

HUMAN RIGHTS WATCH

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DRAFT No.2 - Table 3: Implementing the Rome Statute

Implementation Strategies Adopted by: Argentina, Spain, France, Switzerland and Belgium¹

Comparative criteria	Country				
	Argentina	Spain	France	Switzerland	Belgium
<p>Status of implementing legislation</p>	<p>DRAFT BILL</p> <p>The implementing law is currently being developed. A draft implementing law (“the Draft Law”) has been publicly released and is currently awaiting Presidential signature for subsequent submission to Congress.</p> <p>Argentina ratified the Rome Statute on 8 February 2001.</p>	<p>DRAFT BILL</p> <p>Implementing legislation is currently being developed. Incorporating obligations to cooperate with the ICC is the legislative priority of Spain.²</p> <p>Spain ratified the Rome Statute on 25 October 2000.</p>	<p>SOME IMPLEMENTING LAW ENACTED</p> <p>In February 2002, the Parliament unanimously adopted the <i>Bill Concerning Cooperation with the International Criminal Court</i>. The law addresses only procedural issues. Amending the <i>Code of Criminal Procedure</i>, the Bill inserts a new Section 1 – Cooperation with the International Criminal Court – in Part 4: “Particular Procedures”.</p>	<p>SOME IMPLEMENTING LAW ENACTED</p> <p>The Federal Bill on Cooperation with the ICC was adopted in order to enable Switzerland to fully cooperate with the Court. A separate law implemented Art. 70 of the Rome Statute. A second set of laws will be formulated at a later time to address substantive matters, notably those concerning implementation of ICC crimes and universal jurisdiction.</p>	<p>DRAFT BILLS</p> <p>Two implementing laws will be adopted separately. The first relates to cooperation with the ICC (“the Bill”). The second (“the substantive law”) complements Belgium’s substantive criminal law in order to harmonize it with the Statute’s provisions on the ICC crimes. The Cabinet approved the Bill on 25 January 2002 and it will be sent to the Parliament for adoption, subject to possible</p>

¹ This informative chart was generated by reviewing a country’s Council of Europe Status Report prepared by the government or, preferably, reviewing actual or proposed implementing laws for each jurisdiction. Aspects of adopted or proposed implementing laws in Argentina, France, Switzerland and Belgium were 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 Stated in the Ratification Progress Report provided by Spain to the Council of Europe on 4 September 2001. According to this Progress Report, updating the substantive criminal laws is the next priority and should proceed once the cooperative provisions have been enacted. The Progress Report states that it is hoped that the cooperation obligations are incorporated into Spanish law by the end of 2002.

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Comparative criteria	Country				
	Argentina	Spain	France	Switzerland	Belgium
			France ratified the Rome Statute on 9 June 2000.	Switzerland ratified the Rome Statute on 12 October 2001	amendment. The Ministry of Justice is currently drafting the substantive law. France ratified the Rome Statute on 28 June 2000.
General summary	The Draft Law comprehensively implements the key provisions of the Rome Statute.	The Rome Statute applies by virtue of Spain's ratification. ²	The Bill's provisions are limited to aspects of cooperation between France and the Court. The Ministry of Justice has assured that a substantive law incorporating the ICC crimes and providing for universal jurisdiction will be adopted separately.	The cooperation Bill specifies and facilitates compliance with the obligations set forth in Parts IX and X of the Statute, as well as procedural matters treated in other parts concerning cooperation. The Bill Amending the Criminal Code and the Military Criminal Code incorporates into Swiss law the offenses against the administration of justice by the ICC.	The cooperation Bill addresses all aspects of cooperation between Belgium and the Court.
Were any constitutional amendments made?	No. ³	No. ⁴	Yes. See the 22 January 1999 decision of the Constitutional Court, No 98-408 DC, pursuant to which a constitutional amendment was approved in June 1999.	No. ⁵	Yes. See the 21 April 1999 opinion of the Conseil d'Etat (the Belgian constitutional court).

² Under the Spanish Constitution the Rome Statute takes precedence over domestic laws. However, Spain is in the process of developing implementing legislation to clarify its statutory obligations to the ICC and applicable domestic offences.

³ However, the Draft Law, if adopted by a 2/3 majority of both Parliamentary chambers, will incorporate the Rome Statute into the Constitution giving it constitutional rank.

⁴ Despite the Spanish Constitution conferring absolute immunity on the King, the State Council decided that ratification did not necessitate constitutional amendments.

⁵ Constitutional provisions regarding extradition were not expressly overridden because it was considered that the potential surrender of nationals to the ICC was to be distinguished from extradition to other States.

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Comparative criteria	Country				
	Argentina	Spain	France	Switzerland	Belgium
Incorporation of ICC crimes into domestic law	The Draft Law incorporates all of the ICC crimes. In some cases the Draft Law goes beyond the requirements of the Rome Statute. ⁶	Many of the ICC crimes already exist as part of Spanish domestic law. An amending law will be prepared so that the Spanish <i>Penal Code</i> and <i>Military Penal Code</i> pick up the substantive ICC crimes.	No. A substantive law, to be adopted separately, will address this issue.	No. This issue will be resolved by a forthcoming law. The authorities felt obliged to privilege the legislation at issue here, seen as “urgently required in light of Swiss ratification.”	No. The Bill does not address this issue, which is to be resolved by the substantive law.
Definition of ICC crimes (Articles 6,7,8 – genocide, crimes against humanity and war crimes - & 9 – Elements of Crimes)	The Draft Law provides separate definitions for each of the ICC crimes. These definitions are consistent with the Rome Statute. Although generally the maximum penalties for the ICC crimes appear lower than prescribed in the Rome Statute.	<i>Awaiting draft Spanish implementing law</i>	No. A separate law will address this issue at a later time.	No. A separate law will address this issue.	No. The substantive law will address this issue.
Universal jurisdiction⁷ (UJ)	To some degree. Article 1(4) of the Draft Law applies UJ when so established by treaties ratified by Argentina. Characteristics of UJ: UJ is asserted on the basis of binding international	<i>Awaiting draft Spanish implementing law</i>	Currently, subject to a presence requirement. ⁹ It is anticipated that a substantive law, to be adopted separately in relation to the ICC crimes, will address this issue.	Currently, only for some crimes. ¹⁰ However, a separate law, to be adopted separately in relation to the ICC crimes, may be adopted to address this issue.	Yes, partially. Under existing Belgian law, domestic courts may exercise universal jurisdiction over serious violations of international humanitarian law. See Art. 7 of the <i>Law of 10 February on the Punishment of Serious</i>

⁶ For example, in the war crimes context the prohibited age for child soldiers is 18 years rather than the lower 15 years prescribed in the Rome Statute.

⁷ 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.

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	Argentina	Spain	France	Switzerland	Belgium
	<p>agreements, which would include the Rome Statute.⁸</p> <p>Argentine authorities must extradite or prosecute when the suspect is found in Argentine territory (Art.2).</p>		<p>Characteristics of UJ:</p> <p>Under existing law the victims are required to establish that the suspect is in French territory.</p>		<p><i>Violations of International Humanitarian Law.</i>¹¹</p> <p>Characteristics of UJ:</p> <p>There is no presence or consent restriction.</p>
<p>Retrospectivity</p> <p>(Articles 11 & 24)</p>	No. ¹²	<i>Awaiting draft Spanish implementing law</i>	No. ⁹	No. ⁹	No. ⁹
<p>Immunities, etc</p> <p>(Article 27)</p>	The Draft Law remains silent on this issue.	There are apparently no constitutional issues regarding "official capacity". <i>However, the implementing legislation would need to be reviewed to ascertain whether Article 27 was fully implemented.</i>	The Constitutional Court had found Art. 27 of the Statute to be incompatible with Arts. 26, 68 et 68.1 of the French Constitution, which establish specific frameworks of responsibility for the President of the Republic, government officials and members of Parliament. The matter was subsequently resolved by means of a constitutional amendment.	There are no constitutional problems with respect to own officials. With respect to officials of other States, the Federal Bill on Cooperation with the ICC states that the Federal Council must decide on questions of immunity which arise in the execution of a request relating to Art. 98 in conjunction with Art. 27 of the Statute.	In its opinion of 21 April 1999, the Conseil d'Etat had found Art. 27 of the Statute to be incompatible with provisions in the Belgian Constitution, which provides for absolute immunity of the King (Art. 88) and grants immunity to members of Parliament. ¹³

⁸ This assertion of UJ is based on a formula common to a number of jurisdictions. The basic formula is: that 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.

⁹ Arts. 689-1, 689-2 to 689-7 of the existing *Criminal Procedure Code*.

¹⁰ Genocide and war crimes may, under certain conditions, be prosecuted on the basis of universal jurisdiction under current laws.

¹¹ While this act only applies to certain of the crimes under the ICC's jurisdiction, the underlying principle of universal jurisdiction should extend to the ICC crimes once these have been incorporated into Belgian legislation by the substantive law.

¹² The non-retrospectivity of criminal offenses is a well established principle in this country's legal tradition.

¹³ The opinion of the Conseil d'Etat does not have binding force. Nonetheless, in the view of the Government, compliance with the opinion would require the addition of a constitutional provision, providing that « the State adheres to the statute of the International Criminal Court . . . ». However, no such amendment has yet been adopted.

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Comparative criteria	Country				
	Argentina	Spain	France	Switzerland	Belgium
Statute of Limitations (Article 29)	There is no limitation period for the ICC crimes. ¹⁴	<i>Awaiting draft Spanish implementing law</i>	There is no limitation period for serious crimes. ¹⁵	In Swiss criminal law, there is no statute of limitations for genocide, grave breaches of the Geneva Convention and a number of other crimes. A future law is required to address the issue more clearly for all ICC crimes.	There is no limitation period for the ICC crimes. ¹⁶
Command responsibility (Article 28)	Yes. Consistent with the Rome Statute, criminal responsibility is expressly stated to extend to commanders and other superiors (Art. 7 of the Draft Law).	<i>Awaiting draft Spanish implementing law</i>	The substantive law will address this issue at a later time.	According to applicable principles of Swiss criminal law, a superior can be held criminally responsible for crimes committed by his subordinates. A future law will address the issue specifically with respect to the ICC Statute and other norms of international humanitarian law.	The substantive law will address this issue.
Superior orders (Article 33)	Yes. The Rome Statute defense of superior orders is replicated in Art.12 of the Draft Law.	<i>Awaiting draft Spanish implementing law</i>	The substantive law will address this issue at a later time.	The Swiss Military Penal Code contains a general provision on superior orders (article 18). A future law will address the issue specifically with respect to the ICC Statute and other norms of international humanitarian law.	The substantive law will address this issue.

¹⁴ Ordinarily, Argentine law has relatively short limitation periods. These are specifically overridden by Art. 8 of the Draft Law.

¹⁵ The Constitutional Court found that the policy of « exempting legal claims from the rules of time limitation when they concern those crimes so serious as to be of concern to the international community as a whole » comports with the rules and principles of the French constitutional tradition.

¹⁶ See Art. 8 of the Law of 10 February 1999 on the Punishment of Grave Violations of International Humanitarian Law.

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	Argentina	Spain	France	Switzerland	Belgium
Cooperation with the ICC	The Draft Law implements most of the obligations to cooperate with the Court.	The Spanish Council of Europe Progress Report anticipates that the cooperation provisions of the Rome Statute will be fully incorporated into Spanish law.	The Bill does not address all aspects of cooperation with the Court.	The obligations for cooperation with the Court are implemented through the Federal Bill on Cooperation with the International Criminal Court.	The Bill contains provisions governing all aspects of cooperation with the Court.
(i) general obligation to cooperate	Yes. See Arts. 36 – 40 of the Draft Law.	Yes. See above.	Yes. Art. 627 of the Bill.	Yes, Art. 1 and 2	Yes. Art. 3 of the Bill.
(ii) provision to arrest and surrender upon ICC request	Yes. See Arts. 41 – 70 of the Draft Law.	Yes. See above.	Yes. Arts. 627(4)—627(15)	Yes. Arts. 16-28.	Yes. Arts. 12-21 of the Bill.
(iii) additional requests for assistance contemplated	Yes. See Art. 71 of the Draft Law.	Yes. See above.	Yes. Arts. 627(1)—627(3).	Yes. Arts. 29-41.	Yes. Arts. 22-32 of the Bill.
(iv) ICC prosecutor allowed to investigate on territory	Yes. See Art. 77 of the Draft Law.	Yes. See above.	No. This issue is not specifically addressed.	Yes. Art. 38.	Yes. Art. 33 of the Bill.
(v) incorporates administration of justice offences	Yes. See Arts. 22 – 31 of the Draft Law.	Yes. The Progress Report specifically acknowledges that Spanish law will need amending to incorporate these offences.	No. This issue is not specifically addressed.	Yes. The Federal Bill Amending the Criminal Code and the Military Criminal Code addresses this matter.	Yes. Art. 42 of the Bill.
(Article 70)					

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Fair trial standards (Article 67)	Yes. It can be assumed that in general Argentina's domestic laws and trial procedures already reflect the international standards included in the Rome Statute.	Yes. It can be assumed that Spain's domestic laws and trial procedures already reflect the international standards picked up by the Rome Statute.	Yes. France already applies rules and principles consistent with international standards respecting the right to a fair trial.	Yes. Swiss domestic law already conforms with international standards for a fair trial.	Yes. Belgian domestic law already reflects international and European standards respecting the right to a fair trial.
Willingness to take ICC prisoners in legislation	Yes. See Art. 78 of the Draft Law.	Yes. ¹⁷	Yes. Art. 627(18)—627(20).	Yes. But solely with respect to prisoners who are Swiss nationals or who normally reside in Switzerland. Art. 53.	Yes. Arts. 34-41.
Protecting victims, witnesses and establishing a victims' trust fund	No. The Draft Law does not specifically address this matter.	Yes. See above (general obligation to cooperate).	No. The Bill does not specifically address this issue.	The Bill specifically addresses the issue of forfeiture, transfer to the Trust Fund and restitution (Art. 41). The Federal Law on the Protection of Victims of Crimes, the Swiss Criminal Code (Art. 60 para. 1 lit. b) and the Swiss Military Penal Code (Art. 42a para. 1 lit. b) may provide more extensive protection.	No. The Bill does not address this issue.

¹⁷ However, Spain has declared upon ratification that it would not be prepared to receive persons sentenced to more than 30 years imprisonment (i.e. life imprisonment).
