

INTERNATIONAL CRIMINAL COURT (SCOTLAND) ACT 2001

EXPLANATORY NOTES

THE ACT

Background

Part 1 - Offences

6. **Part 1** incorporates the offences in the ICC Statute into domestic law. This is not an obligation under the ICC Statute, except in respect of offences against the administration of justice in relation to the ICC. Under the principle of “complementarity” it is intended that individual countries should prosecute ICC crimes domestically and the ICC will intervene only where states are genuinely unable or unwilling to take action.

Section 1 – Genocide, crimes against humanity and war crimes

7. This section makes it an offence under Scots law to commit genocide, crimes against humanity and war crimes where the act is committed in Scotland or outwith the UK by a UK national or a UK resident. The crimes are defined in articles 6, 7 and 8.2 of the ICC Statute, which are reproduced in schedule 1. The crime of genocide is already an offence in domestic law by virtue of the Genocide Act 1969. However, jurisdiction under that Act is more limited than is provided for in the Act. Accordingly, that Act is repealed.

Section 2 – Conduct ancillary to genocide etc.

8. This section creates two new offences in relation to conduct which is ancillary to genocide, a crime against humanity or a war crime. First, it makes it an offence for a UK national or a UK resident to engage in conduct outwith Scotland which is ancillary to an offence under section 1, or this section. Second, it criminalises conduct in Scotland, or conduct of a UK national or a UK resident outwith the UK, which is ancillary to an act which if committed in Scotland (or by a UK national or UK resident) would constitute an offence under section 1, or this section, but which being committed (or intended to be committed) outwith the UK by a person who is neither a UK national nor a UK resident does not constitute such an offence. The expression an “ancillary offence” is defined in section 7.
9. Subsections (1) and (2) criminalise conduct outwith Scotland which, if that conduct had been undertaken in Scotland, would have amounted to an “ancillary offence” in relation to a genocide, crime against humanity or war crime. Where any person engages in such ancillary conduct in Scotland that conduct will amount to an offence at common law. Therefore, the offence under subsections (1) and (2) applies only in relation to conduct engaged in outwith Scotland by a UK national or a UK resident. The conduct may be ancillary to either the principal offence or to some other offence which is ancillary to

the principal offence. For example, the conduct may be ancillary to a war crime, or ancillary to the incitement of a war crime.

10. The purpose of subsections (3) and (4) is to criminalise conduct in Scotland (or outwith the UK by a UK national or UK resident) which is ancillary to an act which is not an offence under the Act by virtue of such act being committed outwith Scotland by a person who is neither a UK national nor a UK resident. As with an offence under subsections (1) and (2), the conduct may be ancillary to either the principal act or to some other act which is ancillary to the principal act. For example, genocide committed outwith Scotland by a person who is neither a UK national nor a UK resident does not amount to an offence under the Act. However, conduct which is either ancillary to such a genocide or ancillary to an act which is ancillary to that genocide (such as conspiracy to commit genocide) will, if committed in Scotland (or outwith the UK by a UK national or UK resident), be an offence under subsections (3) and (4).

Section 3 – Trial and punishment of main offences

11. This section makes provision in connection with the prosecution and sentencing of offences under sections 1 and 2 of the Act and offences ancillary to such offences. Subsection (2) provides that these offences must be tried in solemn proceedings, which means that the accused will be tried on indictment before a sheriff, or a judge of the High Court of Justiciary, with a jury of fifteen, whose verdict of guilty must be reached by at least eight votes. Subsection (3) provides that the prosecution of offences committed outwith Scotland may take place anywhere in Scotland. Sentencing of those found guilty of murder, as defined in subsection (6), or an offence ancillary to murder, will be in line with the domestic penalty for murder or relevant ancillary offence in relation to murder. For other offences, sentences of up to 30 years will be available.

Section 4 – Offences in relation to the ICC

12. This section provides that any person who commits an act against the administration of justice in relation to the ICC will be prosecuted as for the equivalent domestic offence. The relevant domestic offences are set out in subsection (2). Many of these are offences at common law, such as attempting to pervert or defeat the ends of justice. Subsection (4) provides that offences committed outwith the UK may be tried anywhere in Scotland.

Section 5 – Responsibility of military commanders and other superiors

13. This section makes provision for military commanders and other superiors to be held criminally responsible for the acts of their subordinates. The provision is based on article 28 of the ICC Statute. The wording draws a distinction between the standard expected of military and quasi-military commanders in relation to military forces under their command and other superior/subordinate relationships, such as those applying to government officials or heads of civilian organisations, as it is recognised that the latter may not have the same degree of control over the actions of their subordinates. It is well established in international law that superiors can be subject to investigation and prosecution with regard to war crimes etc. This concept stretches back as far as the Nuremberg and Tokyo Tribunals and has also been incorporated into the provisions of the Tribunals dealing with the former Yugoslavia and Rwanda. This section would permit such cases to be investigated and prosecuted in domestic courts in circumstances where the ICC might find a case on that basis.
14. Subsections (4) and (5) make it clear that liability under this provision is liability on an art and part basis (i.e. in the capacity of accessory or accomplice in relation to a criminal act), and does not preclude any other liability that the commander or superior may have, for example where the commander has in fact ordered the commission of the offences.

Section 6 – Proceedings against persons becoming resident in the United Kingdom

15. This section provides that a person who is neither a UK national nor a UK resident at the time when he or she commits an offence under Part 1 of the Act, or an offence which is ancillary to an offence under that Part, outwith the UK, may be prosecuted for that offence in Scotland if he or she subsequently becomes a UK resident. Proceedings may be brought against the person only where the offence is committed after the Act comes into effect.

Section 7 – Meaning of “ancillary offence”

16. This section defines ancillary offences for the purposes of Part 1 of the Act. They reflect the forms of secondary liability in article 25.3, but are defined in terms of the equivalent offences in Scots law.

Section 8 – Mental element

17. This section provides, in line with article 30 of the ICC Statute, that unless otherwise provided, the necessary mental element of an offence is present if the material elements of ICC crime or an offence against the administration of justice are committed with “intent” and “knowledge”. “Intent” and “knowledge” are explained in subsection (3).
18. In accordance with article 30, subsection (2) provides that this general rule shall not apply where an alternative mental element is specified in certain provisions of the ICC Statute, certain provisions of the Act or in any of the relevant Elements of Crimes. An example is to be found in the finalised draft of the Elements of Crimes in respect of article 8(2)(b)(xxvi) (conscripting or enlisting children), where it is required that the perpetrator “knew or should have known” the age of the child concerned.

Section 9 – Application of the principles of the law of Scotland, construction etc.

19. This section explains how the courts are to interpret and apply the ICC Statute. Subsection (1) provides that the domestic courts will apply the principles of the law of Scotland in trying offences under Part 1 of the Act.
20. The courts must take into account the Elements of Crimes when interpreting and applying articles 6, 7 and 8.2. The Elements of Crimes will be adopted by the ICC when it is established, but are likely to be similar to those adopted by the Preparatory Commission for the ICC on 30 June 2000. When they have been adopted the UK Act provides that the text will be set out in regulations which will be made by statutory instrument. These articles must also be construed subject to and in accordance with any reservations or declarations made by the UK Government and certified by Order in Council made under the UK Act.
21. In interpreting and applying the provisions of the articles referred to in paragraph 21 above, and also article 70.1 (and sections 5 and 8 of this Act), the courts are required to take into account any relevant jurisprudence of the ICC. They may also take into account any other relevant international jurisprudence (for example, that of the International Criminal Tribunals).
22. Finally, subsection (5) preserves existing enactments and rules in respect of the extraterritorial application of offences and in respect of offences ancillary to offences under Part 1 of the Act. For example, the provision for extraterritorial jurisdiction over grave breaches of the Geneva Convention Act 1957 is unaffected.

Section 10 – Amendment of Criminal Procedure (Scotland) Act 1995

23. This section pertains to the protection of victims and witnesses. Victims and witnesses will be entitled to the same protection as in domestic law and the safeguards provided in sections 50, 92, 271 and 274 of the Criminal Procedure (Scotland) Act 1995 will apply. However, it is considered necessary to extend the restrictions on evidence relating to

*These notes relate to the International Criminal Court (Scotland) Act
2001 (asp 13) which received Royal Assent on 24 September 2001*

sexual offences which is not admissible, to offences under sections 1 and 2 of the Act which involve a sexual offence, and this amendment of the 1995 Act has that effect.