are 30,000 prisoners in a prison and the system will find great difficulty in trying them.

The principle of seniority has to be considered. However, it is fair to say that the principle of the ICC is that there is personal responsibility as well as formal command. That principle would not disallow indictment of lesser commanders.

The Convener: Would you be happy to say on the record that the aims of the ICC should be to prosecute all those who are involved in international crimes, not just those at the top?

Iain Gray: Yes.

The Convener: We now want to examine the international trust fund.

Scott Barrie: You will be aware, minister, that some other countries have legislated for a trust fund and that none is included in the bill. What are the reasons for the omission?

Iain Gray: There is no mention of a trust fund in the bill because it is not necessary. The creation of the trust fund is covered in article 79 of the Rome statute. The ICC trust fund will therefore be created.

Although we sympathise with the sentiments behind the suggestion that a new and separate trust fund should be created, it is difficult to see the necessity for it. Anyone in Scotland will be free to make contributions to the main ICC trust fund. It is not clear to me what the purpose would be of setting up a separate fund. I know that a separate fund has been created in Canada. Clearly I cannot speak for Canada, but that seems to me to be an

unnecessary stage in the transfer of funds to the international fund.

It is certainly the case that the regulations to be made under section 25 will ensure that the proceeds of fines and forfeitures that are enforced in Scotland will go to the ICC trust fund. There should be no concern that that will not happen. I would not say that putting in an additional step would make that less likely, but I do not see how it would help.

Scott Barrie: That clarifies the matter to some extent, but you seem to be suggesting that the example being followed in Canada is a belt-and-braces approach in that, for whatever purpose, the Canadians are setting up something that already exists. You are suggesting that what they are doing is not strictly necessary as it is already covered by the Rome statute and that it is not something we need to concern ourselves about unduly.

Iain Gray: It is obvious that I cannot speak for Canada and why it set up a separate trust fund. If you are asking me whether I cannot see the purpose of that, my answer is that I cannot.

The Convener: If, as you say, we do not need to, do you have an explanation as to why every witness has given us a paragraph at least on why we should legislate for the UN trust fund for victims? Why have all those organisations missed that point?

Iain Gray: I cannot explain why you have been given that evidence. Our clear legal advice is that it is not necessary to mention the fund in the bill as it is clearly covered in the Rome statute and must therefore be set up.

Christine Grahame: Is it all right if I raise a question about consultation, convener?

The Convener: Can you wait until we get to that subject?

Christine Grahame: Certainly.

The Convener: We will move on to why private prosecutions have been excluded from the bill.

Scott Barrie: Although the bill does not expressly exclude private prosecutions, there is a difference between it and the International Criminal Court Act 2001. Might private prosecutions be a possible route for prosecuting offences?

Iain Gray: As far as the bill is concerned, only the Lord Advocate can initiate prosecutions.

Scott Barrie: That is not the evidence we have received.

The Convener: The committee felt that, because the bill does not expressly exclude private prosecutions, such a course might be open in Scotland.

Scott Barrie: Dr Scobbie's evidence last week indicated that, as the bill does not expressly forbid private prosecutions, they could theoretically be brought. However, he counselled us that there has been only one successful such prosecution in Scotland to date.

Iain Gray: We have considered the point and our clear understanding is that a private prosecution would not be possible. Only the Lord Advocate can initiate a prosecution. Having said that, I do not have a detailed argument to hand. I will be happy to look again at the issue and perhaps make a response in writing to the convener.

The Convener: That would be helpful, because it is a particular concern.

Iain Gray: Perhaps I can clarify the matter a little further. A private prosecution could take place, but only if it had the Lord Advocate's consent.

The Convener: On the subject of exclusions, the bill does not contain any references to diplomatic immunity. Is that because it is a reserved matter?

Iain Gray: That is correct—it is reserved—but it is worth saying that state or diplomatic immunity held by nationals of countries that have signed the Rome statute will not be a bar to prosecutions by the ICC. In a country that has not accepted the Rome statute, nationals who have diplomatic immunity cannot be prosecuted by the ICC unless that country agrees to waive it.

Mrs Mulligan: Would legal aid be available for proceedings under the ICC?

Iain Gray: Yes.

Mrs Mulligan: Thank you.

The Convener: That answer was clear.

Christine Grahame: Given that you have frozen the legal aid budget for the next three years, I take it that there will be contingency funding to support any such cases; or has that already been included in the legal aid budget?

Iain Gray: I would take issue with that point.

Christine Grahame: You have frozen the budget for three years.

Iain Gray: I would take issue with that, but this is not the place to do so. The fundamental question is about how to resource implementation of the bill, and legal aid would be part of that. The obligation to exercise the legislation—if and when it becomes legislation—will fall on the Scottish criminal justice system. That will have implications

for the legal aid budget among others. We do not foresee those costs being huge. That said, one particularly expensive case could lead to a resource problem.

It would be the criminal justice system's obligation to exercise what would by then be our law. It is unlikely that we would fail to do that, but if we did it would be due to an inability or unwillingness to pursue the crime, so it would be a reason for the ICC to pursue the prosecution. The issue of resources does not lead to questions of loopholes and escape from prosecution.

The Convener: I am keen to examine the Scottish legal system's input to the international criminal court. In our first round of evidence, we examined the regime of the international criminal court: how the rules are set and how judges are selected. We have got to the point at which we understand that, and we understand that the purpose is not to implement Scots law but to implement a new set of case law in that court. Do you have any concerns about the Scottish input to that? We understand that there could be a UK judge and that that judge could be a Scottish judge, but that they may not be. In your ministerial capacity, should a point be made about the importance of Scots law input to the international criminal court?

Iain Gray: In a sense, convener, you answer your own question, because the judges of the ICC will not be required to exercise Scots law. As the committee knows, there will be 18 judges. It is entirely possible that there will be a UK judge—my understanding is that there could be more than one—and there could be a Scottish judge. That will be an issue for UK nominations to the bench. I am being corrected that there will be only one judge from a country, so there could be a UK judge, and that judge could be a Scottish judge. In the context of the infrastructure that we are creating, that seems reasonable.

The Convener: I guess I am inviting you to consider the possibility. There are two areas that concern us. One is that there will be case law that will be based on what is built up in the international criminal court. That will have an impact on Scottish courts, because they will be expected to interpret that law. We want to ensure that there is maximum input from the Scottish legal system.

Secondly, we do not know exactly what rules and regulations will underpin the international criminal court, but I understand that the principle is that it will use the various legal systems, or the main legal systems, of the countries that sign up to the treaty. We wish the Scottish legal system to be recognised internationally as a system that it would be useful to consider in the context of the international criminal court.

Iain Gray: The Scottish bench has experience of interpreting international law and international judgments and I do not see why it should be unable to do so in this circumstance—it does so in other circumstances. Perhaps the most obvious example is ECHR law. I do not perceive that as a problem.

My understanding is that the rules and regulations of the ICC were negotiated as part of the negotiations that have already taken place. The UK delegation played a part in that, so account was taken of the systems and traditions of the UK.

The Convener: Can I take you to the standards in the legal systems of the countries that have signed up to the treaty, the issue of prisons and the way we go about prosecutions? For example, fingerprinting has been mentioned. Is there any need in the future to look at standards in relation to prisons or the way we do things in Scotland?

Iain Gray: Could you clarify the question a little? I am not sure what you are asking.

The Convener: At the end of the day, if Scotland implements international criminal law and there is a conviction at the end of a trial, we would, like other countries, sentence an individual or put them in prison. Is it necessary to ensure that there are standards of imprisonment or that fingerprint evidence is taken in the same way in the countries that have signed up to the ICC? Sentencing policy varies widely in those countries. I understand that the Netherlands has no such thing as a minimum sentence. I am not saying that that is anything for us to worry about, but it is worth raising the matter in the context of standard rules throughout the countries that have signed up to the treaty.

12:15

Iain Gray: There is a genuine issue behind the question, but with any international agreement there has to be acceptance that standards will probably vary throughout the world. That is part of reaching an agreement. The negotiation of the Rome statute and the work of, for example, the International Law Commission, to some extent represent a consensus of the community on the subject. It would be reasonable to say that that consensus might change over time, so it is not a trivial question. I suppose that the protection—in the legislation and the statute—is the use of "genuinely". The ICC has to judge whether proceedings have been genuine—that is the test.

Christine Grahame: I have a question about standardisation. Amnesty International UK referred to "Elements of Crimes". Once that is adopted, what is its status with regard to national legislation and the bill in Scotland? Does it represent an attempt to standardise throughout nations? To

follow on from what the convener said, would that be the way to try to standardise disposals once certain crimes are proven?

Iain Gray: The finalised draft text of the "Elements of Crimes" is a product of the Preparatory Commission for the Establishment of an International Criminal Court. What it works towards is standardised definitions of the crimes that are covered. Its status is that it will be included in the orders that follow from the UK legislation. Those orders will apply UK-wide. In other words, "Elements of Crimes" will be used in the application of the legislation in Scottish courts as well as the other jurisdictions in the UK.

Christine Grahame: So should the committee be considering them?

Iain Gray: The UK act lays down that they have to go through at Westminster as regulations, so the scrutiny will take place at Westminster.

Christine Grahame: I may not be content with that, but I appreciate that that is the position. My second point is that, given that there is an attempt to standardise definitions, is it a leap too far to move on to standardising guidance rather than having the ICC intervene when it feels that prosecutions have not been genuine? That issue is not so much for today, but it might be a direction that we want to try to push politically.

Iain Gray: If Christine Grahame is willing, I could give some thought to that point.

Christine Grahame: Thank you.

The Convener: We have a few questions on consultation.

Christine Grahame: Can you tell us—if not now, by the next meeting—which organisations were consulted prior to the bill being laid before the Parliament?

Iain Gray: The consultation process was carried out on a UK basis—it was a single consultation. I can provide details of that to the committee. It included Scottish organisations.

Christine Grahame: It would be very useful to know that. When we are talking about such things as universality, it would be interesting to know who was consulted on those issues previously.

The Convener: You will know that we have heard this morning from the Law Society of Scotland, which submitted a paper in evidence. I do not propose to go through it all, but it raises a number of issues, mainly about drafting. I do not know whether you have had the opportunity to see that submission, but I would like to put those questions to you at some point. It may be appropriate to do that by letter. For example, the Law Society of Scotland points out that section 15 refers to the powers of Scottish ministers, when it ought to refer to the powers of the Lord Advocate.

The Law Society also raised about section 14, which is entitled

"Taking or production of evidence: further provisions".

Its submission says:

> "Section 14 is unclear as to its purpose. Is it to facilitate the taking of precognitions on oath on behalf of the ICC as part of the investigation process or would it allow the national court to take evidence from witnesses for use in the proceedings before the ICC?"

We do not need an answer to that question today, but we thought that it would be useful to put to you a number of the questions that the Law Society of Scotland put to us, so that we can include your responses in the stage 1 report.

Iain Gray: I would be happy to send you a response.

The Convener: I thank the minister and his team for answering our questions on the bill.

Subordinate Legislation

The Convener: I refer members to the note by the clerk, which sets out the background and procedure for this item. You will note that a motion—S1M-1910—lodged in my name asked for agreement to limit time for debate to 45 minutes—the limit is usually 90 minutes—and that that motion was agreed to.

I should point out that there is a slight amendment to motion S1M-1905. The words "be approved" should be added on to the end.

I invite the minister to say a few words and move the motion.

Iain Gray: The Sex Offenders (Notice Requirements) (Foreign Travel) (Scotland) Regulations 2001 improve our ability to know the whereabouts of convicted sex offenders, and further contribute to our ability to protect children and other potential victims from them.

To set the regulations in context, part 1 of the Sex Offenders Act 1997 requires those convicted of a specified range of sexual offences to register their name and address, and any subsequent changes of those, with the police. The regulations before us today are made under a power included in the amendments to the 1997 act contained in the Criminal Justice and Court Services Act 2000. They were approved by this Parliament in a Sewel motion debate on 5 October last year.

The relevant section provides for such offenders to be subject to additional requirements to give notice when they propose to leave and return to the UK. The regulations specify those requirements. The act currently applies to offenders only when they are in the UK, which has limited the ability of the police to monitor sex offenders in two ways. First, some offenders have been able to claim, when they were found to be missing from their registered address, that they were abroad at the time and therefore not in breach of the registration requirements of the act. Secondly, because there is no requirement to inform the police of overseas travel, the police do not have the information to communicate effectively with authorities overseas when they believe that doing so would prevent a crime from being committed by a registered offender. The regulations address both issues.

In proposing the regulations, we have had to strike a balance between making them useful to the police for operational purposes and recognising that the Sex Offenders Act 1997 is an important tool for protecting the public, but not the only one. The act is essentially about relevant offenders notifying the police of certain information. It was not intended, and could not properly be used, to restrict the offenders' movements. Indeed, it is worth saying that, in our view, the regulations are compatible with the ECHR. In any event, if it is deemed necessary to restrict an offender's movements, other measures are available for that, such as conditions and licences to which they are subject.

I want to say a little about the period of absence covered by the regulations. The period of absence of eight days or longer was chosen because of the need of the police to be able to manage the volume of information generated by offenders making a notification under the regulations. We took the view that it would not be practical to require information from offenders who were going abroad for shorter periods. The police are free to take whatever action they judge necessary to prevent crime if they become aware through other means that an offender who poses a high risk of harm to victims abroad is leaving the UK for a shorter period.

I would prefer to leave my statement at that point and answer questions from the committee.

I move,

That the Committee recommends that the draft Sex Offenders (Notice Requirements) (Foreign Travel) (Scotland) Regulations 2001 be approved.

Scott Barrie: I have no difficulty with the principle behind the regulations. However, I wonder about its practical effects. If someone who was on the register turns up at a small rural police station and informs them, the police there might not be able to transmit that information to wherever it has to go to. It seems as if an awful lot of bureaucracy is being put in place to deal with something that might not be that much of a problem, except in a small number of cases. We would want to alert other countries to or monitor that small number of people. When the consultation was being undertaken, what was the view of the police? Did that view influence the decision to use a period of absence of eight days?

Iain Gray: The regulations that are before us today are linked in with the Sex Offenders (Notification Requirements) (Prescribed Police Stations) (Scotland) Regulations 2001, which are subject to negative resolution procedure and provide for police stations to be designated for registration purposes. That means that registration could take place only at those police stations.

Christine Grahame: That is an interesting line. The eight-day issue is ancillary to other protective remedies that are open to the police and to certain other regulations that we do not have before us.

However, there is a difficulty in that the regulations require the individual to attend in person. Someone from a remote island might have difficulty in trying to get to a designated police

station within a certain time period. Do you see any practical problems, minister?

Iain Gray: What is more important is whether the police see any practical problems. The Sex Offenders (Notification Requirements) (Prescribed Police Stations) (Scotland) Regulations 2001 have been drafted in consultation with the Association of Chief Police Officers in Scotland, which is content with the level of flexibility that is allowed.

Christine Grahame: We have no problem with the principle behind the regulations, which are sensible and will give some measure of comfort to people, but who else did you consult with regard to the practicalities?

Iain Gray: The police have been by far the main consultees.

Christine Grahame: Anyone else at all?

Iain Gray: No, not that I am aware of.

The Convener: How many sex offenders would have to be monitored?

Iain Gray: There are 14,813 registered sex offenders in England and Wales and 1,491 in Scotland as of last month.

Christine Grahame: Is there a stage at which the need for registration in relation to a de minimus sex offence—flashing, for instance—lapses? Is the offender always on the register?

Iain Gray: The duration of the obligation to be registered depends on the sentence. The length of time will vary according to the seriousness of the offence.

Christine Grahame: I understand. Thank you.

Mrs McIntosh: I fully support trying to prevent children and other people in other countries from being abused. I am curious about one aspect of the regulations that is mentioned in the explanatory note. It says that if more than one country is to be visited, the notice must contain the name of the first country to be visited. What about the countries that the offender might visit thereafter?

Iain Gray: To some extent, that concerns practicalities. If travel plans are changed, the offender will be required to renotify the police, to try to cover the possibility of someone saying they will go to one country then changing their plans.

Mrs McIntosh: What if the offender plans to travel from one country to another and make multiple visits?

Iain Gray: Offenders are supposed to give information on all the countries they intend to visit. If they change their plans, they will be required to tell the police of those changes.

12:30

Mrs McIntosh: I am satisfied. I hope that crime can be prevented elsewhere.

The Convener: Does the minister have any final words to say in summary?

Iain Gray: No.

The Convener: The question is, that motion S1M-1905, in the name of Jim Wallace, be agreed to.

Motion agreed to.

That the Committee recommends that the draft Sex Offenders (Notice Requirements) (Foreign Travel) (Scotland) Regulations 2001 be approved.

The Convener: I managed to get the minister away on the dot of 12.30 pm. How about that?

Petition

The Convener: Agenda item 5 is petition PE336 from Frank Maguire on civil justice for asbestos victims. Members will note that quite a few background papers have been provided on the petition, which the Public Petitions Committee has discussed. Our clerk has produced a background note, Frank Maguire has produced a note, an executive summary is available and so is a note from the Association of Personal Injury Lawyers—APIL—which wrote separately, in the knowledge that we would discuss the petition.

The petition raises several detailed and technical matters, mainly in relation to how asbestos victims have been treated in the court system. Attention has been drawn to some of the court procedures—the suggestion is that the hearing of cases has been unnecessarily delayed. Other issues are raised, which we can draw out if necessary.

Do members have any comments on the petition?

Christine Grahame: The petition is interesting. Delays occur not only in cases concerning asbestosis victims, but in many reparation actions. Issues about what one might loosely call abuse of process are raised. The court rules deal with abuse of process, but the petition raises issues not about whether the court rules should be altered—although that may be an issue and the rules have been under review—but about whether the judiciary should have additional guidelines on the behaviour of some defenders.

The petition talks about cases in which skeletal defences were provided almost up to the door of the proof. An award of expenses can be made against defenders who then want to make a huge amendment to bring their case up to par, but the petition suggests that the proof goes ahead nevertheless and that a decree is not obtained. The extension of the court process over the years penalises the pursuer, or the pursuer's family if the pursuer predeceases the hearing of the case.

The petition raises serious issues and is interesting. I would not choose between the options that are offered in the clerk's note; I would choose to do both. We should write to the Lord President, the Scottish Law Commission and the Scottish Legal Action Group to find out whether they corroborate the views expressed in the petition.

Mrs Mulligan: I support what Christine Grahame says. If difficulties are being flagged up, we should try to deal with them. Any delay is detrimental to the pursuer, particularly in such cases. If the option exists for us to consider the issues, I would support our taking both the courses of action suggested on the second page of the clerk's note.

The Convener: There are two specific issues, one arising from the petition and one relating to the correspondence from the Association of Personal Injury Lawyers.

Frank Maguire, on behalf of victims of asbestos, seems to be saying that, in his experience, the court procedures—the issues and exchanges between the various parties—appear to cause some of the delay. In his view, the nub of the matter is that the proper exchange of information about the areas of dispute does not take place before a case comes to court. There is a procedure for that, but if a pursuer alleges that there has been negligence on the part of the defender, all the defender need say is, "Denied, denied, denied." As Peter Beaton from the Scottish Executive justice department points out, the principle of the Scottish legal system is that it is up to the pursuer to make his or her case. The matter has been raised with me on two or three occasions and I think that it is worth considering.

The issue raised with us by the APIL concerns the Prescription and Limitation (Scotland) Act 1973. The association says that judicial interpretation of the act makes it difficult for victims to make their case within three years because of the stipulation that a claim must be brought

"no later than three years after it was 'reasonably practicable' for him to have known about the existence of the disease".

Recently, the interpretation of that in the Scottish courts seems to have been very strict. Some victims are missing out because, by the time they get to their doctors and are diagnosed, it is after the three-year period.

If we were willing to examine the matter further, we would need to consider a range of issues. We should not stop at the court procedures.

Christine Grahame: If defences are only skeletal, cases could be thrown out at procedure roll, which is a debate on the pleadings and on relevancy and specification. There are procedures—people must not think that they can get away with something and that there is nothing there to block that. Usually, the expenses will land on the defender for not having opened up the case and answered it.

There is a genuine question about the tactics of the insurance companies that fund the defenders—taking cases right up to the wire in reparation actions and then settling. Every reparation lawyer with a reasonable case knows that a settlement will usually be reached on the morning of the proof.

There is, I believe, another procedure, whereby liability is admitted, but I am not sure, so perhaps the clerks could advise. Under that procedure, only the quantum—the amount of damages—is considered, rather than whether there has been negligence and loss.

We are talking about the tactics that are employed—using the rules in a certain way—and about judges failing to come down on defenders for what is really an abuse of process. If we want to go into the matter of the prescription and limitation of cases, we must not restrict our work to cases related to asbestosis. The same thing must happen in other cases. Matters may arise further down the road with CJD—there may be problems with people who develop the condition 10 or 15 years from now.

The question could be much bigger. I would rather keep prescription and limitation separate from the specific matter of how the court rules operate and whether there is a requirement to change the rules or for direction from the Lord President on how the interpretation of abuse of process operates.

The Convener: The other issue that the petition highlights is the length of time that is required for the court hearing—in addition to the time required for the case to get into the court system—in cases in which the parties proceed to court. Civil cases are not a priority at the moment, so there are further delays.

I have raised with the Minister for Justice, Jim Wallace, the fact that we are not always reaching the target, particularly for reparation cases. Whether we examine both issues now—prescription and limitation and how the court rules operate—is a question for the committee, but I think that both are worthy of attention in the contexts of court procedures and interpretation, particularly if APIL's assumption that victims are losing out due to the three-year requirement is correct.

I am happy to go along with the options that have been suggested: we should

"write to the Lord President, as Chairman of the Rules Council"—

particularly as a report is, I believe, due from Lord Coulsfield, so it is a live matter, which it would be relevant to feed into—and

"write to the Scottish Law Commission and the Scottish Legal Action Group inviting comments on the issues raised by the petition."

We would then find out what those organisations have to say. We could then decide how deeply we wish to pursue the matter.

Christine Grahame: Is it competent—I do not know the answer to this—to write to the Lord President to ask whether he wishes to comment on the issues that are raised in the petition? According to the clerk's note, that is not the question that we are asking him.

The Convener: I think you are right, Christine. When we ask him about the time scales for consideration of the report by the rules council, we should also ask him to address the points raised by the petition.

Are both the suggested points of action agreed?

Members *indicated agreement*.

The Convener: That brings us to the end of the public part of the meeting, although the meeting will continue in private for item 6—discussion of the draft stage 1 report on the general principles of the International Criminal Court (Scotland) Bill.

12:40

Meeting continued in private until 12:52.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178