

INTERNATIONAL CRIMINAL COURT ACT 2001

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the International Criminal Court Act which received Royal Assent on 11 May 2001. They have been prepared by the Foreign and Commonwealth Office in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So when a section or part of a section does not seem to require any explanation or comments, none is given.

BACKGROUND

3. Following several years of negotiation, the inter-governmental treaty which forms the Rome Statute of the International Criminal Court (“ICC Statute”) was adopted on 17 July 1998. (The ICC Statute has been published as Cm 4555.) Once the Statute has been ratified by 60 States, the ICC will itself be created. The Foreign Secretary announced in the House of Commons on 20 July 1998 that the Government intended to introduce legislation to enable the UK to ratify the Statute and wished to be among the Court’s founding members. The UK signed the Statute on 30 November 1998 and this Act is intended, together with corresponding legislation in the Scottish Parliament, to enable the UK to comply with all its obligations under the Statute and accordingly to ratify.
4. The International Criminal Court (“ICC”) will be a permanent Court, situated in The Hague, to try individuals for genocide, crimes against humanity and war crimes. The ICC will be able to investigate crimes committed by nationals, or on the territory, of States Parties, or of non-State Parties who have given consent. It will also have jurisdiction over crimes, wherever committed, which are referred to the ICC by the United Nations Security Council. The ICC will have 18 judges and its own Prosecutor. The ICC will work with the assistance of States; States Parties are obliged to co-operate with the ICC, including by gathering evidence and arresting suspects.
5. The ICC will be “complementary” to national courts: relevant States will retain jurisdiction unless they are unable or unwilling genuinely to investigate and prosecute a crime. A situation may be referred to the ICC by the Security Council; alternatively a State Party can refer a situation to the Prosecutor or the Prosecutor can initiate an investigation on his own motion. In the latter two cases, if the Prosecutor has determined that there is a reasonable basis to commence an investigation, he must inform all States Parties and those States which would normally exercise jurisdiction over the alleged crime. Within one month, a State may inform the ICC that it is investigating, or has investigated, the alleged crimes. The Prosecutor must defer to the State’s investigation unless the ICC determines that the State is unwilling or unable genuinely to carry out the investigation or prosecution. The definitions of unwillingness and inability are set out in Article 17 of the Statute.
6. The principal aims of the Act are:

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- to incorporate the offences in the Statute into domestic law so that domestic authorities will always be in a position to investigate and prosecute any ICC crimes committed in this country, or committed overseas by a UK national, a UK resident or a person subject to UK Service jurisdiction;
 - to make provision, where necessary, to enable the UK to meet its obligations under the ICC Statute and so to enable ratification of that Statute. These obligations relate, in particular, to the arrest and surrender of persons wanted by the ICC and the provision of assistance with respect to ICC investigations;
 - to enable the UK to reach an agreement with the ICC so that persons convicted can serve prison sentences in this country.
7. The Act extends to England and Wales, and Northern Ireland. Many provisions of the Act also extend to Scotland, either because they deal with reserved matters under the Scotland Act 1998 or because the Scottish Parliament has agreed that certain matters, although devolved, are more conveniently dealt with on a UK-wide basis in this Act. A separate International Criminal Court (Scotland) Bill has been introduced in the Scottish Parliament to deal with the other issues which fall within that Parliament's competence.

THE ACT

8. The Act is in six Parts, with ten Schedules.
- Part 1 (The International Criminal Court) defines certain terms in the Act.
 - Part 2 (Arrest and Delivery of Persons) enables the arrest and surrender of suspects at the request of the ICC.
 - Part 3 (Other Forms of Assistance) provides for various forms of co-operation with ICC investigations.
 - Part 4 (Enforcement of Sentences and Orders) makes provision for persons convicted by the ICC to serve their sentences in prisons in the UK. It also enables the enforcement of fines, forfeitures and reparations ordered by the ICC.
 - Part 5 (Offences under Domestic Law) incorporates into domestic law the offences of genocide, crimes against humanity and war crimes, and offences against the administration of justice of the ICC.
 - Part 6 (General Provisions), *inter alia*, sets out the territorial extent of the Act, its application to the Crown, and extends certain provisions in the Act to the International Criminal Tribunals.
 - Schedule 1 (Supplementary Provisions relating to the ICC) provides for secondary legislation to confer legal capacity, privileges and immunities on the ICC and persons connected with it; to enable the ICC to sit in the UK; to give effect to the ICC's Rules of Procedure and Evidence; and to protect the pension benefits of UK judges serving on the ICC.
 - Schedule 2 (Delivery up of Persons subject to Criminal Proceedings etc) deals with the situation where the ICC has made a request for the surrender of a person subject to ongoing domestic proceedings, or of a prisoner.
 - Schedule 3 (Rights of Persons during Investigation: Article 55) reproduces the Article of the ICC Statute on that matter.
 - Schedule 4 (Taking of Fingerprints or Non-intimate Samples) enables the taking of evidence in response to an ICC request for assistance in identifying a person.
 - Schedule 5 (Investigation of Proceeds of ICC crime) enables co-operation with ICC investigations into the proceeds of crimes.

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- Schedule 6 (Freezing Orders in respect of Property liable to Forfeiture) enables property to be frozen at the request of the ICC for the purpose of eventual forfeiture.
- Schedule 7 (Domestic provisions not applicable to ICC prisoners) disapplies certain provisions of domestic law with respect to ICC prisoners serving their sentences here.
- Schedule 8 (Genocide, Crimes against Humanity and War Crimes: Articles 6 to 9) reproduces the Articles of the Statute which define those crimes.
- Schedule 9 (Offences against the ICC: Article 70) reproduces the Article which defines offences against the administration of justice of the ICC.
- Schedule 10 (Repeals) lists the provisions repealed by this Act.

COMMENTARY ON SECTIONS

Part 1: the International Criminal Court

9. **Part 1** has UK-wide extent.

Section 1: The ICC and the ICC Statute

10. This section defines certain terms used in the Act. The term “ICC crime” refers to genocide, war crimes, crimes against humanity and offences against the administration of justice of the ICC as defined in the Rome Statute. It does not include the crime of aggression. This is because, under Article 5 of the Statute, the ICC will exercise its jurisdiction over the crime of aggression only when agreement has been reached on a definition of that crime and the conditions under which jurisdiction will be exercised. Agreement has yet to be reached and would in any case require an amendment of the ICC Statute. The earliest such an amendment could be adopted is seven years after the entry into force of the Statute (see Articles 121 and 123). Any amendment to the crimes within the jurisdiction of the ICC, if accepted by the UK, would need to be given effect by amendment to this legislation.
11. *Subsection (2)* provides that references in the Act to “Articles” means Articles of the ICC Statute, unless otherwise indicated. The same convention is used in this Commentary.
12. *Subsection (3)* introduces Schedule 1 which, *inter alia*, makes provision for secondary legislation to be made to confer legal capacity, privileges and immunities on the ICC and persons associated with the ICC; to enable the ICC to sit in the UK; to give effect, as necessary, to the ICC’s Rules of Procedure and Evidence; and to secure the pension benefits of UK judges serving on the ICC. (Notes on Schedule 1 can be found at paragraphs 123-131 below.)

Part 2: Arrest and Delivery of Persons

13. This Part, which has UK-wide extent, puts in place an expedited procedure to execute requests from the ICC for the arrest and surrender of persons. The procedure is broadly based on that already in place for arrest and surrender to the two *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda (“the International Criminal Tribunals”) and is different from that used for extradition to other countries.

Section 2: Request for arrest and surrender

14. This section sets out the procedure to be followed when the Government receives a request from the ICC for the arrest and surrender of an individual. This could be

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someone suspected of having committed an ICC crime or someone who has already been convicted by the ICC but has escaped custody in another country.

15. *Subsection (1)* requires the Secretary of State to transmit the request and the accompanying documents to an appropriate judicial officer (as defined in section 26). *Subsection (3)* requires the judicial officer to endorse an arrest warrant provided he is satisfied that it appears to have been issued by the ICC. Under Article 91.3 of the Statute, an ICC request for the arrest and surrender of a person already convicted may or may not contain an arrest warrant. If a request is received without an arrest warrant but is accompanied by the other documents specified in Article 91.3, *subsection (4)* requires the judicial officer to issue an arrest warrant himself.
16. An arrest warrant endorsed or issued under this section is termed “a section 2 warrant” and may be executed in any part of the UK (see section 14).

Section 3: Request for provisional arrest

17. Under Article 92 of the Statute, the ICC may, in urgent cases, request a State Party to make the provisional arrest of an individual before sending the formal request for surrender. This section provides that, where the UK receives such a request, an application shall be made to an appropriate judicial officer who is required to issue a “provisional warrant”.
18. Under *subsection (2)*, where the Secretary of State considers the application for a provisional arrest warrant should be made in England and Wales, he will direct a constable to make the application. Under *subsection (3)*, where the Secretary of State considers the application for a provisional arrest warrant should be made in Scotland, he will transmit the request to the Scottish Ministers and the procurator fiscal will make the application.

Section 4: Dealing with person arrested under provisional warrant

19. This section sets out what is to happen if a person is arrested under a provisional warrant; it reflects Article 92 of the Statute. The person must be brought as soon as is practicable before a competent court (defined in section 26 as a court consisting of an appropriate judicial officer). The court is required to remand him until such time as a section 2 warrant is produced. If such a warrant is produced, the court will proceed as if the person concerned had been arrested under that warrant. If not, the person will be discharged; however, he can be subsequently re-arrested under a section 2 warrant in accordance with Article 92.4.
20. [Article 92.3](#) of the Statute does not specify the maximum length of time a person who has been provisionally arrested can be detained pending receipt of the ICC’s request for surrender; it instead provides for this to be specified in the ICC’s Rules of Procedure and Evidence. The Rules have been drafted by the Preparatory Commission for the ICC and this time limit has been provisionally set, in Rule 188, at 60 days. However, the Rules, like various other subsidiary documents to the ICC Statute, will not be finally adopted until the first meeting of the Assembly of States Parties, which will not take place until 60 States have ratified the Statute. It therefore remains possible that the provision in Rule 188 might change. For this reason, *subsection (4)* requires the period of remand to be specified in the Order in Council which may be made, under Schedule 1, paragraph 3, to give effect to the Rules of Procedure and Evidence.

Section 5: Proceedings for delivery order

21. This section is intended to implement Article 59.2 of the Statute. Article 59.2 states that a person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that: (a) the warrant applies to that person; (b) the person has been arrested in accordance with the proper process; and (c) the person’s rights have been respected. However,

nothing in the Statute allows a State to refuse to surrender a person to the ICC on the grounds that the person has not been properly arrested or his rights have not been respected. The Government interprets the Statute as meaning that it will be for the ICC to determine the consequence of any violation of a person's rights or of proper procedure for his prosecution before the ICC. It would be open to the ICC, for example, to halt the prosecution on grounds of abuse of process or to award compensation.

22. *Subsection (1)* requires that the person arrested under a section 2 warrant be brought before a competent court as soon as is practicable. *Subsection (2)* requires the court to make a delivery order if it is satisfied that the person before it is the person named in the warrant and that the warrant is from the ICC and has been duly endorsed or that the warrant has been duly issued under section 2.
23. As provided for in Article 89.2 of the Statute, *subsection (4)* allows the domestic court to adjourn surrender proceedings whilst a challenge is still pending before the ICC to the admissibility of the case or to the ICC's jurisdiction. Such a challenge could be made by the accused or by a State under Article 19 of the Statute. This subsection would apply, for example, if the person claimed that he had already been tried for the crime which the ICC wished to prosecute.
24. [Article 59.4](#) states that it shall not be open to a domestic court to consider whether the warrant of arrest was properly issued by the ICC. *Subsection (5)* is intended to implement that obligation. *Subsection (5)* also provides that the competent court shall not consider whether there is evidence to justify the person's trial before the ICC.
25. *Subsection (6)* provides that the competent court may also determine whether the person has been lawfully arrested under the warrant and whether his rights have been respected. The court must make this determination if the person arrested applies for it to do so. *Subsection (6)*, following Article 59.2, does not seek to spell out all the rights which the court may consider. If the domestic court determines that there have been violations of proper process or of the person's rights, *subsections (8) and (9)* state it shall make a declaration (or declarator in Scotland) which will be passed to the ICC. However, the competent court cannot grant any other relief and this declaration will not affect the court's decision whether or not to issue a delivery order under *subsection (2)*. This section does not exclude any other procedure available under domestic law for the remedy of a violation of a person's rights.

Section 6: Supplementary provisions as to proceedings before competent court

26. *Subsection (2)* enables a competent court in England and Wales hearing proceedings under section 5 to exercise certain powers relating to the conduct of the proceedings, including to adjourn the case and remand the arrested person. It provides for criminal advice and assistance, and representation under the Criminal Defence Service to be extended to the arrested person during the delivery proceedings and, in the event of a discharge, for the arrested person's costs to be paid out of central funds. *Subsection (3)* makes similar provision with regard to proceedings under section 5 in Scotland. (With respect to proceedings before the ICC, an accused is entitled under Articles 55 and 67 of the Statute to legal assistance from the ICC, including assistance free of charge if he lacks sufficient means to pay for it.)

Section 7: Consent to surrender

27. This section provides that where an arrested person gives written consent to surrender in the presence of a justice of the peace or, in Scotland, a sheriff, the competent court will make a delivery order and the person will be taken to have waived his rights to appeal against that order. This reflects the provision in Article 92.3 of the Statute.

Section 8: Procedure where court refuses order

28. This section provides that if the competent court refuses to make a delivery order it must remand the person arrested and notify the Secretary of State (and, in Scotland, the Scottish Ministers). If the court is not informed without delay of an intention to appeal, the person concerned will be discharged. Otherwise, the person will remain on remand.

Sections 9 and 10: Appeal against refusal of delivery order

29. **Section 9** provides that, where the competent court in England and Wales refuses to make a delivery order, the Secretary of State may appeal against the refusal, on grounds of fact or law, to the High Court and then, with permission, to the House of Lords. If either the High Court or the House of Lords grants the appeal, it can make the delivery order or send the case back to the original court to do so. The person will remain on remand until the end of the appeal process. **Section 10** makes corresponding provision for Scotland.

Section 11-12: Proceedings where court makes delivery order

30. **Sections 11** and **12** set out the procedure to be followed when a competent court makes a delivery order and protects the right of the person to seek a review of that order by means of an application for habeas corpus (or, in Scotland, a presentation of a Bill of Suspension). The court must notify the person of his right to seek a review of the order. It must also commit the person to custody or on bail to await the Secretary of State's directions as to how the order is to be executed and the practical arrangements for the transfer to the ICC or the State of enforcement. To allow the person time to consider seeking a review, the directions shall not be made for 15 days from the date of the order, unless the person waives his right to seek a review (see section 13) or has already consented to surrender (see section 7). If he does make an application for habeas corpus, directions for the execution of the order are not to be made until proceedings on that application have been completed.
31. *Subsection (4)* of section 12 provides that the court hearing the application for review shall consider the same issues as the court which made the delivery order; *subsections (2) and (4) to (9)* of section 5 shall again apply (see paragraphs 22-25 above).

Section 13: Waiver of right to review

32. This section permits a person to waive his right to seek a review of a delivery order. Waiver must be made in writing and in the presence of a justice of the peace or, in Scotland, a sheriff.

Section 14: Effect of warrant of arrest

33. This section provides for the execution in any part of the UK of any arrest warrant endorsed or issued under this Part and for the legal custody of a person so arrested. The arrest warrant can be executed by any constable or any other person to whom it is directed (for example, an immigration officer).

Section 15: Effect of delivery order

34. The purpose of this section is to enable the execution of a delivery order. It provides that someone subject to a delivery order can be lawfully kept in custody pending or during the execution of the delivery order, whether in the UK or on board a British vessel or aircraft.
35. *Subsection (3)* grants the powers of a constable to a person authorised to carry out custodial duties in respect of a delivery order (such as the person designated to escort the person to the ICC or the State of enforcement) and provides for equivalent authority, protection and privileges.

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36. *Subsection (4)* enables the arrest, without warrant, of someone subject to a delivery order who escapes. If, for example, someone escapes during transit to the ICC, a constable (including someone granted custodial powers under *subsection (3)*) has the authority to arrest the fugitive, keep him in custody and convey him into the custody of the ICC.
37. The reference in *subsection (5)(b)* is to persons such as transport police whose powers are limited to specific places.

Sections 16 to 18: Bail and custody

38. **Article 59** of the ICC Statute deals with the question of interim release pending surrender (i.e. bail). The Article provides that a person arrested at the request of the ICC has the right to apply for bail. It requires that the Pre-Trial Chamber of the ICC be notified of any application for bail and that the authority deciding the application give full consideration to any recommendations made by the Pre-Trial Chamber, including any on measures to prevent the escape of the person, before making its decision. Article 59.4 further requires that the authority consider whether, given the gravity of the alleged crime, there are urgent and exceptional circumstances to justify bail and whether necessary safeguards exist to ensure that the State can fulfil its duty to surrender the person to the ICC.
39. **Sections 16 and 18** are intended to implement these provisions of Article 59. Section 16 provides that a court may grant bail if an application is made. Section 18(1) and (2) provide for compulsory consultation with the ICC. Section 18(3) requires the court to consider the matters specified in Article 59.4. Section 16(2) applies the provisions of the Bail Act 1976 to proceedings under this part in England and Wales as if they were proceedings against a fugitive offender. This ensures that, in view of the very serious nature of the crimes involved, the court is obliged to take into account all of the relevant factors surrounding the bail application with no presumption in favour of, or against, granting bail.
40. **Section 17** covers various eventualities where a person has been granted bail in England and Wales. *Subsections (3) to (5)* deal with a situation in which a person, having been granted bail, surrenders to the custody of a constable shortly before the end of the period of remand. If the constable learns that the end of that period will be unexpectedly delayed, he will re-bail the person and set a new date for the person to surrender to custody. If the person fails to surrender at the appointed time, then the court which originally granted bail may issue an arrest warrant and, once the person is arrested, will reconsider whether bail is appropriate.

Sections 19 and 20: Discharge of persons

41. **Sections 19 and 20** provide for two different situations in which a person arrested under this Part may be discharged. Section 19 grants a person subject to a delivery order the right to make an application for discharge if he has not been delivered up within 40 days of the order being made. The High Court, or High Court of Justiciary in Scotland, is required to order discharge if reasonable cause is not shown for the delay; this is to ensure that the right not to be subject to unnecessarily prolonged detention is respected. Section 20 provides that a person must be discharged if the ICC informs the Secretary of State that the person's surrender is no longer required.

Section 21: Request for transit

42. It is possible that a prisoner being surrendered to the ICC by another State might need to transit the UK. To address this sort of situation, Article 89.3(a) obliges States Parties to authorise transport through their territory of a person being surrendered to the ICC by another State (except where such transit would impede or delay the surrender). Article 89.3(b) sets out what such an ICC request for transit must contain, including the warrant

for arrest and surrender, and Article 89.3(c) requires the person being surrendered to be detained in custody during the period of transit.

43. **Section 21** is intended to implement the obligations under Article 89.3(a)-(c). It provides that, if the Secretary of State receives and agrees to a request for transit, the request will be treated as if it were an ordinary ICC request for arrest and surrender but, in view of the different circumstances, there will be an expedited process for transferring the person in question to the ICC. The person will be treated on arrival as if he had been arrested under an endorsed warrant, will not be granted bail, and, once the competent court has made a delivery order, he will be given only two days in which to make an application for review before the Secretary of State may issue directions for the person's delivery.

Section 22: Unscheduled landing by person in transit

44. It is possible that a person being surrendered to the ICC by another State might need to make an unscheduled landing in the UK. In the case of an unscheduled landing, Article 89.3(e) obliges a State to detain the person being transported until the request for transit is received from the ICC. The request for transit must be received within 96 hours: if not, the individual must be released.
45. **Section 22** is intended to implement the obligations under Article 89.3(e). The section provides that, in such a case, the person being surrendered shall be arrested, brought before a competent court as soon as is practicable, and remanded in custody pending receipt of the ICC request. If no request for transit is received by the Secretary of State within 96 hours of the unscheduled landing, the person must be discharged. If a request is received from the ICC and the Secretary of State notifies the court that he has agreed to it, the person is to be treated as if a person in transit under section 21.

Section 23: Provisions as to State or diplomatic immunity

46. **Article 27** states that the Statute shall apply equally to all persons without any distinction based on official capacity and that immunities attaching to the official capacity of a person, whether under national or international law, shall not bar the ICC from exercising its jurisdiction over such a person. Article 98.1 provides that the ICC may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the ICC can first obtain that third State's co-operation for the waiver of the immunity. These Articles mean that a State Party to the ICC Statute, in accepting Article 27, has already agreed that the immunity of its representatives, officials or agents, including its Head of State, will not prevent the trial of such persons before the ICC, nor their arrest and surrender to the ICC. But non-States Parties have not accepted this provision and so the immunity of their representatives would remain intact unless an express waiver were given by the non-State Party concerned to the ICC.
47. **Subsection (1)** of section 23 therefore provides that any state or diplomatic immunity attaching to a person by reason of his connection to a State Party will not prevent his arrest and surrender under this Act if requested by the ICC. This may include a serving Head of State or Ambassador. As for persons with immunity as a result of their connection to a non-Party, **subsection (2)** provides that a waiver obtained by the ICC in relation to a request for that person's surrender, will be treated as extending to proceedings for his arrest and surrender under this Act.
48. **Subsection (4)** provides that the Secretary of State may direct that proceedings for arrest and delivery shall not be taken against a person who has State or diplomatic immunities which, but for **subsections (1)** or **(2)**, would have prevented such proceedings. The Secretary of State can do so only after consulting with the ICC and the State concerned.

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49. If the United Nations Security Council, acting under Chapter VII of the UN Charter, refers a situation to the ICC for investigation and prosecution, the Security Council resolution might, depending on its wording, override any immunities attaching to representatives of all States, including non-Parties. Subsection (5) is intended to enable such a resolution to be implemented in this country.

Section 24: Delivery up of persons subject to criminal proceedings etc.

50. This section introduces Schedule 2 which applies where the ICC makes a request for arrest and surrender of a person who is also subject to domestic criminal, extradition or delivery proceedings, or is a prisoner. (Notes on Schedule 2 can be found at paragraphs 132-139 below.)

Section 25: Documents having effect as warrants etc.

51. This section provides that a copy or a faxed version of a warrant or other document shall be treated as if it were the original and shall be admissible in evidence.
52. Under Article 58.6, the ICC Prosecutor may ask the Pre-Trial Chamber to amend a warrant of arrest by modifying or adding to the crimes specified in it. *Subsection (3)* provides that the amended warrant shall be treated as if it were a new warrant, but notes that this does not affect the validity of anything done on the basis of the previous warrant.

Section 26: Meaning of “appropriate judicial officer” and “competent court”

53. This section defines “competent court” as a court consisting of the Senior District Judge (Chief Magistrate) or a designated District Judge (Magistrates’ Courts), or the Sheriff of Lothian and Borders.

Part 3: Other Forms of Assistance

54. States Parties to the ICC are required to co-operate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction. In particular, Article 88 requires States Parties to ensure that there are procedures available under national law for all the forms of co-operation which are specified under Part 9 of the Statute. The main forms of assistance, other than the arrest and surrender of suspects, are outlined in Article 93.1.
55. This Act, but particularly this Part, is intended to implement the obligation under Articles 88 and 93.1. It provides a legislative basis, where one is required, for the Government to assist the ICC with its investigations or prosecutions. As in the Orders in Council through which the UK has implemented the UN Security Council resolutions which established the International Criminal Tribunals (S.I. 1996/716 and S.I. 1996/1296), no provision is made with regard to assistance which the Secretary of State can already provide to the ICC. For example, the Secretary of State is able, without further provision, to respond to ICC requests to protect victims and witnesses or to facilitate the voluntary attendance of expert witnesses, in the same way as is already done with regard to the Tribunals.
56. **Part 3** extends to England and Wales, and Northern Ireland. Only sections 32 and 39 extend to Scotland.

Section 27: Provision of assistance

57. The reference in *subsection (1)* to investigations initiated and not concluded by the ICC is intended to include investigations which have been deferred or suspended pursuant to Articles 18 and 19 of the Statute. *Subsection (3)* makes clear that the forms of assistance detailed in Part 3 are not exclusive and that nothing in this Part prevents other assistance being provided to the ICC.

Section 28: Questioning of person being investigated or prosecuted

58. This section relates to Article 93.1(c) whereby the ICC can ask the domestic authorities to question a person whom the ICC is investigating or prosecuting. In accordance with Article 55.2, *subsection (2)* provides that a person shall not be questioned unless he has been informed of his rights under Article 55; these rights are reproduced in Schedule 3.

Section 29: Taking or production of evidence

59. This section applies where the Secretary of State receives an ICC request to take evidence on its behalf, including testimony on oath, or to secure the production of evidence. The Secretary of State may nominate a court to receive the evidence in question. The nominated court will have the same powers to secure the attendance of witnesses and the production of documents or other Articles as it has in domestic cases.

Section 30: Taking or production of evidence: further provisions

60. *Subsection (2)* provides that a court nominated under section 29 to take evidence for transmission to the ICC can sit in private if it considers it necessary in order to protect victims, witnesses or suspects, or to protect confidential or sensitive information. This is in line with the criteria in Article 64.7 under which the ICC can decide to sit in closed session.

Section 31: Service of process

61. Another form of assistance which States Parties must provide is to serve documents, including judicial documents, on persons living in their territory (Article 93.1(d)). These can include a summons for a suspect to appear before the ICC, which the ICC Pre-Trial Chamber, under Article 58.7, may issue as an alternative to an arrest warrant. This section makes provision for a summons or other document to be personally served on an individual in England and Wales or Northern Ireland.

Section 32: Transfer of prisoner to give evidence or assist in investigation

62. *Article 93.7* empowers the ICC to request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred only if he gives his consent. The Article also provides that the person being transferred shall remain in custody and shall be returned without delay when the purposes of the transfer have been fulfilled.
63. This section enables implementation of an ICC request under Article 93.7 with respect to someone in custody anywhere in the UK. The effect of *subsection (5)* is that the person will remain in custody during his transfer to the ICC, any time spent at the ICC will be counted towards the completion of their domestic sentence, and, if he has yet to complete that sentence, he will be returned to the UK to do so.

Section 33: Powers of entry, search and seizure

64. Under Article 93.1(g) and (h), the ICC can ask for sites to be examined and searches and seizures to be carried out on its behalf. This section provides that, where the Secretary of State believes implementation of a request requires the exercise of powers of entry, search and seizure, he may direct a constable to apply for a warrant or order under Part 2 of the Police and Criminal Evidence Act 1984, or the equivalent Northern Ireland legislation. The references in that Act to a serious arrestable offence are to be taken to include an ICC crime.

Section 34: Taking of fingerprints or non-intimate sample

65. The purpose of this section and Schedule 4 is to enable the implementation of an ICC request, made under Article 93.1(a), to locate and identify an individual in whom the ICC has an interest. (Schedule 4 is explained in paragraphs 140-142 below.)

Section 35: Orders for exhumation

66. [Article 93.1\(g\)](#) specifically allows the ICC to request the exhumation and examination of grave sites. This section enables the implementation of such a request.

Section 36: Provision of records and other documents

67. The ICC may request that a State Party provide records and documents, including official records and documents, pursuant to Article 93.1(i). Such a request would normally be able to be met without specific provision or under the powers in sections 29 and 33. This section is intended to ensure that the request can also be met in the particular case where the ICC is requesting information about previous domestic proceedings or investigations in respect of conduct which would constitute an ICC crime.

Sections 37 and 38: Assistance in investigating the proceeds of ICC crime

68. [Article 93.1\(k\)](#) specifies that the ICC may request assistance in
the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.
69. [Sections 37 and 38](#) together make provision for such requests to be carried out. Section 37 provides that, where the ICC requests assistance in ascertaining whether a person has benefited from an ICC crime or in identifying property derived from an ICC crime, the Secretary of State may direct a constable to apply for an order or warrant under Schedule 5. Section 38 provides that, where the ICC requests assistance in the freezing or seizure of property for possible forfeiture, the Secretary of State may direct a person to apply for a freezing order in accordance with the provisions of Schedule 6. (Notes on Schedules 5 and 6 can be found in paragraphs 143-152 below.)

Section 39: Matters prejudicial to national security

70. This section provides that nothing in this Part or in the corresponding provisions of any Act of the Scottish Parliament requires or authorises documents or information to be disclosed where this would be prejudicial to national security. This section must be read in light of the obligations of a State Party under the ICC Statute. Under Article 93.4 of the Statute, a State Party may deny a request for assistance, in whole or part, if the request concerns the production of any documents or disclosure of evidence which would be prejudicial to its national security interests. If such an issue arises, Article 72 sets out the procedure to be followed and the obligations of the State Party, including to take all reasonable steps to seek to resolve the matter through co-operation with the ICC. It also provides that, if no solution permitting the disclosure of that information is reached and the ICC determines that the evidence is relevant and necessary, the ICC may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Part 4: Enforcement of Sentences and Orders

71. Whereas Part 3 provides for implementation of ICC requests during investigations and proceedings, Part 4 provides for the enforcement of ICC sentences and orders made following conviction. The sentences and orders are of two different types. A State Party is obliged to implement orders for fines, forfeitures and reparations that the ICC

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may make against a convicted person. However, a State Party is not obliged to accept persons convicted by the ICC (“ICC prisoners”) to serve their sentences in its prisons. Instead, under Article 103.1, a State may indicate to the ICC its willingness to accept ICC prisoners and can attach conditions to its acceptance. Once the ICC hands down a prison sentence and that sentence is no longer subject to appeal, the ICC will designate a State of enforcement among those States who have volunteered and the State shall inform the ICC if it accepts that designation.

72. The Government envisages reaching an enforcement of sentences agreement with the ICC. This Part sets out the provisions which would apply where the Secretary of State has agreed to an ICC request that a prisoner serve his sentence in the UK. With the exception of section 49 (relating to other orders), Part 4 extends to Scotland.

Section 42: Detention in the United Kingdom in pursuance of ICC sentence

73. This section applies where the Secretary of State has accepted the designation by the ICC of the UK as the State of enforcement with regard to a specific person. Under *subsection (2)* he will consult with the Scottish Ministers if he considers it may be appropriate for the person to serve his sentence in Scotland. The relevant Minister – the Secretary of State or, in Scotland, the Scottish Ministers – will then issue a warrant authorising the person to be brought to the relevant part of the UK. The Secretary of State’s warrant will authorise the detention of the prisoner in England, Wales or Northern Ireland. The International Criminal Court (Scotland) Bill introduced in the Scottish Parliament on 4 April 2001 provides that the warrant issued by the Scottish Ministers under this section will authorise the detention of the prisoner in Scotland.
74. *Subsection (4)* provides that where the prisoner is detained in England, Wales or Northern Ireland, he shall be treated in the same way as a domestic prisoner serving a sentence of imprisonment imposed by a court in that part of the UK for a similar offence. The conditions of the ICC prisoner’s detention are to be the same as those for domestic prisoners, except that, by virtue of Schedule 7, the domestic provisions concerned with the early release of prisoners or which affect the length of sentence are disapplied. Articles 105 and 110 of the Statute make clear that consideration of early release or reduction in sentence will be a matter for the ICC alone. If the ICC itself subsequently amends the sentence imposed on the person, *subsection (3)* enables the domestic warrant to be amended accordingly.
75. *Subsection (5)* disapplies the provisions of the Repatriation of Prisoners Act 1984 to ICC prisoners, as the transfer of ICC prisoners between States is to be determined by the ICC under Article 104. The subsection also disapplies Schedule 1 to the Crime (Sentences) Act 1997 because sections 44 and 45 make separate provision for the transfer of prisoners between different parts of the UK (but see section 46).

Section 43: Temporary return or transfer of custody to another state

76. This section enables the temporary transfer of an ICC prisoner to and from the ICC, for example, to testify at another trial (as provided for in Rule 193 of the finalized draft Rules of Procedure and Evidence). It also enables the transfer of custody to any other State to which the ICC, under its power in Article 104, may decide to transfer the prisoner. The Secretary of State or, if the prisoner is being detained in Scotland, the Scottish Ministers will make the necessary arrangements.

Sections 44 and 45: Transfer to another part of the UK

77. **Section 44** enables the transfer of a prisoner from one part of the UK to another to serve the remainder of the ICC sentence. The warrant under which he is being detained will continue to have effect. **Section 45** provides for the temporary transfer of the prisoner in custody between UK jurisdictions, including Scotland, for example, for the purpose of attending criminal proceedings against him or for testifying at another trial. Under both

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sections, transfer between Scotland and the rest of the UK requires the prior agreement of the relevant Minister in the receiving part of the UK.

Section 46: Domestic sentence current at end of term of ICC sentence

78. This section makes provision in respect of prisoners who have completed a term of imprisonment imposed by the ICC but who are still subject to an ordinary domestic sentence (including a sentence imposed for an offence committed during imprisonment under the ICC sentence). The effect of the section is to ensure that the domestic sentence will continue to apply even where the prisoner has been transferred under section 44 or 45 to a different part of the UK than that in which the domestic sentence was imposed.

Section 47: Custody of prisoner in transit etc.

79. This section enables an ICC prisoner to be held in lawful custody by domestic authorities whilst outside prison, whether he is in the UK or on board a British vessel or aircraft. This would include, for example, while the prisoner is in transit between the UK and the ICC. *Subsection (4)* grants the powers of a constable to a person designated by the Secretary of State to take the prisoner to or from any place, or to keep the prisoner in custody, and provides for equivalent authority, protection and privileges.
80. *Subsection (5)* allows the arrest of any ICC prisoner who escapes or is unlawfully at large, including an ICC prisoner who escapes from prison in any part of the UK. Any constable (including someone granted custodial powers under *subsection (4)*), has the authority to arrest the fugitive prisoner without warrant.

Section 49: Power to make provision for enforcement of other orders

81. Under Articles 77.2 and 70.3, in addition to a sentence of imprisonment, the ICC can impose on a convicted person a fine and a “forfeiture of proceeds, property and assets derived directly or indirectly from” the crime for which the person has been convicted. Moreover, under Article 75, the ICC may
- make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
82. **Section 49** empowers the Secretary of State to make regulations to enforce fines, forfeitures or reparation orders issued by the ICC against a convicted individual. The procedure will broadly follow that established in the Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 1991 (S.I. 1991/1463). The regulations may provide that, on receiving any such order, the Secretary of State will appoint a person to act on the ICC’s behalf. The regulations will provide for the registration of the order and may provide for it to be enforced as if it were an order of a domestic court. The regulations may be different for different types of orders.
83. *Subsection (5)* provides safeguards in respect of persons with an interest or rights in property affected by such an order. This is in accordance with the Statute; Article 109.1, for example, provides that States Parties shall give effect to fines and forfeitures “without prejudice to the rights of bona fide third parties”.

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

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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

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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.

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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

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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

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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.

Part 6: General Provisions

115. This Part has UK-wide extent.

Section 77: Application of provisions to other International Tribunals

116. The effect of *subsections (1) and (2)* is that State or diplomatic immunity will not prevent the arrest and surrender of a person indicted by either of the International Criminal Tribunals for the former Yugoslavia and Rwanda.
117. The effect of *subsection (3)* is that the UK can accept prisoners from either of the two Tribunals to serve their sentences in domestic prisons. This would be subject to the UK reaching an enforcement of sentences agreement with that Tribunal.

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118. Should the Security Council establish any future Tribunals along the lines of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the relevant Security Council resolution will be given effect to by an Order in Council under the United Nations Act 1946. *Subsection (4)* provides that such an Order in Council may include provisions to allow for the arrest and surrender of persons with State or diplomatic immunity and to enable convicted persons to serve their sentences in domestic prisons.

Section 78: Crown application

119. This section specifies that the Act binds the Crown.

Section 79: Extent

120. *Subsection (1)* lists those provisions which do not extend to Scotland.
121. *Subsection (5)* is included because jurisdiction under the Service Discipline Acts is personal rather than geographical. A person subject to Service jurisdiction may be proceeded against under that jurisdiction for an offence wherever in the world it is committed. It is therefore necessary to extend the geographical limits of the Act so that Service courts are able to exercise jurisdiction even when sitting outside the UK.

Section 80: Power to make provision in relation to Scotland

122. The section enables the Secretary of State, by statutory instrument, to make modifications or adaptations of this Act so that it dovetails properly with the corresponding Scottish legislation and ensures that the UK is able to fulfil its obligations under the ICC Statute.

Schedule 1: Supplementary Provisions Relating to the Icc

123. *Schedule 1*, which covers a variety of ICC-related provisions, extends to Scotland.

Paragraph 1: Legal capacity, privileges and immunities

124. This paragraph enables subordinate legislation to be made to confer privileges and immunities on the ICC, the judges and other persons connected with the Court, in accordance with the obligations under Article 48 of the Statute and any other relevant international agreements entered into by the UK. An agreement on the privileges and immunities of the ICC will be adopted at the first meeting of the Assembly of States Parties.

Paragraph 2: Power to provide for sittings of the ICC in the UK

125. Under Article 3, the seat of the ICC shall be in The Hague but the ICC may sit elsewhere, whenever it considers it desirable. This is elaborated in Rule 100 of the draft Rules of Procedure and Evidence which provides that the ICC may sit elsewhere in a particular case where to do so would be in the interests of justice; this is subject to the agreement of the State where the ICC intends to sit. This paragraph enables subordinate legislation to be made to enable the ICC to sit in the UK in the event that it wished to do so.

Paragraph 3: Power to give effect to Rules of Procedure and Evidence

126. The Rules of Procedure and Evidence have been drafted by the Preparatory Commission for the ICC and will be adopted by the first Assembly of States Parties, in accordance with Article 51 of the Statute. This paragraph enables secondary legislation to give effect to any of the Rules if they require implementation in the UK; an example is in section 4(4) (see paragraph 20 above).

Paragraph 4: Parliamentary approval of draft Orders

127. Since the Orders made under paragraphs 1 to 3 will extend to Scotland, this paragraph provides that they shall only be made with the consent of both Houses of Parliament and the Scottish Parliament.

Paragraph 7: Pension provision for UK judges of ICC

128. The purpose of this paragraph is to eliminate a possible disincentive to UK judges standing for election to the ICC. It provides that, in the event that the ICC itself makes no pension provision for judges of that court, the Lord Chancellor (or the Secretary of State) has powers to ensure that a UK judge appointed to the ICC is no worse off for pension purposes than he would have been had he continued to serve in his UK judicial office. The question of whether pension provision will be agreed internationally for ICC judges will not be settled definitely until the first meeting of the Assembly of States Parties.
129. *Sub-paragraph (1)* creates an order making power for the Lord Chancellor (or the Secretary of State in relation to a person holding judicial office in Scotland) in order to secure the pension position of a UK judge sitting on the ICC. *Sub-paragraph (2)* provides that such an order may provide for a judge to remain a member of his existing UK pension scheme (*sub-paragraph (2)(a)*) or that other appropriate arrangements can be made (*sub-paragraph (2)(b)*).
130. *Sub-paragraph (3), (4) and (5)* give additional detail as to what an order made by virtue of *sub-paragraph (2)(a)* may contain. *Sub-paragraph (3)* provides that a judge who remains in his UK pension scheme may do so on the same terms as if he had not been appointed to be a judge of the ICC. By way of securing this outcome, it further provides that the pension benefits payable to him will be based on the salary he would have been entitled to receive for the UK judicial office which he would continue to hold by virtue of section 68 of the Access to Justice Act 1999, were it not for section 68(3)(a) of that Act. *Sub-paragraph (4)* enables the order to provide that the contributions towards dependants' benefits payable under the judicial pension scheme of a judge who remains in a UK pension scheme will continue to be paid by the judge; and that these contributions will be collected under such arrangements as are laid down by the administrators of the scheme. *Sub-paragraph (5)* provides that the order has effect notwithstanding section 68(3)(b) of the Access to Justice Act 1999 (which provides that a seconded judge will not receive pension benefits under a UK judicial pension scheme whilst working for an international court). *Sub-paragraph (5)* also gives the Lord Chancellor power to amend as necessary the provisions of the judicial pensions Acts to give effect to the provisions of this paragraph.
131. *Sub-paragraph (6)* provides for any benefits payable by virtue of an order under *sub-paragraph (2)(b)* to be paid directly from the Consolidated Fund (that is, not from the Departmental Vote) in the same way as other judicial pension benefits.

Schedule 2: Delivery Up of Persons Subject to Criminal Proceedings Etc.

132. The ICC may request the surrender of a person even if he is already before the UK courts or is serving a prison term. This schedule sets out how such a situation would be dealt with.

Part 1: Criminal Proceedings

133. Article 89.4 of the Statute states that:

If a person sought is being proceeded against or is serving a sentence in the requested state for a crime different from that for which surrender to the [ICC] is sought, the requested State, after making its decision to grant the request, shall consult the [ICC].

The purpose of the consultations would be determine when and how the surrender will take place. There may be circumstances in which the ICC agrees to allow the domestic proceedings to be completed before the person's surrender. An example might be if a lengthy domestic trial is close to completion or involves sensitive evidence which might not be available if the trial is postponed.

Paragraphs 2 to 4: Criminal proceedings

134. **Paragraph 2** is intended to implement Article 89.4 where criminal proceedings are taking place in England and Wales or Northern Ireland; paragraphs 3 and 4 make equivalent provision where the criminal proceedings are before a Scottish or a Service court respectively. Paragraph 2 sets out what is to happen if, when the Secretary of State receives a request from the ICC for arrest and surrender, the person concerned is already undergoing criminal proceedings. The Secretary of State will inform the relevant court which will, if necessary, adjourn its proceedings so that proceedings under Part 2 can take place to determine whether the person should be delivered up. If a delivery order is made and the criminal proceedings are still pending or in progress, the Secretary of State is required to consult the ICC. If the ICC wishes to go ahead immediately with the person's surrender, the Secretary of State will direct that the domestic proceedings be discontinued and the delivery order be executed. The discontinuance of the domestic proceedings is without prejudice to the possible institution of fresh proceedings at a later date.

Paragraph 5: Effect on custodial sentences

135. This paragraph provides that terms of imprisonment or detention imposed by a domestic court must still be served even if a person is delivered up to the ICC (*sub-paragraph 5(1)*) or discharged after delivery proceedings (*sub-paragraph 5(2)*). The time spent by that person in the custody of the ICC or another State of enforcement will count towards the completion of his domestic sentence. If that domestic sentence is not completed by the time the person is either acquitted by the ICC or completes any term of imprisonment imposed by the ICC, he shall be returned to serve out that sentence. *Sub-paragraph (4)* requires the Secretary of State to consult the Scottish Ministers in the case of prisoners serving sentences in Scotland.

Paragraph 6: Power to suspend or revoke other orders

136. This paragraph gives the competent court which has made a delivery order power to make sure that its order is executed, including by suspending or revoking any other warrant, order or sentence (other than imprisonment, which is dealt with in paragraph 5) made by any domestic court. Paragraphs 10 and 14 make similar provision with particular regard to cases where the person to be delivered up at the request of the ICC is also subject to an order for extradition or for delivery to another International Tribunal; again the competent court has the power to suspend or revoke any such order to enable the delivery order under this Act to be executed.

Part 2: Extradition Proceedings

137. **Article 90** of the Statute sets out in detail what a State Party is to do if it receives a request from the ICC for the surrender of a person and also receives a request from a State for that person's extradition, whether or not the extradition request relates to the same conduct which the ICC is investigating. In summary, the State Party must give priority to the ICC request unless the country requesting extradition is a non-Party and the requested State is under an existing international obligation to extradite the person to that non-Party. In that exceptional case, Article 90 says that the State Party shall decide whether to surrender the person to the ICC or extradite him to the requesting State after considering all relevant factors, including those stipulated in Articles 90.6 or, as the case may be, 90.7(b).

138. **Paragraph 8** is intended to implement Article 90 in England and Wales and Northern Ireland; paragraph 9 makes equivalent provision for Scotland. Under paragraph 8, if the ICC requests the arrest and surrender of a person already subject to extradition proceedings, the Secretary of State will notify the court hearing the extradition proceedings of the request. That court will, if necessary, adjourn its proceedings so that proceedings under Part 2 of this Act can take place to determine whether the person should be delivered up. If a delivery order is made and the extradition proceedings are still pending or in progress, the Secretary of State is obliged to consult the ICC. Depending on the outcome of those consultations, the Secretary of State may direct that the extradition proceedings be discontinued and the delivery order be executed. The discontinuance of the extradition proceedings is without prejudice to the possible institution of fresh extradition proceedings at a later date.

Part 3: Other Delivery Proceedings

139. **Paragraphs 11 to 14** deal with the highly exceptional situation in which an accused is wanted by both the ICC and one of the International Criminal Tribunals. In such a case, the UK would be under an international obligation to surrender to both bodies. If such a situation were to arise, paragraphs 12 and 13 require the Secretary of State to consult both the ICC and the Tribunal. In practice, it is expected that the ICC and the Tribunal would reach an agreement as to whose request is to take priority.

Schedule 4: Taking of Fingerprints Or Non-Intimate Samples

140. Under Article 93.1(a), the ICC can ask a State Party for assistance in identifying an individual in whom it has an interest. Schedule 4 is intended to enable the taking of evidence necessary for identification where alternative means of responding to such an ICC request have been exhausted.
141. Where the Secretary of State receives an ICC request to identify an individual, paragraph 1 provides that other means of identification must be tried first. If they prove inconclusive, the Secretary of State is to inform the ICC. If the ICC nonetheless wishes to proceed with the request, the Secretary of State may nominate a court for the purpose of obtaining the evidence necessary for identification, which may include fingerprints and/or a non-intimate sample (such as a strand of hair). The court may order the person to attend to provide the specified evidence and if he fails to comply, the court may order his arrest for this purpose and the evidence may be taken without his consent.
142. **Paragraph 7** provides that evidence obtained under this Schedule may only be used for the purpose of an ICC investigation or a domestic investigation under Part V of this Act. Paragraph 8 applies section 64 of the Police and Criminal Evidence Act 1984 with relation to the destruction of the evidence obtained under this Schedule.

Schedule 5: Investigation of Proceeds of Icc Crime

143. **Schedule 5** applies where the ICC has made a request for assistance in ascertaining whether a person has benefited from an ICC crime or in identifying property derived from an ICC crime and the Secretary of State has directed the constable to apply for an order or warrant under section 37.

Part 1: Production or access orders

144. **Part 1** sets out the provisions which govern the making of court orders or warrants for the production of, or access to, material. It is substantially based on the powers which already exist under section 93H of the Criminal Justice Act 1988. That section allows a constable, for the purposes of an investigation into whether any person has benefited from any criminal conduct or into the extent or whereabouts of the proceeds of such conduct, to apply to a Circuit judge for an order for the production of, or access to, particular material or material of a particular description.

145. **Paragraph 3** provides that a standard production or access order will require a named individual to either produce specified material or material of a specified description to a constable (production order) or give the constable access to this material (access order). The material should be produced within a specified period (normally seven days, although this can be shortened or lengthened by the judge if this is deemed appropriate in the circumstances). Paragraph 4 provides that a special production or access order may be made in relation to a person who the judge thinks is likely to have material to which the application relates in his possession within 28 days of the making of the order. Such an order will require a named individual to notify a constable when that material comes into his possession. This provision allows for information that will come either into a person's possession or into existence in the future to be obtained quickly. It is substantially based on Schedule 5 of the Terrorism Act 2000.
146. **Part 1** goes on to detail procedural provisions and the effect of the order, in particular how the order relates to existing legislation, specifically the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989.

Part 2: Search Warrants

147. **Part 2** is based substantially on the provisions in section 93I of the Criminal Justice Act 1988. Paragraph 10 sets out the circumstances in which a search warrant may be issued. *Sub-paragraph (2)* allows for a warrant to be issued if it appears that a production or access order has not been complied with. *Sub-paragraph (3)* allows for a warrant to be issued in circumstances where there are grounds for making a production or access order and, for example, there is a lack of communication with those who may be able to grant access. *Sub-paragraph (4)* makes provision for a search warrant to be issued in circumstances where more general material relating to an ICC crime is sought, when this material is likely to be of substantial value to the investigation.

Schedule 6: Freezing Orders in Respect of Property Liable to Forfeiture

148. **Schedule 6**, which relates to section 38, sets out the procedures for the making, variation and discharge of freezing orders. It also provides a power to appoint a receiver, seize property to prevent its removal from the jurisdiction and defines the interaction of freezing orders with existing legislation.
149. A freezing order would prohibit anyone from dealing with property specified in the order, except by methods and under conditions defined in the order itself. If the ICC makes a request, the Secretary of State may direct a person to apply for a freezing order from the High Court. The court must make the order if it is satisfied that the ICC has made a forfeiture order, or has reasonable grounds for believing that a forfeiture order may be made. Anybody affected by the freezing order shall be notified. The schedule also allows for the variation or discharge of the order on the application of a person affected by it, or on conclusion of the relevant ICC proceedings.
150. The schedule also provides for the High Court to appoint a receiver when a freezing order is in force. The receiver would take possession of the specified property and manage it in accordance with the directions of the court. If a freezing order is in force, a constable may seize property specified in the order to prevent its removal from England and Wales or, as the case may be, Northern Ireland.
151. When a freezing order relates to registered land, under the Land Charges Act 1972, the Land Registration Act 1925, Land Registration Act (Northern Ireland) 1970 and the Registration of Deeds Act (Northern Ireland) 1970, paragraphs 7 and 8 set out the appropriate methods of dealing with this land.
152. This Schedule goes on to detail how freezing orders will be enforced when the order relates to a person adjudged to be bankrupt, or a company which is winding up, in England and Wales or Northern Ireland. Paragraph 13 provides protection for

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which received Royal Assent on 11 May 2001*

insolvency practitioners when they seize or dispose of property which is subject to a freezing order. These provisions are substantially based on the provisions of Part 6 of the Criminal Justice Act 1988.

Schedule 7: Domestic Provisions Not Applicable to Icc Prisoners

Paragraph 1: Introduction

153. **Paragraph 1** sets out the purpose of Schedule 7. The ICC will be responsible for sentencing ICC prisoners. The Statute makes clear that the ICC will determine the sentence after taking into account factors such as time spent in custody on remand and whether multiple offences had been committed. Under Article 110.2 the ICC alone has the right to decide any reduction in the sentence it imposes and Article 105 states that an ICC sentence of imprisonment shall be binding on the States Parties who shall in no case modify it. The provisions in this Schedule therefore disapply those provisions of England and Wales and Northern Ireland law which might otherwise interfere with the power of the ICC to be the body solely responsible for determining the length of detention of the ICC prisoner.

Paragraph 2: Provisions affecting length of sentence

154. *Sub-paragraph (1)* disapplies provisions in England and Wales in relation to: the meaning of 'month'; deduction from time served of time unlawfully at large; discharge at a weekend or on a holiday; and crediting of periods during which the prisoner is remanded in custody. All these matters would be considered by the ICC itself when sentencing or when making rulings on reductions to the original sentence.
155. For the same reason, *sub-paragraph (2)* disapplies provisions in Northern Ireland in relation to: remission; discharge at a weekend or holiday; deduction from time served of time whilst the prisoner is unlawfully at large; and deduction from sentence of time served in custody.

Paragraph 3: Provisions relating to early release or release on licence

156. *Sub-paragraph (1)* disapplies those provisions in England and Wales which allow prisoners to be released: early; on grounds of ill health; temporarily on licence; or on life licence. *Sub-paragraph (2)* disapplies the equivalent provisions in Northern Ireland. The ICC would be responsible for the date of release and there is no provision in the Statute permitting a State Party to release an ICC prisoner early or temporarily.

Schedule 8: Genocide, Crimes Against Humanity and War Crimes: Articles 6 to 9

157. This Schedule reproduces Articles 6-9 of the Statute with the exceptions of three provisions in Article 8 (war crimes): Articles 8.1, 8.2(b)(xx) and 8.3. Article 8.1 and 8.3 are not relevant to the definition of war crimes in Article 8.2. Article 8.2(b)(xx) will only become operative if the Statute is amended and the earliest such an amendment could be adopted is seven years after the entry into force of the Statute. If new offences were to be added to the Statute in this way, they would not become offences under domestic law without new primary legislation.

Schedule 10: Repeals

158. This schedule lists the provisions of previous legislation repealed as a consequence of this Act. The Genocide Act is repealed because its provisions have been subsumed within Part 5 of this Act. The changes to the Geneva Conventions Act 1957 and Geneva Conventions (Amendment) Act 1995 are explained in the commentary on section 70. The changes to the Service Acts are explained in the commentary on section 74.

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COMMENCEMENT

159. [Section 82](#) provides that the provisions of this Act shall come into force on such dates as the Secretary of State appoints by order.

HANSARD REFERENCES

160. The following table sets out the date and Hansard references for each stage of this Act's passage through Parliament.

| Stage | Date | Hansard reference |
|-----------------------------------|--|--|
| House of Lords | | |
| Introduction | 14 December 2000 | Vol 620, Col 493 |
| Second Reading | 15 January 2001 | Vol 620, Cols 924-1001 |
| Committee | 8 and 12 February 2001 | Vol 621 Cols 1270-1329, Vol 622 Cols 11-132 |
| Report | 8 March 2001 | Vol 623 Cols 340-438 |
| Third Reading | 20 March 2001 | Vol 623 Cols 1290-1334 |
| House of Commons | | |
| Introduction | 20 March 2001 | |
| Second Reading | 3 April 2001 | Vol 366, Cols 214-294 |
| Committee | 10, 24 and 26 April and 1 and 3 May | Hansard Standing Committee D |
| Report and Third Reading | 10 May | Vol 362, Cols 305-352 |
| Royal Assent – 11 May 2001 | | House of Lords Hansard Vol 624 Col 2282 |
| | | House of Commons Hansard Vol 368 Col 406 |