

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 - Criminal Law

Section 32 – Genocide, crimes against humanity and war crimes: UK residents

Section 33 – Genocide, crimes against humanity and war crimes: retrospective application

151. **Sections 32 and 33** of this Act amend the International Criminal Court (Scotland) Act 2001 (“the 2001 Act”) in respect of the offences of genocide, crimes against humanity and war crimes. These sections match changes made to the International Criminal Court Act 2001 for England and Wales and Northern Ireland by the Coroners and Justice Act 2009.
152. **Section 32** inserts a new section 8A into the 2001 Act to make supplemental provision about UK residents. Such residents are liable under the 2001 Act for offences committed abroad if they are resident at the time of committing the crime or subsequently become resident. New section 8A makes additional provision in respect of UK residents in two ways. First, subsection (2) lists a number of categories of person who are to be treated as being resident in the UK for the specific purposes of Part 1 of the 2001 Act to the extent this would not otherwise be the case. The specific categories are listed in paragraphs (a) to (j). Secondly, subsection (3) of new section 8A provides a non-exhaustive list of considerations a court must take into account in determining whether a person is resident in the UK.
153. **Section 33** inserts a new section 9A into the 2001 Act. The new section 9A provides for the retrospective application of the offences of genocide, crimes against humanity and war crimes and related offences to things done on or after 1 January 1991. That is the date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the Tribunal’s Statute adopted by the United Nations Security Council.
154. New section 9A has the effect of applying certain offences to acts committed on or after 1 January 1991. Those offences are genocide, crimes against humanity, war crimes, conduct ancillary to such offences committed outside the jurisdiction, offences ancillary to those offences and offences based on the responsibility of commanders and other superiors for such offences. With the exception of genocide and some of the categories of war crimes, the retrospective application of these offences is subject to a requirement that, at the time of its commission, the act constituting the offence amounted in the circumstances to a criminal offence under international law.
155. The effect of this requirement is to allow the courts to apply these offences in the 2001 Act to the extent that they were recognised in international law during the relevant

*These notes relate to the Criminal Justice and Licensing (Scotland)
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

period. So, for example, if a particular offence was recognised in international law at the time of the relevant conduct but in a narrower form than that of the offence set out in the 2001 Act, the defendant may still be convicted of the offence provided that his or her conduct met the elements of the offence as recognised at the relevant time in international law. The international law requirement ensures that the provisions comply with the principles enshrined in Article 7 of the European Convention of Human Rights. The requirement does not apply to genocide and certain categories of war crimes as it is beyond dispute that those offences (and all their constituent elements) were fully recognised in international law in 1991. The requirement is necessary for the other offences as, whilst the vast majority of them were recognised in international law during the relevant period, a small number may have been recognised in a narrower form than that provided for in the 2001 Act and a very small number of offences may not have been sufficiently recognised at all. In addition, international law developed during the period in question.

156. [Section 33](#) also inserts a new section 9B into the 2001 Act. The new section 9B modifies the penalties applicable for the period of retrospectation (1 January 1991 to either 1 September or 17 December 2001) in respect of certain specific offences. The 2001 Act provides for a maximum sentence of 30 years' imprisonment (other than where murder is involved). The same will generally apply for offences committed from 1 January 1991.
157. However for genocide and grave breaches of the Geneva Conventions (a category of war crimes), both of which were already offences in domestic law in 1991, a maximum penalty of 14 years' imprisonment applies instead of 30 years' (other than where murder is involved). New section 9B(2) ensures that a higher penalty cannot be imposed for such offences than existed in domestic law at the time of their commission and consequently ensures compliance with Article 7 of the European Convention of Human Rights. The two different dates in 2001 are necessary because the International Criminal Court Act 2001 raised the penalty throughout the UK for grave breaches of the Geneva Conventions from 1 September 2001, with the International Criminal Court (Scotland) Act 2001 coming into force later in the year on 17 December 2001.