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**THE IMPLICATIONS FOR COUNCIL OF
EUROPE MEMBER STATES OF THE
RATIFICATION OF THE
ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT**

**LES IMPLICATIONS POUR LES ETATS
MEMBRES DU CONSEIL DE L'EUROPE
DE LA RATIFICATION DU STATUT DE
ROME DE LA COUR PENALE
INTERNATIONALE**

PROGRESS REPORT
BY the UNITED KINGDOM

UNITED KINGDOM: IMPLEMENTATION OF THE ICC STATUTE

It has long been the stated intention of the UK to be one of the first 60 States to ratify the ICC Statute. In accordance with longstanding treaty law and practice the UK is putting in place implementing legislation before ratifying the Statute.

The International Criminal Court Act 2001

On 11 May this year the International Criminal Court Act 2001 was enacted.

The Act applies principally to England, Wales and Northern Ireland. Because of the role of the Scottish Parliament in the UK and its ability to pass its own legislation on criminal justice, there is a separate Bill going through the Scottish Parliament. However, many areas of policy for Scotland are also covered in this Act, and the provisions of the Scottish Act are drawn along very similar lines.

The Act has four main purposes:

- 1) To enable UK courts and other authorities to meet requests for the arrest and surrender of persons wanted by the ICC
- 2) To enable UK authorities to co-operate with requests for assistance of a variety of other sorts, including assistance with investigations (in particular the forms of assistance outlined in Article 93.1 of the Rome Statute)
- 3) To make provision for prisoners convicted by the ICC to serve their sentences in the UK, and to provide for enforcement of fines, forfeitures and reparations ordered by the ICC; and
- 4) To incorporate in UK law the offences set out in the Rome Statute: the offences of genocide, crimes against humanity and war crimes, and offences against the administration of justice of the ICC.

The policy behind the Act was that it should provide legislative provision for assistance to the ICC only where legislative provision was needed. Where the UK can already provide assistance to the ICC on the basis of existing legislation, no provision is made in the Act. The Act does not attempt to codify all UK law applicable to the ICC or to reflect every provision of the ICC Statute.

The Act is in six parts. Part 1 is introductory, and defines certain terms used in the Act. Part 6 includes miscellaneous and general provisions, for instance setting out the territorial extent of the Bill, its application to the Crown, and extending certain of its provisions to the International Criminal Tribunals. Parts 2 to 5 of the Bill contain the substantial provisions – Part 2 deals with arrest and surrender, Part 3 with other forms of co-operation, Part 5 with enforcement of sentences and Part 6 with creating ICC crimes in the domestic jurisdiction.

Co-operation with the ICC

Arrest and delivery of persons

The procedures for arrest and surrender of suspects requested by the ICC are intended to be as straightforward as possible. Extradition procedures have not been used. The process in the UK Act is based on the legislation which was drawn up for the swift transfer of suspects between the UK and Ireland, which became the model for the arrest and surrender of suspects to the two International Criminal Tribunals for former Yugoslavia and Rwanda.

The principle behind the UK's approach is that the International Criminal Court is the body where any legal difficulties should be resolved. When an arrest warrant comes to the UK authorities, it will not be for the UK authorities to second-guess the validity of the warrant. The Secretary of State will make no judgement about the inherent justice of the request, but will pass it on to a court or police officer for action. Once an individual is arrested and brought before a UK court so that that court may approve his delivery to the ICC, the UK court must reach a view on whether the warrant applies to the right person, and whether that person has been arrested on the basis of a correct warrant. The court may, and on application must, make a determination as to whether the individual's rights have been respected. But such a determination has no impact on the State's obligation to deliver a suspect to The Hague. Should a UK court determine that an individual's rights had not been respected, it would be for the ICC, when it heard the case, to decide what to do about it.

The same approach is taken in a different context in Part 4 of the Bill dealing with fines and forfeiture orders which the ICC may ask the UK to enforce. In such a case, Section 49 provides that fines and orders for forfeiture or restitution should be registered for enforcement in the High Court. There is no provision for the High Court to amend or revoke ICC orders. In the same way, the provisions of Schedules 5 and 6, which deal with the enforcement of access and production orders, provide in effect for a presumption in favour of such orders being granted, and limit the issues which the UK courts can address to essentially factual questions.

As regards bail, the legislation explicitly requires that the views of the ICC on the advisability of granting bail should be given full consideration by the UK Court, incorporating Article 59.4 of the Statute. On the face of the Act, however, there is no presumption either for or against bail. However, the court must consider the very serious nature of the crimes of which the person is accused (or convicted in the case of an escapee). The domestic court considering bail must also be satisfied that there are "urgent and exceptional" grounds for their release on bail, and ensure that necessary measures exist, or would be put in place, to secure their return to custody.

The Act sets out that the Secretary of State may appeal if the UK Court refuses to make a delivery order for the transfer of the suspect to the ICC. If the Court does make a delivery Order, the suspect is entitled to appeal. In both cases the time limits for making an appeal are short, and the procedure is simplified so that delays in transfer of the individual to the ICC are kept to an absolute minimum, while respecting the rights of the suspect, including the common law right of habeas corpus. The process for dealing with requests for transit or unscheduled landings are similarly framed in such a way as to provide the simplest and most straightforward way of effecting the transfer of an individual to The Hague.

The Act includes provision for the circumstances where an individual may consent to surrender to the ICC. To do so, they must give written consent in the presence of a justice of the peace. The domestic court would then make a delivery order, with the individual being taken to have waived their right to appeal.

Other forms of assistance to the ICC

The approach in this part of the Act is to provide for the legislative basis for the forms of co-operation which the ICC might request under Article 93.1 of the Rome Statute. Most of the provisions are based on existing UK legislation for mutual legal assistance with other States (largely the Criminal Justice (International Co-operation) Act 1990). Examples of instances where the UK does not need legislative provision to meet ICC requests are where the ICC seeks assistance to send expert witnesses to the ICC, or for the protection of victims and witnesses.

Collecting evidence on behalf of the ICC might take various forms – sharing documents, finding expert witnesses would be straightforward examples. In other cases a domestic court might need to be involved; questioning an individual, if necessary with a domestic court taking evidence on oath or making orders for the disclosure of documents. A court taking evidence in this way may sit in private to protect sensitive information. Other examples include serving ICC court papers in the UK, or sending a UK prisoner to the ICC to give evidence, or identifying a person present in the UK. There are particular provisions for the freezing (for eventual seizure) of assets of an accused which are the profits of an ICC crime. These provisions follow existing UK legislation for international co-operation on the proceeds of crime.

Enforcement of Sentences

It is the UK's intention to reach an enforcement of sentences agreement with the ICC. Part 4 of the Act sets out some of the provisions on how this will work. These mostly concern the legal basis for the detention of prisoners, including under such circumstances as while they are travelling, their transfer to a different jurisdiction in the UK or a different State of enforcement, or their temporary transfer to the ICC to give evidence. ICC prisoners will be kept in the UK on the same terms as serious UK offenders.

ICC prisoners will be subject to the same regimes as domestic prisoners, and will be treated in the same way as domestic prisoners. Except in the important respect that the ICC will retain control over the length of their sentence – this Act disapplies various provisions on early or temporary release to ICC prisoners. Further details of the regime will be worked out in a bilateral agreement between the UK and the ICC.

The other kinds of sentences which may need to be enforced are fines and forfeiture orders or reparations to victims. Most of the provisions on these are set out in subordinate legislation. But the principles are the same as for domestic crime and resemble the provisions in place for the enforcement in the UK of overseas forfeiture orders from other States. They will provide for court orders to be made for the enforcement of fines or forfeiture orders, or for reparations to be collected. Reparations would be paid as directed by the ICC.

The ICC Offences

Part 5 of the Act sets out the provisions for incorporating the ICC offences into UK law. This ensures that the UK is able to prosecute offences under the Rome Statute effectively and successfully in domestic courts. There is also provision for the obligation under the Statute to ensure the prosecution of offences against the integrity of the Court and its processes.

The Act incorporates Articles 6-8 of the Statute almost in their entirety into domestic legislation in order to create the domestic crimes. Many of the offences were already offences in UK law but have now been incorporated in the wording of the Statute. To ensure that UK courts are able to keep in step with international developments, and to draw on international experience of the prosecution of ICC crimes, the Act sets out that the domestic courts shall take into account the ICC Elements of Crimes (set out in subordinate legislation), and any relevant ICC case law in interpreting these offences. They may also take into account any other relevant international jurisprudence.

Jurisdiction

As regards jurisdiction over suspected offenders, the UK courts will have jurisdiction over any person resident in the UK. This approach was taken in the War Crimes Act 1991 and the Sex Offenders Act 1997 (which dealt with sex tourism), but is wider than the jurisdiction usually taken in the UK for criminal offences, which is generally based on the territorial principle. The Act also lifts the so-called “dual criminality” rule in extradition. In practice this means that States with wider jurisdiction than the UK has taken will still be able to make extradition requests. Any person not liable to prosecution in the UK may of course still be liable to prosecution before the ICC. Any request coming from the ICC will be acted upon as set out in Part 2 of the Act. Responses to any such request will not be contingent on the nationality or State of residence of the accused.

In the case of offences against the administration of justice, the Statute calls on States to treat offences against the administration of justice of the ICC in the same way as they would treat offences against the administration of their domestic justice. This is the approach adopted in the Act.

On sentencing for the ICC crimes, and crimes ancillary to them, the Act follows the model in the Statute. On conviction for the domestic offence or ancillary offence not involving murder the penalty is a term of imprisonment not exceeding 30 years. For crimes involving murder the penalty is life imprisonment.