

INTERNATIONAL CRIMINAL COURT ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Offences under Domestic Law

84. **Part 5** 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 of the ICC). Rather the purpose is to ensure that domestic authorities will always be in a position to investigate and, if necessary, prosecute ICC crimes allegedly committed by UK nationals, persons resident in this country and UK service personnel. Under the principle of “complementarity”, the ICC cannot commence an investigation into such allegations if they have been dealt with properly by a State Party.
85. **Part 5** extends to England and Wales, and Northern Ireland. Sections 50(3) and (4), 70 and 71 to 73 also extend to Scotland.

Section 50: Meaning of “genocide”, “crime against humanity” and “war crime”

86. *Subsection (1)* provides that genocide, crimes against humanity and war crimes shall be as defined in the relevant Articles of the ICC Statute, i.e. Articles 6, 7 and 8.2, which are set out in Schedule 8. *Subsection (6)* provides that no account is to be taken for the purposes of Part 5 of provisions of those Articles not included in Schedule 8 (see paragraph 157 below).
87. *Subsection (2)* provides that, when trying these offences, domestic courts must take into account any relevant Elements of Crimes adopted by the Assembly of States Parties in accordance with Article 9 of the Statute. To enable domestic courts effectively to prosecute offences under this section even before the Assembly of States Parties meets, *subsection (2)(b)* requires domestic courts to take into account the finalized draft Elements of Crimes adopted by the Preparatory Commission for the ICC on 30 June 2000. The finalized draft Elements and subsequently the adopted Elements will be set out in regulations made by the Secretary of State.
88. *Subsection (4)* provides that any relevant reservations or declarations made by the UK when ratifying any treaty or agreement relevant to the interpretation of Articles 6, 7 or 8 shall be used by the courts to interpret those Articles. Such reservations or declarations will be set out in Orders in Council. This provision follows the precedent of section 7(3) of the Geneva Conventions Act 1957 as amended by the Geneva Conventions (Amendment) Act 1995. Statements made on ratification of Additional Protocol I to the Geneva Conventions are examples of declarations coming within this section.
89. *Subsection (5)* provides that in trying offences, domestic courts must take into account any relevant jurisprudence or decision of the ICC and may also take into account any relevant international jurisprudence. The latter would include any relevant jurisprudence of the International Criminal Tribunals and the International Court of Justice.

Section 51: Genocide, crimes against humanity and war crimes

90. This section is intended to incorporate the offences of genocide, crimes against humanity and war crimes as defined in the Statute into the law of England and Wales. Courts will have jurisdiction over these offences when committed in England and Wales, or when committed overseas by UK nationals, UK residents or persons subject to UK Service jurisdiction. (UK nationals, UK residents and persons subject to UK Service jurisdiction are defined in section 67.)
91. *Subsection (1)* establishes domestic offences of genocide, war crimes and crimes against humanity. Almost all of the acts falling within these definitions would already have been crimes if committed in the UK, although attracting different penalties from those provided for in this Act, but would generally not have been crimes if committed by UK nationals or UK residents overseas.
92. The crime of genocide was already an offence in domestic law by virtue of the Genocide Act 1969 but the jurisdiction provided for in that Act is more limited than is provided for in this Act. The Genocide Act is repealed under Schedule 10. Certain war crimes within the definition of Article 8 (notably, grave breaches of the Geneva Conventions) also constituted existing domestic offences in identical terms. However, as the Geneva Conventions Act 1957 takes wider jurisdiction than this Act (and, by virtue of the Geneva Convention (Amendment) Act 1995, also covers grave breaches of Additional Protocol I of the Geneva Conventions), it remains in force subject to the amendments specified in section 70 (see paragraph 109 below).

Section 52: Conduct ancillary to genocide, etc. committed outside jurisdiction

93. This section criminalises conduct in England and Wales (or that of a UK national, UK resident or person subject to UK Service jurisdiction abroad) that is ancillary to an act which, if committed in England and Wales, would constitute an offence under section 51 or under this section but which being committed (or intended to be committed) outside England and Wales does not constitute such an offence. For example, it is an offence under this section to incite, in England and Wales, the commission of genocide overseas even if the perpetrators have no connection with the UK. It would also be an offence if such incitement took place overseas but was committed by a UK national, UK resident or a person subject to UK Service jurisdiction.

Section 53: Trial and punishment of main offences

94. This section makes provision for trying the offences of genocide, crimes against humanity and war crimes, offences under section 52, and offences that are ancillary to such offences. *Subsections (5) and (6)* set out the sentences which the domestic courts may impose for the new domestic offences created by the Act. If the offence involves murder, the sentence will be the same as if the offender had been found guilty on a domestic charge of murder; the same is true for offences ancillary to an offence involving murder. In any other case, the penalty will be imprisonment of up to 30 years. This is in line with Article 77 of the Statute, under which the ICC can impose prison sentences of life, or up to 30 years. Under the Power of Criminal Court (Sentencing) Act 2000 and the Criminal Justice Act 1988, it may, in certain circumstances, also be open to the court to impose a fine and order compensation or to make a confiscation order in respect of the offender's proceeds of crime.

Section 54: Offences in relation to the ICC

95. This section extends existing offences against the administration of justice (e.g. contempt of court) to acts committed against the administration of justice of the ICC. The section is intended to implement Article 70.4 of the Statute, which requires a State Party to the ICC to

“extend its criminal laws penalising offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this Article committed on its territory, or by one of its nationals”.

The offences against the administration of justice of the ICC are set out in Article 70.1 (reproduced in Schedule 9). Upon request by the ICC, the State Party is obliged to submit a case to its competent authorities for the purpose of prosecution.

96. *Subsection (3)* sets out the domestic offences corresponding to those in Article 70.1. These include false testimony (section 1 of the Perjury Act 1911), interference with witnesses or evidence (section 51 of the Criminal Justice and Public Order Act 1994 or at common law), and certain offences at common law including perverting the course of justice and contempt of court. For instance, it is a contempt under common law to bribe a court official, or to take or threaten revenge upon a court official for what he has done in the discharge of his duties.
97. Domestic courts have jurisdiction when such offences are committed in England and Wales or when committed overseas by UK nationals, UK residents or persons subject to UK Service jurisdiction (*subsection (4)*). The penalties available will be the same as are otherwise available for the relevant domestic offence.
98. *Subsection (2)* provides that, in trying these offences, the domestic court shall take into account relevant jurisprudence of the ICC and may also take into account any other relevant international jurisprudence (e.g. that of the International Criminal Tribunals).

Section 55: Meaning of “ancillary offences”

99. This section defines ancillary offences for the purposes of this Part. They include the forms of secondary liability in Article 25.3 of the Statute but are defined in terms of the principles of secondary liability under the law of England and Wales.

Section 56: Saving for general principles of liability

100. The Statute sets out certain general principles of law to be followed by the ICC in its proceedings. Although these are mostly similar to those applicable under the law of England and Wales, there are some differences. Therefore, for consistency with other parts of national criminal law, *subsection (1)* provides that the domestic courts will apply the principles of the law of England and Wales in trying offences under this Part.
101. *Subsection (2)* preserves existing enactments and rules in respect of the extraterritorial application of offences and in respect of offences ancillary to offences under this Part. For example, the provision for extraterritorial jurisdiction over grave breaches of the Geneva Conventions, under the Geneva Conventions Act 1957, is unaffected. Existing principles of secondary liability apply in relation to offences created under Part 5 of the Act.

Section 57: Protection of victims and witnesses

102. This section extends the protections currently afforded to victims and witnesses of sexual offences under the Sexual Offences (Amendment) Acts 1976 and 1992, Chapters 1 to 3 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 and the Sexual Offences (Protected Material) Act 1997 to victims and witnesses in proceedings brought under this Act. Such protections include the entitlement to anonymity, restrictions on the freedom of defendants to cross-examine their alleged witnesses personally and restrictions on what evidence about an alleged victim’s sexual behaviour can be considered relevant in a trial. These protections will apply when a prosecution under this Act relates to conduct amounting to the criminal offences specified in those Acts as attracting such protections. So, for example, where an individual is prosecuted for a crime against humanity under section 51 that involves a rape, the alleged victim will be entitled to all the protections that would have been afforded to her under the specified

statutory provisions had the defendant been prosecuted for rape rather than for a crime against humanity.

Sections 58 to 64: Northern Ireland

103. Sections 58 to 64 apply provisions to Northern Ireland comparable to sections 51 to 57 with regard to England and Wales.

Section 65: Responsibility of commanders and other superiors

104. This section provides for an additional form of criminal responsibility, namely that of commanders and superiors for the acts of their subordinates. This is a well known concept of international law and was reflected in the jurisprudence of the Nuremberg and Tokyo Tribunals. As well as the ICC Statute, it also appears in the Statutes of the Tribunals for the former Yugoslavia and Rwanda. It reflects the hierarchical structure of military and administrative control over subordinates in the context of these crimes. Inclusion of command responsibility with respect to the crimes in this Part is intended to permit the investigation and prosecution of cases before domestic courts in all the circumstances where the ICC might find a case on that basis. The wording of this section is taken directly from Article 28 of the Statute. The wording draws a distinction between the standards expected of military and quasi-military commanders in relation to military forces under their command, and other superiors such as 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.
105. Subsections (4) and (6) make plain that liability under this provision is a form of aiding and abetting and does not preclude any other liability that the commander or superior might have, for example where the commander has in fact ordered the commission of the offences.

Section 66: Mental Element

106. This section reflects Article 30 of the Statute. It provides a general rule that, unless otherwise provided, the necessary mental element of an offence is present if the material elements of genocide, a crime against humanity, a war crime or an offence against the administration of justice are committed with intent and knowledge. “Intent” and “knowledge” are explained in subsection (3).
107. 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 Statute, certain provisions of the Act or in any of the relevant Elements of Crimes. An example is to be found in the finalized draft Elements of Crimes in respect of Article 8(2)(b)(xxvi) (conscripting or enlisting children under the age of fifteen) where it is required that the perpetrator “knew or should have known” of the age of the child concerned.

Section 67: Meaning of “United Kingdom national”, “UK resident” and “person subject to UK service jurisdiction”

108. Subsection (3) defines a “person subject to UK Service jurisdiction” by reference to the various Service Discipline Acts. Such persons are within the jurisdiction of Service courts and may be tried for offences under Service law, wherever they may be in the world at the time the offence is committed. This mainly involves Service personnel but may also, in the circumstances specified in the Service Discipline Acts, include certain categories of civilians, such as families and certain civilians who carry out support facilities for the Armed Forces.

Section 68: Proceedings against persons becoming resident within the jurisdiction

109. This Act follows the War Crimes Act 1991 and the Sex Offenders Act 1997 in providing for jurisdiction over crimes committed overseas by someone resident in the United Kingdom. This (and other references to “resident”) applies irrespective of whether the person is also resident in any other country. Section 68 stipulates that proceedings can be taken under this Part against persons who become resident in the UK subsequent to the offence taking place, provided that they are resident here at the time the proceedings are brought and the offence was committed after this Act came into force.

Section 70: Offences under section 1 of the Geneva Conventions Act 1957

109. This section makes various amendments to the Geneva Conventions Act to ensure that provisions governing the prosecution of grave breaches of the Geneva Conventions under that Act are consistent with those governing the prosecution of offences under this Act. The amendments relate to where the trial shall be held, the need for Attorney General’s consent to prosecutions, and the sentence available on conviction.

Section 71: Extradition: Orders in Council under the 1870 Act

110. This section has the effect of making the offences set out in sections 51, 52, 58 and 59 of the Act, and any offence ancillary to any such offence, extraditable under Schedule 1 to the Extradition Act 1989. Schedule 1 to the Extradition Act 1989 covers extradition with countries with which the United Kingdom has a bilateral extradition treaty which was in force prior to the coming into force of the 1989 Act. (As a result of section 2(1) of the Extradition Act 1989, these offences are automatically extraditable in relation to a foreign State, a designated Commonwealth country, a colony or the Hong Kong Special Administrative Region as offences which are punishable for a term of imprisonment of 12 months or more.)
111. As extradition is a reserved matter for the purposes of the Scotland Act, these provisions and those in section 72 and 73 apply to any corresponding offence under Scottish law.

Section 72: Extradition: exception to dual criminality rule under the 1989 Act

112. Section 2 of the Extradition Act 1989 defines what is an extradition crime for cases dealt with under Part 3 of that Act (i.e. all extradition arrangements excluding bilateral extradition treaty partners where the treaty was in force prior to the 1989 Act coming into force). This section amends section 2 of the Extradition Act 1989 and has the effect of disapplying the principle of dual criminality as it relates to extra-territorial offences. (Dual criminality means that extradition can only be granted when the offence at issue would have been a crime both under UK law and the law of the requesting country at the time the offence was committed). This change thus permits extradition to a third country which has extra-territorial jurisdiction for the offences in sections 51, 52, 58 and 59 and any offence ancillary to those offences in cases when the UK does not. *Subsection (5)* of section 71 is intended to achieve the same result in respect of Schedule 1 to the Extradition Act 1989.

Section 73: Extradition: offences not regarded as of political character etc.

113. This section replaces section 23 of the Extradition Act 1989 which provided that an offence of genocide, or an ancillary offence to the offence of genocide, shall not be regarded as an offence of political character for the purposes of extradition and that extradition can take place even if the act was not an offence at the time and place where it was allegedly committed. It broadens that provision to include all the offences in sections 51, 52, 58 and 59 of this Act, ancillary offences in relation to these offences, and the offences under section 1 of the Geneva Conventions Act 1957. It also amends the equivalent provision of the Backing of Warrants (Republic of Ireland) Act 1965.

Section 74: Consequential amendments of armed forces legislation

114. This section deals with restrictions on the exercise of Service jurisdiction. In recognition of the primacy of civil courts, Service courts are prevented by law from exercising jurisdiction over certain serious offences when they are committed in the UK. The list currently includes murder, manslaughter and rape as well as certain offences relating to international law such as genocide and any offence under section 1 of the Biological Weapons Act 1974. Consistent with this approach, this section provides that offences under this Act may not be dealt with by Service courts if committed in the UK. This does not affect the jurisdiction of Service courts to deal with offences committed overseas.