

HUMAN RIGHTS WATCH

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DRAFT No.2 - Table 2: Implementation of the Rome Statute

Implementation Strategies Adopted by: Norway, Finland, Estonia, the Netherlands and Germany¹

Comparative criteria	Country				
	Norway	Finland	Estonia	Netherlands	Germany
Status of implementing legislation	<p>SOME IMPLEMENTING LAW ENACTED</p> <p>Implementing legislation regarding Norway’s obligations to cooperate was enacted on 15 June 2001 (Act No.65 of 2001).²</p> <p>Norway ratified the Rome Statute on 16 February 2000.</p>	<p>IMPLEMENTING LAWS ENACTED</p> <p>Two implementing Acts (Act No. 1284/2000 – “the Cooperation Act” - and Act No. 1285/2000 – “the ICC Crimes Act”) were enacted on 28 December 2000. Both Acts commenced on 1 July 2002.</p> <p>Finland ratified the Rome Statute on 29 December 2000.</p>	<p>IMPLEMENTING LAWS ENACTED</p> <p>Two Acts (“the Ratification Act” and “the ICC Procedure Act”) contain minimal implementing provisions and were enacted in late 2001. A <i>Penal Code</i> of 6 June 2001 – to enter into force late 2002 – replaces the <i>Criminal Code</i> and incorporates many ICC crimes.</p> <p>Estonia ratified the Rome Statute on 30 January 2002.</p>	<p>SOME IMPLEMENTING LAW ENACTED</p> <p>There are two implementing Acts (“the Cooperation Act” and “the International Crimes Act”). The Cooperation Act entered into force on 1 July 2002. The International Crimes Act is still before Parliament.</p> <p>The Netherlands ratified the Rome Statute on 17 July 2001.</p>	<p>DRAFT BILLS</p> <p>The <i>Code of Crimes Against International Law</i> (“the International Crimes Code”), will incorporate the ICC crimes into domestic German law. The <i>Rome Statute Implementation Act</i> will regulate German cooperation with the ICC. Both Bills are currently before Parliament.</p> <p>Germany ratified the Rome Statute on 11 Dec. 2000.</p>

¹ This informative chart, with the exception of the Germany entry, is initially based on each country’s Status Report prepared by the government and submitted to the Council of Europe. In some cases only minimal provisions of the implementing law provided with the Status Report were examined. The German draft *Code of Crimes Against International Law* has been reviewed. Importantly, each entry has been settled in consultation with government representatives from each relevant country during and after the 9th Preparatory Commission meeting in April 2002. Updates since the 9th PrepCom have not been subject to consultation. Comments from government representatives are welcome.

² Even though some ICC crimes may be covered by existing offences in the Norwegian Penal Code, Norway considers it appropriate to update the Penal Code in light of the Rome Statute. Possible amendments to the Penal Code have been suggested in a recent report submitted by the Permanent Commission on Criminal Law.

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Comparative criteria	Country				
	Norway	Finland	Estonia	Netherlands	Germany
General summary	The Act contains minimal provisions that implement, in a general sense, the obligations to cooperate with the ICC and enable Norwegian authorities to provide voluntary assistance to the Court. ³	The provisions of the Rome Statute, insofar as they are of a legislative nature, entered into force in Finland on 1 July. Provisions of the Penal Code that are not identical with the Rome Statute apply only with regard to proceedings in Finland. If national proceedings under the Penal Code are not possible, the Cooperation Act would oblige Finnish authorities to surrender the suspect to the ICC.	The Acts contain minimal provisions that implement aspects of the obligations to cooperate with the ICC. Arguably, this may not compromise Estonian cooperation with the ICC. ⁴	The Cooperation Act implements the obligation to cooperate with the ICC and specific Host Country matters. The International Crimes Act implements the substantive offences of the Rome Statute and other relevant international law instruments (e.g. Geneva Conventions, Convention against Torture).	The International Crimes Code implements the substantive offence provisions of the Rome Statute. The <i>Rome Statute Implementation Act</i> will regulate German cooperation with the ICC.
Were any constitutional amendments made?	No.	No, but certain provisions of the Cooperation Act were enacted via special Parliamentary procedures so that they override the Finnish Constitution to the extent of any inconsistency. ⁵	No (but see “Immunities, etc” section).	No, but the Ratification Act was enacted via special Parliamentary procedures so that the Rome Statute overrides the Dutch Constitution to the extent of any inconsistency. ⁶	Yes. An amendment to Germany’s Basic Law (i.e. its Constitution) was made enabling the surrender of German citizens to the ICC. ⁷

³ The minimalist provisions should be interpreted in light of travaux préparatoires, adopted by the Norwegian Parliament and which further delineate the scope of Norway’s obligations under the Rome Statute.

⁴ Ratification of the Rome Statute means that its provisions apply in Estonia, even to the extent that there is any inconsistency with domestic laws (Art. 123 of the Constitution).

⁵ The special provisions were passed by a two-thirds parliamentary majority to override, as they would apply to the ICC: (i) the constitutional prohibition on surrendering Finnish nationals to foreign courts and (ii) the constitutional power of the Finnish President to pardon sentences enforced in Finland. Also, the provision of the Cooperation Act which obliges witnesses to comply with the ICC’s request to appear in a hearing before the ICC was enacted via the same special procedure.

⁶ The Ratification Act was passed by a two-thirds parliamentary majority to override the prosecutorial immunity enjoyed by the Head of State generally and by politicians regarding their written and spoken Parliamentary communications.

⁷ The Basic Law states that “No German may be extradited to a foreign country.” This has been qualified to allow extradition to “an international court provided there is observance of the principles of the rule of law.”

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Incorporation of ICC crimes into domestic law	The Act <i>does not</i> incorporate the ICC crimes into Norwegian domestic law. ⁸	The majority of the ICC crimes already existed in the Finnish Penal Code. The ICC Crimes Act updated the Penal Code to incorporate the administration of justice offences in the Rome Statute. However, there are some gaps (see “Definitions of Crimes” section).	The ICC crimes already exist in the Estonian Penal Code. ⁹	Genocide and certain war crimes are already crimes under Dutch law. However, the International Crimes Act will fill the gap with regard to crimes against humanity, while also incorporating genocide, war crimes and torture.	All of the ICC crimes will be incorporated into German domestic law pursuant to the International Crimes Code. (There are some differences – see “Definitions” section below.) The draft Code goes beyond the requirements of the Rome Statute where norms of customary international criminal law are wider in scope than the Rome Statute. ¹⁰
Definition of ICC crimes (Articles 6,7,8 – genocide, crimes against humanity and war crimes - &	Not yet incorporated.	Finland has relied on the existing definitions of genocide and war crimes in the Penal Code. These substantively correspond to the ICC crimes. The Penal Code does not	The definitions of genocide, crimes against humanity and war crimes in the Penal Code substantively correspond to the ICC crimes.	The International Crimes Act generally replicates the definitions of the Rome Statute. With regard to war crimes it also contains a general criminalization of ‘breaches of the laws and customs of war’.	Although the draft International Crimes Code does not define each crime in detail it generally replicates the Rome Statute. Although some differences are apparent these are not substantive and were

⁸ The Permanent Commission on Criminal Law regarding reviews of the Norwegian Penal Code has proposed to incorporate the ICC crimes into the Penal Code, and to include a provision stating that the maximum penalty applies to these crimes.

⁹ Sections 89 – 109 of the Estonian Penal Code outline the offences of genocide, crimes against humanity and war crimes. A crime of aggression is also included. The offences of genocide and crimes against humanity are broadly consistent with the definitions of the crimes in the Rome Statute (although less detailed). A number of separate war crimes are included in the Penal Code.

¹⁰ For example, under Protocol I of 1977 to the 1949 Geneva Conventions and under Protocol II of 1999 to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

¹¹ Finland currently relies on the fact that crimes against humanity usually fulfill the elements of homicide and bodily injury, sexual offences and offences against personal liberty in the Penal Code. However, Finland is considering amending the Penal Code to expressly replicate the ICC crimes and to better conform to the Rome Statute. Indeed, the Legal and Foreign Relations Parliamentary Committee recommended this course of action.

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9 – Elements of Crimes)		cover the circumstances defined as crimes against humanity in the Rome Statute. ¹¹			required to maintain consistency with the existing German Criminal Code. ¹²
Universal jurisdiction¹³ (UJ)	Existing offences in the Penal Code, which cover some of the ICC crimes (see also fn 2), are subject to extra-territorial jurisdiction, so that certain crimes committed abroad by foreigners can be prosecuted – Norway characterizes this as UJ. ¹⁴	Yes, existing s.7 of Chapter 1 of the Penal Code applies UJ to crimes generally, including the ICC crimes. <i>Characteristics of UJ:</i> UJ is asserted on the basis of binding international agreements, which would cover the majority of the ICC crimes. ¹⁵	Yes, existing s.8 of the Penal Code applies UJ to crimes generally, including the ICC crimes. <i>Characteristics of UJ:</i> UJ is asserted on the basis of binding international agreements, which would cover the majority of the ICC crimes. ¹⁵	Currently, UJ exists for some crimes (e.g. torture and war crimes). The International Crimes Act will assert UJ for all the ICC crimes subject to a presence requirement. <i>Characteristics of UJ:</i> The accused must be present in the territory of the	Yes. Section 1 of the International Crimes Code extends UJ to all ICC Crimes “even when the offence was committed abroad and bears no relation to Germany”. ¹⁶ <i>Characteristics of UJ:</i> There is a presence requirement. ¹⁷

¹² For example, the various war crimes are differentiated depending on the level of injury inflicted. Lower penalties are then explicitly prescribed for the infliction of less serious injuries. (See s.9 of the draft International Crimes Code.)

¹³ Many jurisdictions purport to apply UJ subject to a “presence requirement”. The term “presence requirement” is used here to refer to a requirement for the accused to be physically situated within a country’s territory before giving rise to the necessary jurisdiction to prosecute. In jurisdictions with a “presence requirement” the accused must generally be present only for the prosecution stage of proceedings. A country could open an investigation into an accused’s conduct *in absentia* but, before a prosecution could proceed, the accused would have to be successfully extradited to the country intending to prosecute.

¹⁴ However, until the Penal Code is amended to specifically incorporate the ICC crimes it remains uncertain as to whether complete UJ will apply to ICC crimes under Norwegian law. The implementing law already in place states that for ICC crimes committed by a foreigner outside Norway the usual step of obtaining approval of the King in Council of State to prosecute is not required.

¹⁵ This assertion of UJ is based on a formula common to a number of jurisdictions. The basic formula is: a country’s law shall apply to an offence committed outside of that country where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on that country. In other words, UJ applies to *international* offences, including the ICC crimes contained in the Rome Statute.

¹⁶ With the exception of negligent commission of command responsibility offences (ss. 13 – 14 of the International Crimes Code.)

¹⁷ The *Code of Criminal Procedure* will be amended to include a new s.135f stating that UJ will be exercised on condition that the suspect is present on German territory (eg. during a stopover at an airport) or that his/her presence is to be expected. If another international court or state is prosecuting that person, Germany is likely to surrender or extradite that person to the international court or other state.

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				Netherlands. This should not prevent an investigation commencing <i>in absentia</i> .	
Retrospectivity (Articles 11 & 24)	No. Retrospectivity would contravene the Norwegian Constitution.	The Acts will not apply retrospectively (although certain ICC crimes already existed in the Penal Code).	No. Retrospectivity would contravene the Estonian Constitution (see Art. 23).	No.	No. Retrospectivity would be unconstitutional.
Immunities, etc (Article 27)	The Act is silent on this issue. The Constitution confers immunity on the King. ¹⁸	Article 27 of the Rome Statute will be in force as of 1 July. The Constitution confers immunity in some circumstances. ¹⁹	The Acts are silent on this issue. The Constitution confers immunity in certain circumstances. ²⁰	The International Crimes Act contains a provision recognizing immunities of Heads of State or Government, foreign ministers etc, to the extent that they exist under international customary or treaty law.	The International Crimes Code remains silent on this issue. German courts must determine whether immunities at international law bar the exercise of German jurisdiction. <i>The Rome Statute Implementation Act</i> also remains silent on this issue. Germany considers that only the ICC is competent to resolve immunity issues under Art. 98 of the Rome Statute. In this regard, the German Constitution is considered to override any immunities conferred under German national law. ²¹

¹⁸ Article 5 of Norway’s Constitution states: “The King’s person is sacred; he cannot be censured or accused.” Norway considers that there is considerable legal uncertainty as to whether a conflict would ever arise between the Rome Statute and this constitutional immunity. In any event, the extremely slight and uncertain hypothetical possibility of conflict is considered to be no impediment to full Norwegian cooperation with the ICC.

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Statute of Limitations (Article 29)	The Permanent Commission on Criminal Law has proposed that the Penal Code includes a provision prohibiting the application of statutory limitations to the ICC crimes.	The Acts are silent on this issue. ²²	There is no limitation period for the ICC crimes and other crimes punishable by life imprisonment under the Penal Code.	The International Crimes Act excludes any statute of limitations, except for the least serious war crimes. ²³	Relevant statutes of limitations are expressly overridden for the ICC crimes (see s.6 of the International Crimes Code). ¹⁶
Command responsibility (Article 28)	Not present in implementing law. The Permanent Commission on Criminal Law has proposed to incorporate Art. 28 into the Penal Code.	Not present in implementing law. There are no specific provisions in the Penal Code either. ²⁴	Yes. Section 88(1) of the Penal Code substantively replicates Art. 28 of the Rome Statute.	The International Crimes Act contains a provision similar to Art. 28 of the Rome Statute. ²⁵	Yes. The draft International Crimes Code and existing German law replicate the command responsibility provisions. ²⁶
Superior orders	This concept of criminal	The Acts are silent on this	This defense is specifically	The International Crimes Act	This defense is excluded if

¹⁹ The Finnish Constitution confers some immunity on the President and members of the Government (i.e. Ministers) and there are particular procedures regarding the institution of proceedings against the President, Ministers and Members of Parliament in other laws. The Finnish Parliament decided that because of the nature of the seriousness of the ICC crimes these provisions would not apply in a relevant situation so there was no need to expressly override them.

²⁰ Articles 46II-IV of the German Basic Law expressly prohibits the prosecution of German officials unless permission has been granted by the German Parliament. In contrast, Article 24 of the Basic Law authorises the German Parliament to transfer part of German sovereign rights to an international body like the ICC. It is considered that Article 24 overrides Articles 46II-IV so that the potential immunity conferred in the Basic Law is not applicable to the ICC.

²¹ Genocide and common murder – currently relied upon in lieu of specific crimes against humanity offences (see fn 10) – are not subject to a limitation period. The Constitutional Law Parliamentary Committee has recommended a review with regard to the other ICC crimes.

²² For grave breaches of the Geneva Conventions and war crimes of similar gravity no statute of limitations exists.

²³ Finland asserts this aspect of criminal responsibility is partly covered under existing Finnish law.

²⁴ Where the commander ‘reasonably should have known’ of the offence committed by his subordinate, the maximum penalty is one third less than when he ‘knew’.

²⁵ However, where a commander does not know in advance that a crime will be committed by a subordinate his/her failure to properly supervise a subordinate (resulting in the commission of a crime) or to subsequently report that submission is considered less serious than a situation where the commander *consciously* abstains from preventing the commission of a crime he/she knows to be imminent.

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Comparative criteria	Country				
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(Article 33)	liability is already included in the Penal Code.	issue. Existing provisions on the Penal Code on criminal responsibility of a subordinate officer are currently under review.	excluded in s.88(2) of the Penal Code.	contains a provision similar to Art. 33 of the Rome Statute.	the accused knew that the order was unlawful or if it was manifestly unlawful. ²⁷
Cooperation with the ICC	The cooperation provisions of the Rome Statute apply by virtue of s.1 of the Act. Little is added to the requirements of the Rome Statute by the Act.	The cooperation provisions of the Rome Statute apply by virtue of s.1 of the Cooperation Act. Little is added to the requirements of the Rome Statute by the Act.	The Acts only incorporate a few of the cooperation provisions specifically. But because the Rome Statute is afforded primacy under Estonia's Constitution the cooperation provisions should still apply (although it would be better to have them specifically implemented).	The cooperation provisions of the Rome Statute will be implemented in the Cooperation Act. Additional provisions will be included given the Netherlands unique situation as host country for the ICC.	The <i>Rome Statute Implementation Act</i> should comprehensively replicate the obligations to cooperate in the Rome Statute.
(i) general obligation to cooperate	Yes. See s.1 of the Act, which states that: "Requests from the Court shall be complied with in so far as the Rome Statute provides."	Yes. See s.1 of the Cooperation Act, which states: "The provisions of the [Rome Statute], insofar as they are of a legislative nature, shall be in force as applicable law in accordance with the commitments of Finland." ²⁷	Acts necessary to cooperate with the ICC will be performed pursuant to the <i>Code of Criminal Procedure</i> . ²⁹	No. There is no general cooperation provision in the Cooperation Act.	Yes. See s.1 of the <i>Rome Statute Implementation Act</i> .
(ii) provision to	Yes. See s.2 of the Act.	Yes. See s.3 of the	No. Estonia has elected to	Yes. See Art. 11 of the	Yes. See Part 2 of the <i>Rome</i>

²⁶ Although section 22 of the German *Military Criminal Code* states that the execution of an obligatory order cannot be unlawful this does not constitute a loophole. Under German military criminal law an order that constitutes a criminal offence can never be obligatory.

²⁷ See also, s.4(1) of the Cooperation Act: "The competent Finnish authorities shall be under an obligation to give judicial assistance to the International Criminal Court, as required by the Court, for the investigation and prosecution of crimes within the jurisdiction of the Court."

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Comparative criteria	Country				
	Norway	Finland	Estonia	Netherlands	Germany
arrest and surrender upon ICC request	Although s.2 states that Norway “may” surrender a person upon request of the ICC rather than “shall”, the general obligation to cooperate in s.1 of the Act oblige full cooperation with the ICC. Note that the surrender procedure may also be governed by the existing Extradition Act. ³⁰	Cooperation Act. Note that the procedural aspects of surrender may be governed by the existing Extradition Act. ³⁰	rely on existing extradition procedures. ³¹	Cooperation Act.	<i>Statute Implementation Act.</i>
(iii) additional requests for assistance contemplated	Yes. See s.3 of the Act. Additional assistance is subject to prohibitions at Norwegian law.	Yes. See ss.1 and 4 of the Cooperation Act.	Not specifically. But because the Rome Statute is afforded primacy under Estonia’s Constitution these cooperation provisions would still apply.	Yes. See Art. 45 of the Cooperation Act.	Yes. See Part 5 of the <i>Rome Statute Implementation Act.</i>
(iv) ICC prosecutor allowed to investigate on territory	This provision is not expressly stated in the Act, although could be covered under the general obligation to cooperate (see s.1 of the Act).	This provision is not expressly stated in the Act, although Finland considers it is covered under the general obligation to cooperate (see s.1 of the Cooperation Act).	Yes. The ICC prosecutor has the same rights and duties of an Estonian prosecutor (see Art. 415 of the <i>Code of Criminal Procedure</i>). ³²	The Cooperation Act does not contain a statutory right for the Prosecutor to investigate independently. ³³	Yes. See s.62 of the <i>Rome Statute Implementation Act</i> ; see also s.60 which allows ICC personnel to be present while German authorities are providing legal assistance to the ICC.
(v) incorporates	Yes. See s.12 of the Act,	Yes. The ICC Crimes Act	Yes. Existing administration	Yes. A separate act	Yes. See s.2 of the <i>Rome</i>

³⁰ A surrender request shall be dealt with in accordance with the Extradition Act (Norway: s.3, para 2; Finland: s.3(2)). This may affect the surrender procedure as conceived under the Rome Statute.

³² However, the ICC prosecutor must act in accordance with the Estonian *Code of Criminal Procedure* (see Art. 415(3)).

³³ Article 46 of the Cooperation Act states: ‘Requests of the Court for cooperation under Article 93 of the Rome Statute shall be executed, in as much as possible, in the manner indicated in the request, including the possibility for the persons indicated by the Court to be present and to assist in the execution.’

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Comparative criteria	Country				
	Norway	Finland	Estonia	Netherlands	Germany
administration of justice offences (Article 70)	which refers to existing administration of justice offences in the Penal Code.	inserted these offences into the Penal Code.	of justice offences in the Penal Code would extend to the ICC context.	amending the <i>Criminal Code</i> is pending before Parliament. The amendments will not replicate Art. 70 literally, but will extend existing offences against the administration of justice to the ICC context.	<i>Statute Implementation Act.</i>
Fair trial standards (Article 67)	Not in implementing law. Norway's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute. Sections 5 to 9 supplement the fair trial requirements of the Rome Statute.	Not in implementing law. Finland's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.	Not in implementing law. Estonia's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute. ³⁴	Not in implementing law. The domestic laws and trial procedures of the Netherlands already reflect the international standards picked up by the Rome Statute.	Not in implementing law. Germany's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.
Willingness to take ICC prisoners in legislation	Yes. See s.10 of the Act.	Yes. See s.7 of the Cooperation Act.	Not specifically addressed. ³⁴	Yes. See Arts. 67 and 68 of the Cooperation Act with respect to 'voluntary' enforcement of sentences and enforcement of sentences by the Host State under Article 103, par. 4, of the Rome Statute.	Yes. See Part 4 of the <i>Rome Statute Implementation Act.</i>
Protecting victims,	These requirements are not expressly stated in the Act,	These requirements are not expressly stated in the Act,	The <i>Code of Criminal Procedure</i> provides for	The provisions of the Cooperation Act dealing	Yes. See s.56 of the <i>Rome Statute Implementation Act.</i>

³⁴ As the Rome Statute is afforded primacy under Estonia's Constitution these provisions automatically apply.

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Comparative criteria	Country				
	Norway	Finland	Estonia	Netherlands	Germany
witnesses and establishing a victims' trust fund	but could be covered under the obligations to cooperate (see ss.1 and 3 of the Act). Victims and witnesses are also protected under the Penal Code and the Police Code.	although could be covered under the obligations to cooperate (see ss.1 of the Cooperation Act).	anonymous witnesses (e.g. s.791). The <i>State Benefits to Victims of Crimes Act</i> helps victims in alleviating the material consequences arising from serious violent crimes. ³⁴	with Host Country matters contemplate protection measures for all those required to be at the seat of the Court, including victims and witnesses. The Netherlands is relying on the general obligation to cooperate with requests of the Court to cover Trust Fund interests.	