

**MEMORANDUM**

**UK INTERNATIONAL CRIMINAL COURT BILL**

**Purpose**

1. To set out the proposed handling of the implementation of the International Criminal Court (ICC) Statute, and in particular to set out those aspects which are proposed to be covered by the UK ICC Bill but which are within the competence of the Scottish Parliament.

**Background**

2. The UK International Criminal Court (ICC) Bill was introduced in the House of Lords on December 14. The Executive intends to introduce a Bill in the Scottish Parliament in April 2001, which will make provision for some of the matters in the UK Bill.

3. The purpose of the Bills is to give effect to the ICC Statute and thus to enable its ratification by the Government.

4. The Rome Statute of the International Criminal Court was signed by the UK Government on 30<sup>th</sup> November 1998, and is the culmination of considerable prior discussion and negotiation, which can be traced back to work begun by the International Law Commission in the aftermath of World War Two.

5. Since 1995, serious efforts were made to revitalise the Statute for an International Criminal Court. The Rome Statute was adopted on 17<sup>th</sup> July 1998, when 120 states voted in favour. Since then 25 states have ratified. However, the ICC can only be established when 60 states have fully and properly ratified the Statute.

6. The main arguments in favour of a permanent ICC are that it will:

- be a deterrent;
- end accusations of selective international justice;
- be based on core principles;
- allow for quick response; and
- promote reconciliation by placing responsibility on individuals not communities.

7. The Statute offences are genocide, war crimes and crimes against humanity. It is envisaged that the ICC would be able to investigate allegations of those crimes committed by nationals or on the territory:

- of States party to the Court, and
- of non party States who consent to the jurisdiction of the Court in an individual case, as with offences committed on the territory of a non party State which relate to a situation referred to the ICC by the UN Security Council.

8. The ICC is complementary to national jurisdictions and the ICC will only intervene where states are unable or unwilling to act.

## The UK ICC Bill

9. The legislation will provide the legal basis for the UK to provide support and co-operation to the ICC in all the ways provided for in the Statute, where this is not already possible under domestic law. The main features of the Bill are:

- to provide for arrest of suspects indicted by the ICC and for their surrender to the Court by the making of delivery orders granted by the courts in the United Kingdom;
- to provide for a range of other forms of judicial co-operation to the ICC;
- to provide for ICC prisoners to serve their sentences in prisons in the United Kingdom where the Secretary of State has accepted that the UK is to be designated as the place where the ICC sentence is to be served; and
- to make offences in the ICC Statute offences under the law of England and Wales and the law of Northern Ireland, to enable the courts in England and Wales and in Northern Ireland to try cases of ICC crimes.

10. The ICC Bill is in six parts.

### Part 1: Introductory Provisions

10.1 This part defines various terms used in the Bill and makes provision with regard to the legal capacity, privileges and immunities of the ICC, enables it to sit in the UK, gives effect to its rules of procedure and evidence and protects the pension benefits of UK judges serving on it.

### Part 2: Arrest and Delivery of Persons

10.2 This part provides for the arrest and delivery to the ICC of persons in the United Kingdom following a request from the ICC to the UK.

### Part 3: Other Forms of Assistance

10.3 This part makes provision to enable authorities in England, Wales and Northern Ireland only to comply with other requests by the ICC for judicial co-operation.

### Part 4: Enforcement of Sentences and Orders

10.4 This part provides for the Secretary of State to accept designation of the UK as the state in which a person is to serve a sentence of imprisonment imposed by the ICC and to issue a warrant bringing the person to the UK. It makes provision for persons sentenced to imprisonment by the ICC to serve their sentences in prisons in England, Wales and Northern Ireland or, with the involvement of the Scottish Ministers, in Scotland. It also makes possible the moving around of prisoners to serve sentences elsewhere or to take part in other criminal proceedings, and provides for the enforcement of fines and orders for forfeitures, restitution, compensation or rehabilitation issued by the ICC.

## Part 5: Offences under Domestic Law

10.5 This part incorporates into the law of England and Wales and of Northern Ireland the offences of genocide, crimes against humanity and war crimes, offences against the administration of justice by the ICC, and also offences ancillary to the crimes mentioned above.

## Part 6: Miscellaneous and General Provisions

10.6 This part, inter alia, sets out the territorial extent of the Bill.

### **Proposal**

11. While foreign affairs, including international relations, is reserved under the Scotland Act (Schedule 5, Part I, paragraph 7(1)), the implementation of such international obligations is within the competence of the Scottish Parliament in so far as those obligations relate to otherwise devolved matters. The UK ICC Bill contains some provisions extending to Scotland that fall within the reservation relating to foreign affairs. It is also proposed that some provisions within the UK Bill should extend to Scotland although they are not reserved by virtue of the Scotland Act.

### Part I – The International Criminal Court

12. Part I extends throughout the United Kingdom. This Part, which consists of clause 1 and Schedule 1, defines certain terms used in the Bill, including the ICC crimes and introduces the provisions of Schedule 1, as follows:

- the conferral of privileges and immunities under domestic law in relation to the ICC and its officers;
- the sittings of the ICC in the UK;
- the effect of the ICC's Rules of Procedure and Evidence;
- proof of orders, judgements, warrants or requests of the ICC;
- evidence about the ICC procedures and orders; and
- pension provision for UK judges of the ICC.

13. The Executive considers that the provisions in relation to procedural issues concerning the operation of the ICC and its orders, judgement, warrants and requests in Scotland is a matter which would be within the competence of the Scottish Parliament. However, some of the privileges and immunities normally conferred upon international bodies such as the ICC would include, for example, exemption from tax and customs duties and from border controls, which would fall outside the competence of the Parliament. Rather than attempt to divide up these provisions and then to replicate some of them in the Scottish Bill, the Executive believes it would be more sensible to deal with this issue on a UK basis. The mechanism proposed in the UK Bill for conferring these privileges and immunities on the ICC is by Order in Council. Scottish Parliamentary scrutiny will be maintained by a provision which states that no such Order may be made unless a draft has been approved by the Scottish Parliament.

## Part II - Arrest and delivery of persons

14. Part II extends to Scotland. This Part provides for the arrest and delivery to the ICC of persons as specified in a request from the ICC to the UK. The arrest of such persons by Scottish police forces and the delivery of them to the jurisdiction of an international tribunal such as the ICC by a Scottish court is in the view of the Executive a subject which would be within the competence of the Scottish Parliament to legislate.

15. However, this is an area in which it is essential to eliminate as far as is possible any doubt whatsoever as to the legality of arrest and delivery of specified persons. It is possible that a person arrested for surrender to the ICC under Scottish legislation could argue that such action fell within the definition of extradition, which is reserved by virtue of Part II Section B11 of Schedule 5 of the Scotland Act. The Executive takes the view that the arrest and delivery of a person to an institution such as the ICC is materially different from extradition to or from a sovereign state. However, it is arguable that such activities by analogy with extradition are also reserved and that a court could take this view.

16. The Executive considers it essential that no such loopholes are available. It would not be acceptable for those accused of extremely grave offences to escape justice in Scotland as a result of an unexpectedly successful challenge to the competence of the Scottish legislation. In the circumstances, it is recommended that the UK Parliament should legislate for the whole of the UK for the arrest and delivery of persons to the ICC.

## Part III – Other forms of assistance

17. Part III, which relates to the provision of forms of assistance to the ICC in relation to investigations or prosecutions initiated by the ICC, does not extend to Scotland except for the provisions of clause 39. That clause is concerned with restrictions on disclosure of information prejudicial to national security. It is thought that this matter is, in any event, a matter which relates to the reserved matter of national security under the Scotland Act 1998, (Schedule 5, Part II, section B8). Comparable provision to the other clauses in this Part will be within the Scottish Bill.

## Part IV – Enforcement of sentences and orders

18. This part details arrangements with regard to individuals convicted by the ICC, who are to serve their sentences in the UK. It also provides for the measures necessary to move prisoners about for sundry purposes e.g. appeal proceedings back at the ICC, change of designated place of imprisonment, attendance at further criminal proceedings etc.

19. The provisions of clause 42 deal with situations where the ICC designates the UK as the state in which a person is to serve a sentence imposed by the ICC. The Secretary of State, acting with the Scottish Ministers, will determine whether the prisoner should be detained in Scotland or elsewhere in the UK.

20. The provisions of clauses 43 to 48 deal with transfers of prisoners within the United Kingdom, and the arrangements for custody of prisoners in transit. These aspects would clearly need to involve actions on the part of the Scottish Prison Service, Scottish police forces and Scottish legal officials wherever the movement of prisoners was to or from Scotland.

21. While it is thought that provisions dealing with the moving of a prisoner to and from and within Scotland could be dealt with entirely within the Scottish Bill, it is clearly very important these provisions operate seamlessly where cross-border arrangements are required. It is the view of the Executive that the best way to ensure that no gaps are left in cross-border arrangements is to include all the relevant provisions within the UK Bill and so to avoid extremely complex statutory provisions in more than one enactment.

#### Part V – Offences under domestic law

22. Part V is concerned with offences under the law of England and Wales and Northern Ireland. It does not extend to Scotland except for the provisions of clauses 70 to 72 which are concerned with the reserved matter of the Extradition (see Scotland Act 1998, Schedule 5, Part II, section B11). Comparable provision in relation to Scotland will be contained in the Scottish Bill.

#### Part VI – General provisions

23. Part VI contains general provisions in relation to interpretation, extent, regulations in relation to Scotland and application of provisions to other international tribunals. It extends throughout the United Kingdom. It relates to devolved competence so far as it relates to other matters of the Bill that are within the devolved competence of the Scottish Parliament. In view of the subject matter of Part VI, it is considered that it would be appropriate for the Part to extend throughout the United Kingdom.

**Scottish Executive**  
**January 2001**