Exhibit B

to the Memorandum of Points and Authorities (Part 1 of 4)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. VICTORIA CUMMOCK, in her own right, and as Personal Representative of the ESTATE of JOHN CUMMOCK, deceased; CHRISTOPHER JOHN CUMMOCK; MATTHEW DAVID CUMMOCK; and ASHLEY MICHELLE CUMMOCK,	)	
Plaintiffs,	)	
v.	)	**Case No. 96-CV-1029 (CKK)**
THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, a/k/a JAMAHIRIYA SECURITY ORGANIZATION; LIBYAN ARAB AIRLINES; ABDEL-BASSET ALI AL-MEGRAHI, a/k/a MR. BASET, a/k/a AHMED KHALIFA ABDUSAMED, a/k/a ABD AL-BASIT AL-MAQRAHI; and LAMEN KHALIFA FHIMAH, a/k/a AL AMIN KHALIFA FHIMAH, a/k/a MR. LAMIN,	)	
Defendants.	)	

DECLARATION OF ALISTAIR J. BONNINGTON

I, Alistair J. Bonnington, declare as follows:

Curriculum Vitae of Affiant

1. I am 53 years of age and have been admitted as a Scottish solicitor since 1976. I hold an LLB Honours degree in law from the University of Glasgow. I have been admitted as a Solicitor Advocate with rights of audience before the High Court of Justiciary in Scotland since 2001. I am an Honorary Professor of Law at the School of Law, the University of Glasgow. I have specialised in the teaching of criminal procedure law. From 1986 to 2002, I

was the lecturer in criminal procedure in the post-graduate Diploma course at the University of Glasgow. I attach a copy of my curriculum vitae as Exhibit 1.

2. This affidavit is based both on my expertise in Scottish law and my personal experience and observations of the criminal proceedings discussed herein.

University of Glasgow, School of Law: Lockerbie Trial Briefing Unit

3. When it became clear that there was to be a trial of those accused by US and UK prosecutors of being involved in the planting of a bomb aboard Pan Am Flight 103 from London Heathrow to New York on Wednesday 21st December 1988, it was decided by some senior law professors at the University of Glasgow to set up a briefing unit within the Glasgow University School of Law to aid international understanding of the trial process. It had become clear from the international press interest in the prospect of a trial taking place under Scots law that there was a lack of knowledge of Scottish criminal procedure amongst interested journalists and persons. It was thought that a group of legal experts from the University of Glasgow Law School could provide a much needed service for the world's media in order to raise the standard of coverage of the trial. The senior professors were anxious that Glasgow University's "Lockerbie Trial Briefing Unit" provide impartial advice on the trial process and the trial itself. It was determined that, to adequately cover the trial, the following full-time and part-time members of staff at the Glasgow University School of Law would form the Lockerbie Trial Briefing Unit (LTBU): Professor John Grant, Professor of Public International Law; Professor Jim Murdoch, Professor of Human Rights; Professor Fraser Davidson, Head of the School of Law and a specialist in the Scottish law of evidence; Honorary Professor Alistair Bonnington, a lecturer in criminal procedure; Claire Connelly, Senior Lecturer in criminal law; and Martin Kerr, Lecturer and Tutor in communications law and a specialist in the Internet. Mr. Kerr maintained the Lockerbie Trial Briefing Unit's website. In addition, secretarial support was provided by Miss Alison Clement, a secretary within Glasgow University School of Law. During the course of our work, we produced two guidance pamphlets on the legal issues in the case.

Personal involvement in LTBU

4. I was a member of the Lockerbie Trial Briefing Team. It was my job to explain the rules and procedures which the Scottish court was following in terms of the Criminal Procedure (Scotland) Act and any other legal rules which applied to the Lockerbie trial. In company with Professor Grant and the other academic colleagues whose names I have given above, I travelled to Kamp van Zeist in Holland, where the trial was taking place. I attended the proceedings on a number of occasions – 6th -7th December 1999, 15th-16th October 2001,

22nd-24th January 2002 and 13th-15th March 2002. On my first visit, I travelled to Kamp van Zeist to observe the preliminary hearing before Lord Sutherland (see Opinion of Lord Sutherland in Preliminary Diet, Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, Judgment of 8th December 1999, reported at 2000 JC 555; 2000 SCCR 177; 2000 SLT 1393 and at p.203 of "The Lockerbie Trial: A Documentary History," attached hereto as Exhibit 2); on later occasions to observe part of the trial proceedings before Lords Sutherland, Coulsfield and McLean (the verdict Judgment in Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah is to be found at www.scotcourts.gov.uk, attached hereto as Exhibit 3); and latterly, in March 2002, to observe the appeal hearing before a bench of five judges headed by the Lord Justice-General, Lord Cullen (Megrahi v. Her Majesty's Advocate, Appeal Judgment, Opinion of Appeals Court, High Court of Justiciary, reported at 2002 JC 99; 2002 SCCR 509; 2002 SLT1433 attached hereto as Exhibit 4. In addition to observing the trial proceedings first hand, I was involved in reading the trial's transcripts for the purpose of updating the Lockerbie Trial Briefing Unit website, maintained by Glasgow University Law School's IT expert, Martin Kerr.

My Suitability to Give this Affidavit

5. For the foregoing reasons, I think I am in a position to meet the request made by Motley Rice, Attorneys at Law, on behalf of their client, Ms. Victoria Cummock, to provide an affidavit which gives the Court an opinion on matters arising out of the Scottish Lockerbie trial which are relevant to the proceedings raised by Ms. Cummock against Megrahi, Fhimah and the State of Libya; and in particular to provide an opinion on: the protections offered to accused persons under Scottish criminal procedure; the procedural protections afforded in the trial of Abdel Bassett Ali Mohammed Al-Megrahi and Al-Amin Khalifa Fhimah and the terms of the ruling made by the trial court; the effect of the criminal conviction of Al-Megrahi on subsequent civil proceedings, were these civil proceedings to take place in a Scottish court; and the collateral estopell effect of the criminal conviction.

Protections Afforded to Accused Persons under the law of Scotland

Presumption of Innocence: Onus on Crown

6. Under Scottish law, an accused person (in the English common law system called "the defendant") is presumed to be innocent. An authoritative statement regarding this point was made by Lord Justice-Clerk Thomson in McKenzie v HMA 1959 JC 32, where at pages 36-37, he stated as follows:

> The presumption of innocence is a fundamental tenet of our criminal procedure. It follows that the burden of proof rests on the Crown to displace this presumption.

7. The burden of proof remains with the Crown throughout the trial and never shifts to the accused; Lord Justice-General Normand's Judgment in Lenny v. HMA 1946 JC 79 at p.80 is authority for this view. At the conclusion of the trial, any "reasonable doubt" which remains in the minds of the jury (or in the mind of the judge, where there is no jury) must be exercised in favour of the accused. The onus is entirely on the prosecution (also called "the Crown" in Scotland) to prove that the accused is guilty to the required standard. I should add, although it may not be relevant to the proceedings here under consideration, that Scots law requires that any prior convictions of an accused person, or evidence regarding his previous bad character, are concealed from the court until after a determination of guilt or innocence.

Standard of Proof

8. The standard of proof required for a Scottish court in criminal trials is beyond a reasonable doubt. Lord Justice-Clerk Wheatley in the case Ritchie v. Pirie 1972 JC 7 stated as follows:

> The onus of proving the case beyond reasonable doubt rests with the prosecution, and remains with the prosecution throughout, and whether that has been done depends upon all the evidence before the court, whether adduced by the prosecution or by the defence, and on the view which the court takes of it.

9. So it is for the court to assess the reliability and veracity of the evidence adduced, and then to determine if the necessary standard has been reached for a verdict of guilty.

Corroboration

10. In addition, Scottish law requires that all the important elements of the crime libelled against the accused persons are proved by corroborated evidence – that is to say, evidence from two separate sources. This is a fundamental tenet of Scottish law. It is not departed from in any criminal case. In this respect, the standard of proof required by a Scottish criminal court is higher than that required by an English criminal court, which will convict on uncorroborated evidence if from a sufficiently reliable source.

11. Corroborative evidence means one item of evidence derived from an independent source that is available to support another item of evidence. As a general rule, in criminal proceedings an essential fact cannot be proved by the testimony of one witness alone.

Instead, that witness's testimony must be proved by corroborative evidence. Corroboration means that the testimony should be supplemented, supported and confirmed by independent evidence to the same effect from a second source. That second source need not be another witness – it could, for example, be evidence of a documentary nature. As the Scottish Law Commission Report No. 100 pointed out, "in practice it [corroboration] is commonly found in a combination of direct testimony and circumstantial evidence".

12. So if, for example, an accused person, when arrested by the police, had confessed fully to the crime with which he is later charged, this would be insufficient to convict him. There must be evidence from another source to corroborate the confession. If the crime to which the accused person had confessed was stealing a car and his fingerprints were later discovered to be inside the car, then this forensic evidence would corroborate the confession and there would be enough evidence for a Scottish court to convict the accused. But without the additional forensic evidence there would be no corroboration of the essential facts and the accused would be acquitted.

13. The need for corroboration in criminal cases reflects a concern that a case should not normally be decided on the basis of the testimony of one witness. The rationale is that corroboration from a separate source provides an independent check on the reliability of the fact in question. This is not a rationale adopted in English law, where there is no general requirement for corroboration, and legislation there in 1994 abolished the need for a judge to give a warning to the jury about the dangers of convicting on the basis of uncorroborated evidence.

14. So in conclusion, the evidentiary burden which the Crown requires to discharge under the Scottish system of criminal procedure is higher than that which is required of the prosecution in a US court. There was, for example, evidence against Fhimah showing entries in his personal diary which indicated his knowledge of and involvement in the plot to plant a bomb on Pan Am Flight 103. Nevertheless, because this evidence was not corroborated by evidence from a separate source, the Scottish court found Fhimah not guilty of all charges against him. On the other hand, there was sufficient credible corroborative evidence pointing towards the guilt of Megrahi. So the Crown had discharged the evidentiary burden on them in Megrahi's case and he was convicted.

Verdicts Open to Court

15. An unusual aspect of Scottish criminal procedure is that three verdicts are open to the court; namely, guilty, not guilty and not proven. Both not guilty and not proven are acquittals. The existence of the third verdict which results in an acquittal is to the advantage

of the accused person (the defendant in US law). If a verdict of not guilty or a verdict of not proven is entered, then the matter is treated as *res judicata* – that is to say, the accused person cannot be tried criminally again for the crime before the court. That *res judicata* rule would operate, even if fresh evidence clearly demonstrating the accused person's guilt were to emerge at a later point in time, or even if the accused person subsequently admitted his guilt of the crime. Therefore, in Scotland, of the three verdicts available, two will result in an acquittal and one will result in a finding of guilt. I can explain the historical reasons for the existence of the three verdicts, if that is required by the Court.

Summary or Solemn Procedure

16. Scottish criminal procedure allows two different methods of trial, namely summary and solemn. The majority of cases involving less serious crimes are prosecuted under summary procedure. In a summary court, a judge sits alone. He is the judge of both fact and law. In some situations, the prosecution has discretion as to whether to bring the case before a summary court or a solemn court. However, as the Lockerbie trial involved the charge of murder, which can only competently be brought before the High Court of Justiciary in Scotland, there was no discretion as to which court would hear this case

Indictment Trials: Juries as Fact Finders

17. Serious crimes are prosecuted on indictment in Scotland. This procedure is generally more formal, requiring a great deal more paperwork and recording of every step in the procedure. This type of case is prosecuted either before a Sheriff (lower court judge) and a jury of 15; or alternatively, in the High Court of Justiciary before a single judge and a jury of 15. The High Court, as its name suggests, takes the most serious cases. The crimes of murder and rape, for example, can only be prosecuted before the High Court. As this court knows, the prosecution against Megrahi and Fhimah involved the charge of murder.

18. In a trial by jury, the judge is master of the law while the jury are masters of the facts. It is up to the jury to assess the evidence, deciding what they find to be reliable and credible. It is up to the jury to decide what inferences to draw from the evidence which they deem to have been proved. So in the normal indictment trial, there is a split function on law and facts as between judge and jury.

The Lockerbie Trial: How Procedure to Be Used Was Arrived At

19. Normally, the prosecution of Megrahi and Fhimah would have gone before a single judge of the High Court of Justiciary plus a jury of 15. However, representations had been made to the British government by the government of Libya to the effect that the Libyans feared that a jury comprising members of the Scottish public would be biased against

the Libyan accused persons. Reference is made to the Libyan position paper of 1997 and in particular paragraph 19 of that paper which states in the final sentence:

> Libya believes that the two Libyan suspects in the Lockerbie accident, have also the right to stand before a just court at venue free from the atmosphere of prior condemnation prevalent in the United States and in Scotland, as is the case with their citizens, and as provided for in article 14 of the International Covenant on Civil and Political Rights.

Libyan Position Paper (1997), reproduced at p.135, 140 of The Lockerbie Trial: A Documentary History," attached hereto as Exhibit 5.

20. In fact, in the negotiations between the Libyan government and the UK government, the Libyan government's refusal to permit the case to be tried to a Scottish jury was the main stumbling block to the trial proceeding before a Scottish court. Eventually, a compromise solution was reached whereby it was agreed between the government of the UK and the government of Libya that the trial would proceed in a neutral country before a Scottish court applying Scottish law, but the fact finders in that trial would be Scottish judges and not a Scottish jury comprising members of the Scottish public. That agreement required to be put into effect under domestic Scottish law to enable the trial to proceed in the format agreed between the government of Libya and the government of the UK. Accordingly, an Order in Council was made by the Queen in Council on 16th September 1998. The Order in Council had been attached in draft form to the joint UK/US letter of 24th August 1998, which was a joint communication to the UN Secretary-General and which presented a compromise proposal by the UK and US governments for holding the trial of Megrahi and Fhimah. Letter dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations, addressed to the Secretary-General, S/1998/795, attached hereto as Exhibit 6.

21. The Order in Council (SINO.1998/2251) proceeded under specific reference to Article 41 of the Charter of the United Nations and the resolution adopted by the Security Council on 27th August 1998. That gritty resolution 1192 (1998) is found at page 147 of "The Lockerbie Trial: A Documentary History," attached hereto as Exhibit 7. In essence, the Order in Council allowed the Scottish court to sit outside Scotland, in The Netherlands. It also made provision for the fact finders of the trial to be three Scottish High Court judges, rather than a jury of 15. Except as amended by the terms of the Order in Council, the Lockerbie trial proceeded under the terms of the Criminal Procedure (Scotland) Act 1995. The terms of the agreement between the government of Libyan and the government of the United Kingdom

were put into effect by the Order in Council number 1998 SI No.1998/2251, attached as Exhibit 8.

Service of Petition Warrant and Indictment

22. Serious Scottish criminal cases begin with the accused person being arrested (usually by the police) and brought before a Sheriff in chambers for a hearing. The purpose of that hearing is to let the accused person see the allegations which the Crown are making against him and give him a chance to respond to them if he wishes. The Petition warrant will not necessarily be in the same terms as the final terms of the indictment, which comprises the charges on which the accused person ultimately stands trial. That is because the Petition warrant is prepared at a stage when the Crown may not be fully aware of all the facts and circumstances of the case. For example, a Petition warrant might state that the accused was facing an allegation of assault to severe injury and the danger of life. He would be brought before the court the next day after his arrest following on the incident itself. But, after full medical examination of the victim, it may transpire that the description of the charge put in the Petition warrant was excessively severe. So when it comes to the stage of the indictment being served on the accused person, it might state that he was charged with simple assault only.

23. Petition warrants are normally served in Scottish procedure by a police officer on an accused person who is in custody in a Sheriff Court awaiting his appearance before the Sheriff. In the Lockerbie case, a Sheriff Court was constituted comprising of the Sheriff-Principal of South Strathclyde, Dumfries & Galloway. He went over to Kamp van Zeist, and Megrahi and Fhimah appeared before him in chambers on Petition following the usual practice of the Scottish courts. By way of background, Megrahi and Fhimah were flown into a Dutch airbase and surrendered themselves to Dutch police officers. They did not insist on their right to contest extradition to Scotland. They were therefore handed over almost immediately after landing by the Dutch police into the custody of Scottish police officers. From that point, they were taken to the court at Kamp van Zeist, which at this point was being used as a Sheriff Court, not the High Court, and appeared before the Sheriff-Principal on the day following their arrival in Holland. They made no plea or declaration and were remanded in custody.

Service of Indictment

24. An indictment has to be served at least 29 clear days before the trial diet. An indictment is validly served by being served on the accused's domicile of citation. Usually that will be the accused person's home address, or alternatively, if he is in custody, the prison

where he is incarcerated. As a matter of practice, the Crown in Scotland serve the indictment not only on the accused person but at the same time let his legal representatives have a courtesy copy. This allows the legal representatives to begin to prepare the case for trial. In the Lockerbie case, the indictment was properly served as described above and within the appropriate time limit.

Objections to Service of Petition and/or Indictment

25. It is competent for an accused person to object to any form of service of documentation which does not conform to the rules of Scottish criminal procedure. No such objection was taken by either Megrahi or Fhimah to the service of the Petition warrant or the service of the indictment.

Conclusion

26. Service of the Petition warrants and indictments in the Lockerbie case accorded with the law of Scotland.

Scottish Trial Procedure in Solemn Criminal Cases

27. What follows is a précis of Scottish procedure in a criminal trial on indictment: The case starts when it is called by the Clerk of Court. The accused person's Counsel rises and advises the court if a plea of guilty or not guilty is being tendered. If a plea of not guilty is tendered, the matter then proceeds to Proof.

28. As the onus is on the Crown, the Crown leads. There are no opening statements. The trial commences by the Crown calling its first witness. The name and contact details of each witness to be called by the prosecution is attached to the indictment of the accused and served on his or her counsel before trial. All witnesses are put on oath by the judge. The party calling the witness questions the witness, being prohibited from asking leading questions in this examination. This examination is called examination-in-chief. Cross-examination by the opposing Counsel then takes place. Leading questions are allowed at this point. Re-examination by the Counsel calling the witness is allowed. Leading questions are not allowed in re-examination. After Counsel for parties have examined the witnesses, then the judge can ask questions to clarify areas of the testimony given. If a new matter arises from what the witness said in reply to the judge's questions, then Counsel will be given an opportunity to ask further questions of the witness on this passage of new evidence which has been elicited by the judge's questions.

29. It is possible for a witness to be recalled to the court at a later stage in the proceedings, should that be felt necessary to clear up ambiguities or to provide additional

evidence which is required in light of other evidence heard by the court subsequent to the first appearance of that individual as a witness.

30. If a witness is being asked to refer to a documentary or physical production, that will normally be produced in court, although if it is physically too large, a label may be used in place of the production. If need be, the court can be convened at the place where the production is situated. The witness will be shown the document or real evidence (e.g., a knife) and asked to say whether or not this is, for example the knife, they refer to in their evidence. Affidavits and depositions are not lodged (filed) in advance of the case. The Crown will be in possession of statements made by the witness at interview to investigating police officers or in the Procurator-Fiscal's office. Similarly, the defence will be in possession of precognitions which have been taken by the defence solicitor from witnesses who are willing to give precognitions.

31. A precognition is a summary of the evidence of a potential witness to a criminal trial. Precognitions are taken both by the Crown and the Defence. A precognition is taken by the precognoscer (usually a lawyer, but sometimes an employee of the Procurator-Fiscal's office) questioning the potential witness at a face-to-face meeting about the evidence which the witness may be able to give at a trial. The precognoscer notes down what is said by the witness. After the interview has been completed, the precognoscer produces a written summary of the potential evidence of the witness. There is a contrast here with English law, in that under the English system the defence are not permitted to take precognitions from Crown witnesses. In Scotland, in the rare event when a witness refuses to give a statement to the Crown or a precognition to the defence, that witness can be compelled at the instance of an interested party, the Crown or Defence, with the agreement of the court to do so by means of what is called a precognition on oath. In that procedure, the witness is called before a sheriff (lower court judge), put on oath and asked to indicate what he or she will say when called upon to give evidence at the trial diet.

32. The purpose of these statements and precognitions is that in advance of the trial both the Crown and defence will be roughly aware of what a witness will say and can therefore prepare for examination and cross-examination. It also assists in determining the strength of a case.

33. What is said at any precognition on oath diet, when such takes place, is recorded and can be referred to at trial. Precognition on oath is also used in circumstances where it is believed that a witness may depart from the evidence given at the investigatory stage when he or she goes into the witness box to give evidence.

34. At the end of the Crown's case, the Crown will indicate that their case is closed. At this point, the defence are entitled to make a submission that there is no case to answer. This is in terms of the Criminal Procedure (Scotland) Act 1995 S97(1)(a). This submission is made where the defence are alleging that there is insufficient evidence brought before the court to allow the court to convict. The veracity of the evidence is not in issue at this point. It is simply the quantity of evidence.

35. If any such submission is rejected, or if no submission is made, the defence then are given an opportunity to lead evidence. The defence are under no obligation to lead evidence. There is no onus on the defence to prove anything. If defence Counsel wishes to call his client as a witness, then the accused client is called as the first defence witness. But the defence need not lead the accused as a witness, even if they wish to call other witnesses. An accused has the right of silence. One accused person cannot call another accused person as a witness unless that second accused person has agreed to give evidence in the case. The defence evidence need only raise a reasonable doubt in the minds of the judges. Even if a special defence has been lodged, there is no onus on the defence to prove that the special defence is true. In this case, a special defence of incrimination had been lodged on behalf of Megrahi and Fhimah. In short, the special defence of incrimination stated that the Lockerbie bombing had been carried out by a terrorist group sponsored by the Syrian government, rather than Libya.

36. It is important to note that, throughout the preliminary hearings of the trial, William Taylor QC, the senior counsel appearing for Megrahi maintained that his client had an option to elect for a jury trial in Scotland, rather than proceed with the trial before the three judges at Kamp van Zeist in Holland. In the event, the matter was not put to the test because Megrahi did not try to elect to be tried by a Scottish jury. By failing to make a motion that the case be put before a jury, Megrahi waived the right to that kind of trial. It may reasonably be assumed that, in discussion with his legal advisers, Megrahi took the same view as his government and employer, namely that a jury comprised of 15 members of the Scottish public would be more likely to convict him than would a panel of Scottish judges, who, like judges throughout the democratic countries of the world, are trained to be impartial in determining legal and factual issues.

37. This adaptation of Scottish solemn procedure, that is to say a trial on indictment before the High Court, was the only departure from normal Scottish criminal procedure. The trial proceeded otherwise as normal under Scottish criminal procedure. The trial lasted for a period of 84 days. The accused men and their legal advisers had access to all

Crown productions, which had been intimated to the court well in advance of the statutory required period of 10 days. The witnesses called by the Crown had also been intimated to the defence well in advance of the statutory requirement of 10 days. The defence were allowed an adjournment at one point during the proceedings when they claimed they were following a line of investigation which might require the calling of further witnesses and the lodging of further productions.

The 110-Day Rule

38. The accused men had been appointed a Scottish legal adviser (Mr. Alistair Duff, Solicitor Advocate of McCourts & Co, Solicitors, Edinburgh) over a year in advance of the trial taking place. In Scottish criminal procedure, where the accused person is held in custody, as in the Lockerbie trial, normally the trial has to proceed within 110 days. The purpose of that rule is not to prejudice accused persons by holding them in custody for an excessive period of time. In the Lockerbie case, the 110-day rule was extended because the defence wished additional time to make some enquiries. On 7th June 1999, Lord Sutherland, as Presiding Judge, granted an extension of the 110-day rule under Section 65 of the Criminal Procedure (Scotland) Act 1995. The extension was granted until 4th February 2000. The purpose of the extension was to enable the defence more time to prepare their case. On 2nd February 2000, Lord Sutherland granted another extension of the 110-day rule, again to enable to the defence further time to make investigations and generally prepare their case for trial. That was in addition to the adjournment during the trial to seek extra time to make further investigations into possible fresh sources of defence evidence.

The Verdicts

39. In terms of the unanimous decision of the court issued at Kamp van Zeist by the Presiding Judge, Lord Sutherland, on 31st January 2001, Abdel Bassett Ali Mohammed Ed-Megrahi was found guilty of the murder of the occupants of Pan Am Flight No.103 plus the 11 citizens of Lockerbie who died when parts of the plane fell on that town on the night of 21st December 1988. The Crown had only asked for a conviction on the charge of murder at the end of the trial. The indictment was revised during closing submissions by the Crown, made on 11th January 2001. The revised indictment is found at page 222 of "The Lockerbie Trial: A Documentary History," attached as Exhibit 9. Megrahi was convicted as "a member of the Libyan Intelligence Services, and in particular being the head of security of Libyan Arab Airlines and thereafter director of the Center for Strategic Studies, Tripoli, Libya ". The indictment had narrated this description of Megrahi. Megrahi never challenged the veracity of that description. If Megrahi wished to challenge this description, which was his

right, he would have been required to lodge a preliminary motion in court in terms of Section 255 of the Criminal Procedure (Scotland) Act 1995. That section is in the following terms:

> Where an offence is alleged to be committed in any special capacity, as by the holder of a licence, master of a vessel, occupier of a house, or the like, the fact that the accused possesses the qualification necessary to the commission of the offence shall, unless challenged –
>
> > (a) in the case of proceedings on indictment, by giving notice of a preliminary objection under paragraph (b) of section 72(1) of this Act or under that paragraph as applied by section 71(2) of this Act; or
> >
> > (b) in summary proceedings, by preliminary objection before his plea is recorded, be held as admitted.

40. Mr. Taylor did not make any challenge to this description of his client, Megrahi. Nor was any cross-examination of any witness directed towards challenging that Megrahi was a Libyan secret service agent.

41. Moreover, the trial Court found:

> We accept the evidence that [Megrahi] was a member of the JSO [Jamahiriya Security Organization], occupying posts of fairly high rank. One of these posts was head of airline security, from which it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which LAA [Libyan Arab Airlines] operated. He also appears to have been involved in military procurement.

Her Majesty's Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah, attached as Exhibit 3, at pp. 80-81.

Right of Appeal

42. Under Scots law, a person convicted on indictment has the right to appeal. In terms of Section 106 of the Criminal Procedure (Scotland) Act 1995, the appeal can be lodged on almost any ground. That is because the section states that the basis for an appeal is "a miscarriage of justice". At an appeal hearing in the Scottish system, it is up to the appellant to discharge the burden which now lies on him to demonstrate that the verdict of the trial court is defective in some regard and that this amounts to a "miscarriage of justice". Given this broad standard, a defendant has the right to present newly discovered evidence that was not presented in the trial. The appeal hearing in Megrahi v. Her Majesty's Advocate was extremely wide in range, as will be seen from the papers which were before the Scottish High Court regarding the appeal hearing – see the Note of Appeal at page 287 of "The Lockerbie Trial: A Documentary History," attached as Exhibit 10. In support of his appeal, Megrahi, as

was his right, presented a body of evidence that was not introduced at trial. From my understanding of US law, the evidence Megrahi presented would not have been considered by a US appellate court.

43. The appeal hearing proceeded at Kamp van Zeist in front of five senior Scottish judges of the High Court of Justiciary headed by Lord Justice-General Cullen. The other members of the court were Lords Kirkwood, Osborne, Macfadyen and Nimmo-Smith. They heard argument from William Taylor QC on behalf of Megrahi from 23rd January to 14th February 2002. Their decision, which was accompanied by a 100-page written Opinion, was to reject Mr. Megrahi's appeal. The Opinion was issued on 14th March 2002, attached as Exhibit 4.

Other Possible Avenues of Appeal Open to Megrahi

44. Even after the rejection of his appeal to the five judges, Megrahi had two further avenues he could take to have his conviction reviewed. These two avenues are: an appeal to the Privy Council, a court which sits in London and consists, in essence, of the most senior judges in the UK and Commonwealth (usually the same judges as sit in the House of Lords); or a request to the Scottish Criminal Cases Review Commission to investigate and review his conviction with a view to having the SCCRC refer the case back to the High Court for a second appeal hearing.

45. These two avenues of review after the rejection of an appeal in a criminal matter are additional protections for an accused person which are afforded to a convicted person under Scottish law. Such protections are not afforded to convicted persons under US law.

46. As observed above, after rejection of his appeal to the five judges, it would have been possible for Megrahi to take an appeal that he had not been given a fair trial, something which it guaranteed under Article 6 of the European Convention on Human Rights, which is in the following terms:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention on Human Rights, p. 5, *available at http://www.echr.coe.int/Convention/webConvenENG.pdf (last viewed on May 27, 2005).*

47. Everyone charged with a criminal offence has the following minimum rights:

- to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- to have adequate time and facilities for the preparation of his defence;
- to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court. European Convention on Human

Id.

48. The European Convention on Human Rights was imported into UK law by the Human Rights Act 1998. In the case of Scotland, there is interaction between the Human Rights Act 1998 and the Scotland Act 1998. Since the devolution settlement encapsulated in the Scotland Act 1998, it would have been competent for Megrahi to appeal to the Privy Council had he been alleging that there had been a breach of his human rights. In Scottish criminal procedure, a so-called devolution point is pursued by, in effect, making a complaint to the Scottish court that section 100 and schedule 6 of the Scotland Act should apply. The effect of schedule 6 of the Scotland Act 1998 has now been judicially determined by the Scottish courts. In effect, if the Lord Advocate, as the prosecutor in the Scottish courts, has breached the terms of the articles of the European Convention on Human Rights which have been imported into Scots law, then the court can uphold an appeal against conviction on that basis. The procedure to be followed when such a "devolution issue" applies is set out in schedule 6 to the Scotland Act 1998. It is specifically mentioned in schedule 6 that an appeal to the Judicial Committee of the Privy Council can be made in a Scottish criminal case. All criminal cases in Scotland where there has been an alleged breach of human rights have been

dealt with in that fashion. Accordingly, if Megrahi was alleging he had not been given a fair trial, that is to say the rights afforded to him under Article 6 of the European Convention of Human Rights had been breached, he would have taken an appeal to the Privy Council in London. However, he did not do so.

49. It has been reported in the Scottish newspapers that Megrahi is proceeding with an application to the Scottish Criminal Cases Review Commission. The Scottish Criminal Cases Review Commission has the function of examining cases where the rights of appeal open to accused persons have been exhausted, but the accused person still maintains innocence. The Scottish Criminal Cases Review Commission will only refer a case back to the High Court of Justiciary for the hearing of a second appeal if there is a prima facie case that there may have been a miscarriage of justice. It is to be assumed from the procedure here followed that Megrahi is not maintaining that he did not have a fair trial. He is, however, trying to have another chance to get his case put before the appeal court.

The Effect of a Criminal Conviction in Civil Cases in Scotland

50. In terms of Section 10(1) of the Law Reform (Miscellaneous Provisions) Act 1968, a criminal conviction is prima facie evidence of the facts which have been proved. That subsection states as follows:

> In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

51. Sub-section (2)(a) goes on to state that where the person in question is proved to have been convicted of an offence then "he shall be taken to have committed that offence unless the contrary is proved". The section therefore creates a rebuttable, not conclusive, presumption of guilt. It places a persuasive burden on the person who wishes to prove his innocence.

52. Section (2)(a) is frequently used in civil cases such as actions for damages arising out of a road accident in which the defender has already been convicted of a motoring offence arising from the same facts. While it is not impossible for the defender in civil proceeding to discharge the onus which now lies on him to prove his innocence, it should be remembered that the criminal conviction was proved beyond reasonable doubt. In a civil case, the lower standard of proof required by a

Scottish court is balance of probabilities. Accordingly, the conviction of Megrahi for murder by placing a bomb on PanAm flight 103 would be a good basis for his being sued by bereaved relatives in Scottish courts. The onus would be on Megrahi to prove that the criminal conviction was incorrect.

Scottish Criminal Trial Procedure Compared to U.S. Criminal Procedure

53. I have some degree of knowledge of the procedure followed in the U.S. Federal Courts, as I studied American law in my final year at Glasgow University Faculty of Law. I am also a member of the International Bar Association and regularly meet and discuss court proceedings with American trial lawyers. I am also a member of the Media Resource Defense Center (MDRC) based in New York. MDRC meetings are concerned with trial procedure in the American courts. Through these various sources, I have some knowledge of the way American courts try those accused of crimes. I would not, however, claim to be an expert in American procedural law or evidential law.

54. From what I know of American law, I would say that the trial which took place at Kamp van Zeist and the subsequent appeal hearing accorded with the general principles of American criminal justice. It is important to understand that the entire procedure was observed by a number of American attorneys who were present in court to assist with the presentation of evidence to the court – some evidence having been gathered by the American security services, in addition to that gathered by the UK security services. The American attorneys were also there to ensure that the bereaved families were treated in accordance with American procedures – in particular, the Office for the Victims of Crime was involved in assisting the bereaved relatives. It is my understanding that the American attorneys present were satisfied that the procedure followed by the Scottish courts was proper and that justice had been done in the case.

55. I have also been asked to explain the position regarding the intervention of third parties in Scottish criminal proceedings. It is not possible for third parties to intervene under Scottish procedure. The criminal trial is a forensic contest as between the prosecution and defence. There can be no intervention from third parties.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2ND day of JUNE, 2005.

ALISTAIR J. BONNINGTON

CITY OF GLASGOW)
)
COUNTRY OF SCOTLAND)

SWORN to before me this Second
day of June, 2005.

R S Taylor,
Notary Public, Glasgow

(Seal)

NOTARY PUBLIC
My Comm. Expires: N/A

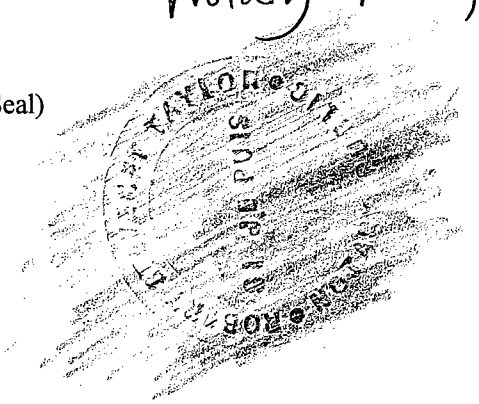

Exhibit 1
(Declaration of Alistair J. Bonnington)

CURRICULUM VITAE

NAME: Alistair J. Bonnington

DATE OF BIRTH: 28 May 1952

ADDRESS: 9 Boclair Road, Bearsden, Glasgow, G61 2AD

POSITIONS HELD: Employment: Solicitor, Scotland with BBC Scotland, Queen Margaret Drive, Glasgow.

In my daily work I specialise in the law of defamation, contempt of court, rule of protecting identification of parties at court proceedings (especially children), copyright, Data Protection, Freedomof Information and associated subjects. I also deal with litigation arising out of programmes. I deal with complaints to the Broadcasting Standards Commission/now Ofcom.

I conduct seminars throughout BBC Scotland's premises and provide in-house legal training for BBC journalists, producers and other staff.

I am a qualified Solicitor-Advocate and have rights of audience in the High Court of Justiciary. I appear in the High Court of Justiciary on behalf of BBC Scotland when Orders are made under the Contempt of Court Act 1981, Section 4(2).

ACADEMIC POSITIONS HELD

Honorary Professor of Law, Glasgow University

Part-time lecturer in Criminal Procedure at Glasgow University and then at Glasgow Graduate School of Law from 1989 to 2003.

Part-time lecturer and tutor in Media Law (Honours) at Glasgow University and Strathclyde University.

I held an external examinership in Law at Glasgow Caledonian University in Criminal and Civil Procedure. This post was held for three academic years. It expired in 2001.

External Examiner in Journalism at Leeds University 1997 to 1999.

I am currently the External Examiner in the Diploma at Aberdeen University, in Criminal Procedure.

I am also the External Examiner in the Undergraduate course at Aberdeen of "Legal Understanding".

I have been an internal examiner at Glasgow University in Law for the past 20 years.

I have been an internal examiner in Media Law at Glasgow University and Strathclyde University for the past five years.

Member of Centre of Research into Law Reform, Glasgow University Law School. Have prepared several of the Centre's submissions to Government on variety of topics, including those to the Sutherland Committee on Miscarriages of Justice.

PUBLISHING EDITORSHIPS

Books Review Editor of the Journal of the Law Society of Scotland;

Legal Review Editor, Journal of the Law Society of Scotland

UK MEDIA SOCIETY MEMBERSHIPS

Secretary of the Scottish Media Lawyers Society.

Member of Fleet Street Lawyers Society.

SCHOOL:

Hillhead High School, Glasgow.

UNIVERSITY: DEGREES

Glasgow University Law Faculty. Graduated LLB Honours (Second Class Upper Division) in Public Law. Graduated 1974.

University of Bradford Diploma in Business Administration - Graduated December 1998 – BBC-sponsored management course.

Hold Certificate in Legal Teaching from National Institute of Trial Advocates (NITA) of America for residential course at Harvard University, Boston.

TEACHING EXPERIENCE:

1976-1980 - Part-time lecturer in General Principles of Scots Law at College of Commerce, Glasgow.

1980-1984 - Part-time tutor in Public Law at the Law School, Glasgow University.

1984-1989 - Part-time tutor in Civil and Criminal Court Practice, the Law School, Strathclyde University.

1984-1993 - Part-time tutor at Glasgow University Law School in Civil and Criminal Court Practice.

1988-1990 - Part-time tutor, Glasgow University Law School in Professional Ethics.

1990 – 1992 – Teacher in Journalism course, along with Bruce McKain, at Glasgow Caledonian University. This course was a joint venture between Glasgow Caledonian University and Strathclyde University. It was NCTJ approved.

1989-1999 - Part-time lecturer in Criminal Procedure, Glasgow University Law School. Duties transferred to Glasgow Graduate School of Law.

1995 - Present - occasional teaching on NCTJ courses in Scotland.

1996-Present - Part-time tutor in Media Law (Honours), Strathclyde University Law School.

Note: Presently developing a journalism course at Strathclyde University. This is a joint venture by the English Department and the Law School. NCTJ approval is sought for this course.

SUMMER SCHOOLS TAUGHT

Delivered paper to Georgetown University (Washington DC, USA) Summer School in London on Scots Procedure Law as applied in the Lockerbie Trial in August 2002.

Delivered papers on Media Law to Eastern European delegates to Oxford University Summer School for Promotion of Understanding and Freedom of Expression in Eastern European countries – 2002, 2003 and 2004.

Delivered papers to Oxford University Summer School organised by Franco Anglo Lawyers Society 2002

PUBLICATIONS:

Scots Law for Journalists (along with Bruce McKain and Rosalind McInnes), 6th and 7th editions.

Various articles on Contempt of Court in Scots Law Times.

Articles on media law and criminal procedure in:

1. The Journal of the Law Society of Scotland
2. The Glasgow Bar Association Review.
3. The Legal Defence Union Review.

Article in Juridical Review; Articles in New Law Journal; Articles in Scottish Law & Practice Quarterly; International Bar Association Magazine.

	Newspaper articles for past 20 years on current legal issues - especially The Times Law Page and The Herald.
MEMBERSHIP OF INTERNATIONAL MEDIA ASSOCIATIONS	Member of AdIDEM, Lawyers for Freedom of Expression in the Media based in Toronto, Canada Member of NITA (National Institute for Trial Advocacy), based in Boulder, Indiana, USA Member of Media Defense Resource Center, based in Washington DC, USA International Bar Association (IBA) Media Law Committee
CURRENT ACADEMIC INTERESTS:	Criminal court procedure. Criminal law "Media Law" comprising:- a) the law of defamation b) the law of contempt c) the law of privacy d) the law of confidentiality e) law of official secrecy f) pre-publication interdicts/injunctions European Convention on Human Rights as it affects various areas of the Media law.

June 2004

Exhibit 2
(Declaration of Alistair J. Bonnington)

HIGH COURT OF JUSTICIARY AT CAMP ZEIST

OPINION OF LORD SUTHERLAND

in

PRELIMINARY DIET

in causa

HER MAJESTY'S ADVOCATE

Appellant;

against

ABDELBASET ALI MOHMED AL MEGRAHI and AL AMIN KHALIFA FHIMAH

Respondents:

Appellant: Solicitor General, A.D.; Crown Agent

Respondents: W.J. Taylor, Q.C., J. Beckett; McCourts

R. Keen, Q.C., M. MacLeod; McGrigor Donald

8 December 1999

[1] LORD SUTHERLAND: At this stage of the Preliminary Diet a number of objections have been taken to the competency and relevancy of parts of the Indictment. I deal first with the submission that Charge 1 on the Indictment is not a charge which is subject to the jurisdiction of a Scottish Court.

[2] The definition of "conspiracy" is best contained in the Speech of Viscount Simon L.C. in *Crofter Hand Woven Harris Tweed Company* v. *Veitch* A.C. 435. That definition is that

> "Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it."

[3] I accept, of course, that the crime is complete once agreement has been reached and can be charged as such once agreement has been reached.

[4] Defence Counsel submitted that because the conspiracy is complete as soon as agreement is reached, and because in Lines 12 to 25 of Page 1 of the Indictment the only locations which are specified are outwith Scotland, then it must follow that no part of the conspiracy took place in Scotland and, therefore, the Scottish Court has no jurisdiction.

[5] In my view, however, just because the crime has been completed when agreement has been reached and can be charged at that stage, it does not follow at all that the crime is necessarily spent.

[6] I refer first of all to the case of the *Director of Public Prosecutions* v. *Doot* (1973) A.C. 807. In that case Viscount Dilhorne at Page 822, referred to the case of *Regina* v. *Aspinall* where what was said was this:

> "In order to apply these rules to the present case it is necessary next to determine what are the essential facts to be alleged in order to support a charge of conspiracy. Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed."

[7] Having quoted that passage, Viscount Dilhorne went on to say this:

> "I see no reason to criticise this passage unless it be interpreted to mean that the crime, though completed by the agreement, ends when the agreement is made. When there is agreement between two or more to commit an unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to its intending to carry out the design."

[8] He then quotes from a decision of Coleridge J. in *Regina* v. *Murphy* where what was said was:

> "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You have to say whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in this matter."

[9] He then went on to say:

> "This statement of Coleridge J. has not been questioned and I take it to be well established that it is a correct statement of the law. If it is, it is not easy to reconcile it with the view expressed by the Court of Appeal, for a man who joins a conspiracy after it has been formed was not a party to the conspiracy when it was 'completed.' The face that a man who later joins a conspiracy may be convicted of it shows that although the offence is complete in one sense when the conspiracy is made, it is nevertheless a continuing offence."

[10] Viscount Dilhorne's conclusion at the end of his speech is in the following terms:

> "The conclusion to which I have come after consideration of these authorities and of many others to which the House was referred but to which I do not think it is necessary to refer is that though the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the Prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it. Proof of acts done by the accused in this country may suffice to prove that there was at the time of those acts a conspiracy in existence in this country to which they were parties and, if that is proved, then the charge of conspiracy is within the jurisdiction of the English Courts, even though the initial agreement was made outside the jurisdiction."

[11] In the same case Lord Pearson said this:

> "When the conspiratorial agreement had been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."

[12] Finally from that case I refer to the speech of Lord Salmon who says this:

> "It is obvious that a conspiracy to carry out a bank robbery in London is equally a threat to the Queen's peace whether it is hatched, say, in Birmingham or in Brussels. Accordingly, having regard to the special nature of the offence a conspiracy to commit a crime in England is, in my opinion, an offence against the common law even when entered into abroad, certainly if acts in furtherance of the conspiracy are done in this country. There can in such circumstances be no doubt that the conspiracy is in fact as well as in theory a real threat to the Queen's peace.
>
> Suppose a case in which evidence existed of a conspiracy hatched abroad by bank robbers to raid a bank in London, or by terrorists to carry out some violent crime at an English airport, or by drug peddlers to smuggle large quantities of dangerous drugs on some stretch of the English coast. Suppose the conspirators came to England for the purpose of carrying out the crime and were detected by the police reconnoitring the place where they proposed to commit it, but doing nothing which by itself would be illegal, it would surely be absurd if the police could not arrest them then and there but had to take the risk of waiting and hoping to be able to catch them as they were actually committing or attempting to commit the crime. Yet that is precisely what the police would have to do if a conspiracy entered into abroad to commit a crime here were not in the circumstances postulated recognised by our law as a criminal offence which our Courts had any jurisdiction to try.
>
> I do not believe that any civilised country, even assuming that its own laws do not recognise conspiracy as a criminal offence, could today have any reasonable objection to its nationals

> being arrested, tried and convicted by English Courts in the circumstances to which I have referred."

[13] These passages in *Doot* to which I have referred appear to me to be strong indications of a number of factors. In the first place, that conspiracy is a continuing crime until abandoned or until its purpose is completed, secondly, that if its purpose is to offend against the peace of this country, it is justiciable in this country, and, thirdly, that such an assumption of jurisdiction would not in any way offend against international comity.

[14] Similar passages can be found in the advice of the Board in the case of *Somchai Liangsiriprasert* v. *the Government of the United States* (1991) 1 A.C. 225. There Lord Griffiths, having come to the conclusion that defrauding of Germans in Germany is not a threat to English society and, therefore, such a crime should be dealt with by the Germans and not by the English Courts, goes on to say this:

> "But looking at the obverse side of the coin what should be the position if a conspiracy is entered into in Germany to commit a crime in England? Such a conspiracy is obviously a threat to English and not to German society and it would appear that the Court of Criminal Appeal and Lord Tucker considered that such a conspiracy would constitute an indictable crime in this country."

[15] He then referred to the case of *Doot* and said this:

> "As there had been acts performed in England, namely the importation of the cannabis, in pursuance of the conspiracy, Lord Pearson who gave the leading speech confined himself to that situation. He said, 'On principle, apart from authority, I think (and it would seem the Court of Appeal also thought) that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England. Lord Wilberforce expressly reserved his opinion on the question of whether a conspiracy formed abroad to do an illegal act in England, but not actually implemented in England could be tried in England. The general tenor of Lord Salmon" speech appears to be in favour of the view that a conspiracy entered into abroad to commit a crime in England is triable in England even if no other act pursuant to the conspiracy takes place in England."

And he then quotes the passages which I have already quoted from Lord Salmon's speech.

[16] Certainly there is no suggestion from Lord Griffiths that he is in any way disapproving of what was said, particularly by Lord Salmon in the case of *Doot*.

[17] Finally Lord Griffiths says this:

> "As Lord Tucker pointed out in *Board of Trade* v. *Owen*, inchoate crimes of conspiracy, attempt and incitement developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they committed the crime. If the inchoate crime is aimed at England with the consequent injury to English society why should the English Courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures? If evidence is obtained that a terrorist cell operating abroad is planning a bombing campaign in London what sense can there be in the authorities holding their hand and not acting until the cell comes to England to plant the bombs, with the risk that the terrorists may slip through the net?

> Extradition should be sought before they have a chance to put their plan into action and they should be tried for the conspiracy or the attempt as the case may be. Furthermore, if one of the conspirators should chance to come to England, for whatever purpose, he should be liable to arrest and trial for the criminal agreement he has entered into abroad.
>
> The Law Commission in their Working Paper 'Territorial and Extra Territorial Extent of the Criminal Law' published in 1970 said: 'As to conspiracies abroad to commit offences in England, we take the view that such conspiracies should not constitute offences in English law unless overt acts pursuant thereto take place in England.'
>
> But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.
>
> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit and common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong."

[18] I accept that the situations posited in the cases of *Doot* and *Somchai* rely to some extent on the specific target being the country seeking jurisdiction, and it might be argued that a country not a specific target cannot have jurisdiction. If the conspiracy never reached fruition and if there was no overt act to carry on the conspiracy in the country concerned, I appreciate that that would be a formidable objection.

[19] Where however, a crime of the utmost gravity has been in fact committed in a particular country and it can be shown that that crime is the culmination of a long drawn out and complex conspiracy, it appears to me quite illogical to say that that country has no interest in putting the conspirators on trial for their part in what has happened, even though their activities were all carried out abroad. Defence Counsel recognise that this is undoubtedly so in relation to the charge of murder in Scotland. I see no logical reason why the same principle should not apply to the charge of conspiring to commit the final criminal act, which is alleged to be the culmination and the whole purpose of the conspiracy. That view, in my opinion, is consistent with what has been said in the cases of *Doot* and *Somchai*, which, although they deal with the English law of conspiracy, appear to me to be entirely consistent with the law in Scotland.

[20] Counsel submitted, however, that there were certain authorities which should prevent me from coming to this conclusion.

[21] In the case of *H.M.A.* v. *Witherington* 1881 8 R. (J.) 41 a distinction was made between result crimes and conduct crimes and the implication was that conduct crimes committed abroad would not be

justiciable in Scotland because the whole crime was committed abroad. The example given in that case was forgery and uttering; and I would accept that a person could not be tried in Scotland for the crime of forgery and uttering committed in England. That, however, does not address the question of what would be the position if the forged document was used to commit a fraud in Scotland and the Accused was charged with conspiring to defraud and, in pursuance of that conspiracy, forging the document in England. That, in my view, would be justiciable in Scotland and a perfectly permissible extension of the rule. That would also be following the case of *Dumoulin* v. *H.M.A.* 1974 S.L.T. (Notes) 42 where it was said that foreign offences could only be charged if there was a nexus between them and the crime committed in Scotland. That, in my view, would be so even if conspiracy should not be regarded as a continuing crime.

[22] I was also referred to the case of *Maxwell* v. *H.M.A.* 1980 J.C. 40. In that case Lord Cameron said:

> "That crime is constituted by the agreement of two or more persons to further or achieve a criminal purpose. A criminal purpose is one which if attempted or achieved by action on the part of an individual would itself constitute a crime by the law of Scotland. It is the criminality of the purpose and not the result which may or may not follow from the execution of the purpose which makes the crime a criminal conspiracy."

it was suggested that in that passage Lord Cameron was indicating that what one has to look to is the original agreement to commit the crime rather than look to the result to see if the crime has been committed. It should, however, be noted that his Lordship's observations were in the context of a case where harmful effects will be felt, and the single purpose, with which all those involved were in their own way concerned, was to bring this about.

> "The underlying mischief at which these provisions are directed is the supply or offer to supply of a controlled drug to another, and to look to the place of the mischief as the place where jurisdiction can be established against all those involved would be consistent with the idea that the courts of the place where the harmful acts occur may exercise jurisdiction over those whose acts elsewhere have these consequences."

[23] Counsel referred to Lord Coulsfield's observation on result and conduct crimes. What his Lordship said was:

> "The general rule undoubtedly is that in the absence of legislation to the contrary, the jurisdiction of the Scottish Criminal Courts is limited to crimes committed in Scotland. In the ordinary case a crime may be held to have been committed in Scotland either if there has been conduct in Scotland which amounts to a crime there or there has been conduct abroad which has had as its result an *actus reus* in Scotland. In considering the argument was that as the purpose of the conspiracy was one which was impossible of achievement, no offence could have been committed. Accordingly, all that Lord Cameron was pointing out was that a successful conclusion to the conspiracy is not a necessary part of the commission of the offence and that the offence has been committed when the agreement has been entered into. I do not read what Lord Cameron has said as meaning that the result of the conspiracy is something which can simply be ignored."

[24] In the case of *Clements* v. *H.M.A.* 1991 J.C. 62 the Lord Justice General, Lord Hope, said, in connection with an offence under Section 4(3)(b) of the Misuse of Drugs Act:

> "On the other hand the nature of the offence which is created by Section 4(3)(b) suggests

> strongly that all those who participated in the chain should be subject to the jurisdiction of the Courts of the place in the United Kingdom where the chain comes to an end. For the criminal enterprise with which they were concerned was the whole network or chain of supply, right up to the end of the chain. It is at the end of the chain that the questions of jurisdiction, therefore, crimes may be classified as 'conduct crimes' and 'result crimes' although, as has been pointed out, it must not be forgotten that conduct on the part of the Accused is an essential element in both types of crime. I do not, however, think that it could be said that all offences under Section 4(3)(b) of the 1971 Act must be either conduct crimes on the one hand or result crimes on the other. Section 4(30(b) has a very wide scope and covers many different types of conduct. According to circumstances, Section 4(3)(b) may apply where what is charged is conduct in Scotland or conduct which leads to a result in Scotland, or both. To decide whether the court has jurisdiction to try a particular accused on a charge under Section 4(3)(b), therefore, it is necessary, in my view, to consider the precise conduct which is the subject of the charge in the particular case."

[25] In my opinion this passage does not go as far as to say that on no view could a conduct crime committed abroad ever be justiciable in Scotland. As Lord Coulsfield pointed out, "it is necessary to consider the precise conduct which is the subject of the charge in the particular case."

[26] I do not therefore consider that anything said by the Scottish authorities to which I have referred detracts from the general principles relating to jurisdiction in conspiracy which are set out in the speeches in the cases of *Doot* and *Somchai*, and I am satisfied that on the basis of what is set out in Charge 1 of this Indictment the Scottish Courts do have jurisdiction in this matter.

[27] The next point that was taken by Defence Counsel was an attack on the general relevancy of Charge 1 on the basis that it charged both conspiracy and murder cumulatively and that that is not competent.

[28] Reference was made to the cases of *Cordiner* v. *H.M.A.* 1993 S.L.T. 2, *H.M.A.* v. *Young* and *H.M.A.* v. *Wilson, Latta and Rooney* and in these cases the Court had stressed that separate offences should be libelled in separate charges. Reference was also made to Gordon on Criminal Law at Paragraphs 655 to 659 where he points to the great possibility of confusion when conspiracy charges are combined with substantive charges.

[29] The use of conspiracy charges with other substantive charges, being said to have been carried out in pursuance thereof, is now a fairly regular practice; whether it is a desirable practice is another matter, but it is a regular practice, and this is shown by the indictments in a number of terrorist-type cases. It is now recognised that the approach to these is to deal separately with the conspiracy and the various substantive charges by returning verdicts separately on each of these charges. As I have said, the practice may be somewhat regrettable and may cause confusion, certainly to juries, but I am satisfied that it cannot be said to be incompetent.

[30] The problem which is envisaged in Article 2(b) of the Minute which is before the Court on behalf of the Accused, namely that "*esto* the Court having determined that it has jurisdiction in Charge 1 and the Court determines that the Accused is not guilty of murder, Charge 1 would cease to be justiciable before the High Court of Justiciary", is one which might have to be faced if the eventuality arises which is figured in that article. But in that situation in my view the solution of the problem will lie in the particular nature of the evidence which has given rise to that apparently somewhat unlikely situation.

[31] In these circumstances I am not satisfied that the attack on the relevancy and competency of Charge 1 can succeed.

[32] Finally, Counsel attacked the averment that each of the Accused was a member of the Libyan Intelligence Service, attacked the final paragraph of each charge which related to certain matters connected with the Libyan Intelligence Service and attacked the allegations in Charge 2(a) and (b) on the ground that offences were narrated in these charges committed abroad which had no nexus to the principal charge.

[33] It appears to me from the face of the Indictment that this case appears to hinge on the use of an explosive device contained in a cassette recorder with the use of a timing device, and it appears to me that any evidence relating to the availability of these items to the Accused must be relevant to that charge. If, therefore, as is said in the final paragraph of each of the charges, the Libyan Intelligence Service holds a store of such items for the use of their members, that would be a possible source of supply; and if the Accused are members of that Service, then it would follow that these supplies would be readily available to them. Now, I appreciate, of course, that all of these matters will have to be substantiated by evidence from the Crown. What I cannot at present see, however, is that it can be said that any of the matters complained of have no connection with the charge that the Accused did in fact make use of such devices.

[34] As far as 2(a) is concerned, the timing of that alleged part of the offence and the route taken could well be regarded, on one view of the evidence, as what might be called a dry run. As far as 2(b) is concerned, it is again connected with the question of availability of timing devices of a nature alleged to have been used by the Accused. In both cases, therefore, it appears to me that there is sufficient connection with the alleged crimes to enable these matters to fall within the rule expressed in *Dumoulin*.

[35] On the whole matter, therefore, I find that I am unable to accept the submissions of Defence Counsel and I shall hold the libel relevant.