Implementation of the Rome Statute in Estonia

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I. Introduction

Estonia signed the Rome Statute of the International Criminal Court1 on 27 December 1999 and ratified it on 30 January 2002. Unlike in many other states, there have been no major domestic measures to implement the Statute. Two main reasons can be identified to account for this fact and should remain in the background when considering the analysis presented in this article.

Firstly, the Estonian legal system is generally very ‘open’ to international law. According to the Constitution, ‘generally recognized principles and rules of international law’ form an ‘inseparable part’ of the Estonian legal system.2 This effectively incorporates customary international law and the general principles of law recognized by the community of nations into domestic law, arguably at a level equal to the Constitution.3 The Constitution further provides that, should laws or other legal Acts of

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Estonia be in conflict with a treaty approved by the Estonia parliament (Riigikogu), the provisions of the treaty shall prevail. Judicial practice reveals, moreover, that treaties can be directly applied in the domestic legal order even if there is no conflict with domestic law. However, treaties are not regarded as prevailing over the Constitution. In sum, given that the Rome Statute is a treaty approved by the Riigikogu, it forms a part of the Estonian legal system and prevails over all domestic law with the exception of the Constitution. Therefore, there is no apparent need to duplicate provisions of the Statute in domestic law, at least as far as provisions of a self-executing nature are concerned.

Secondly, there is a detectable preference for codifications in domestic law, especially criminal law. A stand-alone act for the implementation of the Rome Statute would have stood out as an anomaly of sorts. In addition, a new Penal Code was adopted prior to the ratification of the Statute, codifying international crimes in domestic law (and seeking to define them while avoiding references to international law). Since the ratification, a new Code of Criminal Procedure has also been adopted, which regulates all issues of international cooperation in criminal matters, including cooperation with the Court. Hence, the only separate legal instrument that has relevance to the present discussion is an Act adopted by the Riigikogu in late 2001 to approve the Statute for ratification. This Act stipulates that requests for surrender by the Court should be fulfilled in accordance with the provisions of the Code of Criminal Procedure dealing with extradition to foreign states, an approach that is explicitly reflected in the new Code itself.

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4 Section 123(2), Constitution.
5 See Martinion v. Lihula Rural Municipality, Case No. 3-3-1-58-02, Supreme Court, Judgement of 20 December 2002, Riigi Teataja III 2003, 2, 19, at para. 11 (no English translation available).
10 See infra note 112 and accompanying text.
II. Complementarity

1. General Principles of Jurisdiction

First and foremost, Estonian penal law applies to all acts committed within the territory of Estonia and on board or against its ships and aircraft.\(^{11}\) In addition, subject to the rule of double criminality, Estonian law applies to acts committed abroad by or against Estonian citizens or by foreigners who are arrested in Estonia and not extradited.\(^{12}\) Irrespective of the laws of the place of commission, Estonian law can also be applied to certain acts committed against the Republic of Estonia, namely acts against the life and health of its population, its state authority, its national security, and the environment.\(^{13}\)

Under the heading of ‘interests protected by international law’, the Penal Code stipulates that Estonian penal law applies regardless of the place of commission of an act (or the perpetrator’s nationality) if criminal liability for the act arises from a binding international agreement.\(^{14}\) This provision, which clearly seeks to establish universal jurisdiction, is conceptually unsound in that it completely disregards customary law as a source of international criminal law. Admittedly, the explicit reference to treaties might have been the result of concerns for the principle *nulla poena sine lege scripta*. However, such concerns could have been better addressed by listing all crimes to which universal jurisdiction applies in the Penal Code. Nevertheless, in case of the core crimes no significant consequences ensue from this deficit, since genocide, crimes against humanity and war crimes are criminalized in treaty law, including the Rome Statute itself.\(^{15}\)

2. Core Crimes

Estonia acceded to the 1948 Genocide Convention on 19 January 1992.\(^{16}\) Genocide, along with crimes against humanity and war crimes, was first criminalized under Estonian

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\(^{11}\) The principle of territoriality, Section 6, PC.

\(^{12}\) The principles of active and passive personality and vicarious administration of justice, Section 7(1), PC. Double criminality is not required if the perpetrator is a member of an Estonian military contingent, Section 7(2), PC.

\(^{13}\) The protective principle, Section 9, PC.

\(^{14}\) Section 8, PC.

\(^{15}\) On the issue of the presence of the accused see *infra* notes 101–102 and accompanying text.

law in 1994 by an amendment to the Criminal Code in force at the time. Currently, genocide is punishable pursuant to Section 90 of the Penal Code:

Killing, torturing or causing health damage to a member of a national, ethnical, racial or religious group, a group resisting occupation or any other social group, imposing coercive measures preventing childbirth within such a group or forcibly transferring children of the group—when committed with the intention to destroy said group in whole or in part—, or subjecting members of such a group to living conditions which have brought about the danger for the total or partial physical destruction of the group, shall be punishable by imprisonment for a term from 10 to 20 years or by life imprisonment.

This definition differs considerably from that of Article 2 of the Genocide Convention and Article 6 of the Rome Statute. First, the range of protected groups is broader under Estonian law, since any social group is covered. The legislator has made a further point of explicitly including groups resisting occupation. Secondly, instead of considering ‘serious bodily or mental harm’ (Article 6(b) of the Statute) an act that may constitute genocide, the Penal Code refers to the causing of ‘health damage’, a somewhat broader category. Thirdly, unlike Article 6(c) of the Statute, which considers the deliberate infliction of conditions of life on a group ‘calculated to bring about its physical destruction’ as a form of genocide, the Penal Code criminalizes the infliction of conditions that ‘have brought about the danger for the … destruction of the group’. It would seem that whereas under the Statute the intent is central, under the Code the determining factor is the actual presence of the danger of destruction.


18 Unofficial English translations of Estonian Acts are available from the Estonian Legal Language Centre, <www.legaltext.ee/indexen.htm>. Unless stated otherwise, translations used in this article derive from this source with corrections the authors considered necessary.

19 ‘Health damage’ means any violation of the integrity of the human body or disturbance of the functioning thereof by an external factor—this covers bodily injuries as well as illnesses, including mental disorders. See Jaan Sootak, Iksusvastased süüteod (Offences against the Person) (Juura: Tallinn, 2003) at 63; Jaanus Tehver, ‘§ 90’ in Jaan Sootak and Prit Pikämäe (eds), Karistussaadustik: kommentariteit kriminaalvastusseadus (Penal Code: Commentaries) (2nd edn, Juura: Tallinn, 2004) 265–266 at 265; Margus Kurm, ‘§ 118’ in Sootak and Pikämäe, Karistussaadustik, 306–310 at 306. An act that may cause a bodily health damage also qualifies, see Margus Kurm, ‘§ 121’ in Sootak and Pikämäe, Karistussaadustik, 314–316 at 314.

20 Other commentators have considered this a mere linguistic difference. See Andres Parmas and Tristan Ploom, ‘Prosecution of International Crimes in Estonia’ in Albin Eser, Ulrich Sieber and Helmut Kreicker
Notwithstanding the last observation, the crime of genocide has been properly included in Estonian penal law, and in some respect arguably reaches even further than international law as it currently stands.

As regards crimes against humanity, Estonia is a party to a number of international instruments imposing the obligation to criminalize conduct falling under Article 7 of the Statute.\(^{21}\) The relevant provision of domestic criminal law is Section 89 of the Penal Code:

Deprivation or restriction of human rights and freedoms, as well as killing, torturing, raping, causing health damage to, forcefully displacing, expelling, subjecting to prostitution, unfoundedly depriving of liberty or otherwise abusing civilians,—when committed systematically or on a large scale and instigated or directed by a state, organization or group—shall be punishable by imprisonment for a term from 8 to 20 years or by life imprisonment.

Again, this definition does not fully correspond to that of the Statute. Estonian law criminalizes relevant acts committed at the instigation or direction of a ‘group’, not only a state or organization, thus including associations of people with a low degree of internal organization.\(^{22}\) It should be noted that acts committed in furtherance of a policy (cf. Article 7(2)(a) of the Statute) are not punishable as crimes against humanity unless held to have been ‘directed’ or ‘instigated’ by a group, state or organization. Here, ‘direction’ presupposes a considerable degree of control of a state, organization or group over the acts, whereas ‘instigation’ refers to a relatively specific call for those acts.\(^{23}\)

Further, instead of comprehensively enumerating specific acts that constitute crimes against humanity, the Penal Code makes use of generalizations. The phrase ‘deprivation or restriction of human rights’ is essentially a blanket reference to Estonia’s obligations under international human rights law and to the fundamental rights and freedoms enshrined in the Constitution.\(^{24}\) Given the ever-increasing scope of human rights, it is highly doubtful whether all restrictions of human rights, even when systematic or large scale, may be properly deemed crimes against humanity. Moreover, the


\(^{22}\) See Jaanus Tehver, ‘§ 89’ in Sootak and Pikamäe, Karistusseadustik, supra note 19, 261–264 at 264.

\(^{23}\) Cf. ibid.

\(^{24}\) See Tehver, ‘§ 89’, supra note 22, at 262.
language in question leaves the crime substantially undefined to the extent that doubts arise whether it falls short of the requirements of the principle of legality. ‘Abuse of civilians’, on the other hand, is understood here as a reference to all crimes against a person which degrade human dignity (as laid down in Chapter 9 of the Penal Code). This seems a rather reasonable abstraction, which also serves as a fallback clause that may remedy some shortcomings this definition of crimes against humanity may otherwise have. Taken as a whole, Section 89 of the Penal Code includes in its scope the various modes of commission.

When it comes to international humanitarian law, Estonia acceded to the 1949 Geneva Conventions and both 1977 Additional Protocols on 18 January 1993. A coherent and consistent set of provisions criminalizing war crimes, although more abstractly formulated than those of the Statute, can be found in Sections 95 through 109 of the Penal Code. War crimes are defined in the Code without distinction between international and non-international armed conflicts, and without the requirement that they take place ‘as part of a plan or policy or as part of a large scale commission of such crimes’ (Article 8(1) of the Statute). It is expressly provided that offences committed in time of war, which are not punishable as war crimes, are to be punished as ‘ordinary’ offences, those being moreover aggravated by the fact that they were committed during a state of emergency or state of war.

Although the Penal Code thus generally covers war crimes as defined by the Statute, there are some deficiencies, the most noteworthy of which are the following.

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25 See ibid. at 263. On ‘health damage’, see supra note 19 and accompanying text.
26 For instance, torture is understood under national law as physical abuse that is continuous or causes great pain (Section 122, PC). Acts of abuse not meeting this definition may nonetheless be punished as a crime against humanity of ‘otherwise abusing civilians’ (see Parmas and Ploom, ‘Estonia’, supra note 20, at 116 and 118).
28 Acts of war against civilian population (Section 95, PC); illegal use of means of warfare against civilians (Section 96); attacks against civilians (Section 97); unlawful treatment of prisoners of war and interned civilians (Section 98); attacks against prisoners of war and interned civilians (Section 99); refusal to provide assistance to wounded, sick, and shipwrecked (Section 100); attacks against combatants hors de combat (Section 101); attacks against protected persons (Section 102); use of prohibited weapons (Section 103); damaging the environment as method of warfare (Section 104); exploitative abuse of emblems and marks designating international protection (Section 105); attacks against non-military targets (Section 106); attacks against cultural property (Section 107); destruction or illegal appropriation of property in war zone or occupied territory (Section 108); and marauding (Section 109).
29 See Sections 94(1) and 58 clause 5, PC.
30 For a comprehensive provision-by-provision comparison and analysis, see Parmas and Ploom, ‘Estonia’,
First, launching an attack in the knowledge that it will cause environmental damage is only punishable as a war crime when the environment is intentionally influenced as a means of warfare, although the acts in question may also be punished as ordinary crimes. Second, treacherous killing or wounding is not punishable as a war crime. Third, declaring that no quarter will be given is not punishable as a war crime, but may be punished as threatening the life of another person. However, where an order has been given not to give quarter, but the threat has not been made known to those concerned, there appears to be no criminal responsibility under domestic law. Fourth, declaring abolished, suspended or inadmissible in court the rights and actions of the nationals of the hostile party is not punishable as a war crime, but may be punished as an ordinary crime of discrimination, or as a crime against fundamental liberties. Fifth, committing outrages upon personal dignity is not punishable unless it reaches the level of causing physical pain or health damage. Sixth, the use of human shields is not punishable as a war crime, but may be punished as an ordinary crime of endangering persons. Seventh, intentionally using starvation of civilians as a method of warfare is punishable as a war crime only when food or water supplies are destroyed or rendered unusable, but not when access to them is otherwise prevented; the theft or embezzlement of such supplies is punishable as illegal appropriation. Eighth, conscripting or enlisting children into the armed forces or using them to participate actively in hostilities is not defined as a war crime in domestic law.

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31 Compare Article 8(2)(b)(iv), RS, with Section 104, PC.

32 In particular, illegally polluting the environment. Sections 364 and 365, PC.

33 Compare Articles 8(2)(b)(xi) and (e)(ix), RS.

34 See Articles 8(2)(b)(xii) and (e)(x), RS, with Section 120, PC.

35 See Parmas and Ploom, ‘Estonia’, supra note 20, at 114 and 121. Acts of violence committed in fulfilment of such a threat are, of course, punishable under various other provisions of the Penal Code.

36 Compare Article 8(2)(b)(xiv), RS, with Sections 152 and 154–159, PC.

37 See Articles 8(2)(b)(xxii) and (c)(d), RS; see also Parmas and Ploom, ‘Estonia’, supra note 20, at 116 and 118.

38 Compare Article 8(2)(b)(xxiii), RS, with Section 123, PC.

39 Compare Article 8(2)(b)(xxv), RS, with Section 95, PC; see also Parmas and Ploom, ‘Estonia’, supra note 20, at 117.

40 Section 108, PC.

41 See Articles 8(2)(b)(xxvi) and (c)(vii), RS.
Jurisdiction for war crimes is universal under Estonian law, by virtue of the fact that criminal liability for these acts arises from international instruments binding on Estonia, in particular the Geneva Conventions and the Statute.42

3. General Principles of Criminal Law

Under Estonian law, a person who commits an offence individually, or jointly with, or by taking advantage of, another person is punished as the principal offender.43 Two types of accomplices—instigators and aiders—are also punished. An instigator is a person who ‘intentionally induces’ another to commit an intentional, unlawful act, whereas an aider is a person who ‘intentionally provides physical, material or moral assistance’ for such an act.44 These stipulations generally conform to Articles 25(3)(a–c) of the Statute. However, the joint criminal enterprise doctrine, as incorporated in Article 25(3)(d) of the Statute, is recognised only in so far as the other person meets the criteria for an accomplice, i.e. where he is an instigator or an aider.45

Direct and public incitement in respect of the crime of genocide (Article 25(3)(e) of the Statute) is not punishable in Estonia as participation in the commission of genocide. Rather, it is covered by a separate crime of inciting social hatred, which includes all activities aimed at publicly inciting hatred or violence on the basis of nationality, race, colour, sex, language, origin, religion, political opinion, and financial or social status.46 In 2006, the elements of this crime underwent change.47 Specifically, sexual orientation was added to the list of discriminatory bases, and incitement leading to discrimination (not amounting to hatred or violence) was also criminalized. At the same time, the corpus delicti was narrowed by means of a condition that the incitement must have caused a threat to a person’s life, health or property. The latter change is unfortunate as it ‘raises the bar’ considerably under domestic law for holding a person responsible for incitement to genocide. Consequently, the provision in question now fails to fully implement Estonia’s obligations under international law.

42 See supra note 14 and accompanying text.
43 Section 21, PC.
44 Sections 22(2) and (3), PC. It has been settled in the practice of the courts that an accomplice can be punished if the principal offence has been committed or attempted; the actual conviction or punishment of the principal offender is not required (see Jaan Sootak, ‘§ 22’ in Sootak and Pikamäe, Karistusseadustik, supra note 19, 102–109 at 104).
46 Section 151, PC, as in force until 15 July 2006. Under some limited circumstances, incitement to genocide could conceivably be punished as war propaganda (Section 92, PC).
47 Section 151, PC, as in force from 16 July 2006 (Reisj Teataja I 2006, 31, 234).
Command responsibility for acts laid down in Chapter 8 of the Penal Code, including genocide, crimes against humanity and war crimes, is established as follows:

The state officials or the military commander who issued the order to commit the offence, who consented to the commission of the offence or who failed to prevent the commission of the offence although it was in his or her power to do so, shall be punished in addition to the principal offender.48

This provision addresses two issues that are dealt with separately in the Statute. First, it prescribes responsibility in case the commander orders the commission of a crime—this corresponds to Article 25(3)(b) of the Statute. Second, the same provision lays down command responsibility as it appears in Article 28 of the Statute, i.e. in case of a failure to prevent the commission of the crime. In the latter case, it is somewhat unclear whether the phrase ‘in his or her power to do so’ actually presumes that the commander knew of the act or whether it is sufficient that he should have known about it.49

Apart from military commanders, the rules pertaining to command responsibility only apply to state officials. In principle, however, one can envisage binding orders being given by a superior who is neither a state official nor a military commander.50 The limited interpretation of command responsibility may fall short of Article 28(b) of the Statute, which merely requires ‘effective authority and control’ of the superior. However, in the opinion of the Ministry of Justice, this issue may be resolved by interpreting the pertinent provision of the Penal Code in light of the language of the Statute.51

As regards defences, domestic law distinguishes between two types of grounds that exclude criminal responsibility: those precluding the unlawfulness of the act52 and those precluding the guilt of the offender.53 First, an act is not unlawful if it is carried out in self-defence, that is to say in combating a direct, or immediate, unlawful attack against oneself or another person.54 This is not applicable if the defence is carried out by means that are ‘evidently incongruous’ with the danger of the original

48 Section 88, PC.
50 For instance, local government officials are not, strictly speaking, state officials under Estonian law: Jaanus Tehver, ‘§ 88’ in Sootak and Pikamäe, Karistusseadustik, supra note 19, 259–261, at 260.
51 Comments of the Ministry of Justice on an earlier draft of this paper, 11 January 2006 (on file with the authors, hereinafter ‘Ministry of Justice Memo’).
52 See Section 27 et seq., PC.
53 See Section 32 et seq., PC.
54 Section 28, PC.
attack or that cause ‘excessive damage’. Although more general in language, these provisions are consistent with the principle contained in Article 31(1)(c) of the Statute. Furthermore, an act is not unlawful if carried out due to necessity, i.e. in order to avert a ‘direct or immediate danger’, provided that the means chosen are necessary for the aversion of the danger and the interest protected is ‘evidently of higher importance’ than the interest damaged. Nor is an act unlawful where a person seeks to perform several legal obligations simultaneously and, in the event this proves impossible, does everything in his power to perform the obligation which is ‘at least as important’ as the obligation violated against.

Unlike the comparable regulation in Article 31(1)(d) of the Statute, the Penal Code does not refer expressly to a ‘threat of death or serious bodily harm’ in defining defences that may apply to crimes under the jurisdiction of the Court. However, in light of the tests outlined above for comparing the protected and discarded interests, no other circumstances than a threat of death or serious bodily harm could meet the conditions of these defences when it comes to the crimes covered by the Statute. Threat and duress not falling under necessity are not defences under Estonian law, but do constitute mitigating circumstances.

Personal guilt is precluded where an accused is less than 14 years old or mentally incompetent. Incompetence refers here to the incapacity to understand the unlawfulness of one’s act at the time of its commission or to act in accordance with such an understanding. As a general rule, a state of intoxication that is caused intentionally or through negligence does not preclude guilt. However, a pathological state of intoxication—a rare condition where a small amount of intoxicant can temporarily provoke a grossly excessive and unusual disturbance of mental or physical capacities—is considered a temporary, severe mental disorder. Thus, in practice, the conditions of incapacitation are more or less the same as laid down in Article 21(1)(a) and (b) of the Statute. Acting under orders while committing an act of genocide, a crime against
humanity or a war crime does not preclude punishment. Estonian law is in this sense somewhat stricter than the Statute as it does not embody the exceptions contained in Article 33.

Domestic law distinguishes between three levels of intent, all of which presuppose the existence of knowledge within the meaning of Article 30(3) of the Statute. In principle, any level of intent recognised in domestic law is sufficient for establishing responsibility for the core crimes. What may be regarded as a mistake of fact is defined as unawareness of a circumstance that constitutes a material element of an offence. This means that if a person does not know of a circumstance that renders his act an offence, he is not deemed to have committed the act intentionally and may only be held liable for negligence if this constitutes a separate offence. This compares favourably to Article 32(1) of the Statute. As for a mistake of law, a person is deemed to have acted without guilt and will not be punished if he is incapable of understanding the unlawfulness of his act and could not have avoided the error. If he erroneously assumes that something legally justifies his act (for example, circumstances of self-defence that in reality do not exist), he may be held liable for negligence if this constitutes an offence in itself.

The Constitution stipulates that no one is to be convicted of an act that did not constitute a crime under the law in force at the time the act was committed nor be punished more severely than was prescribed at that time. Accordingly, legislative Acts on substantive criminal law have no retroactive effect, unless they produce favourable effects for the accused. However, genocide, crimes against humanity and war crimes are considered to be of such severity that they are punishable even if their criminalization under domestic law may be deemed retroactive. The Estonian Supreme Court has held, with reference to Article 7(2) of the European Convention of Human Rights,

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64 Section 88(2), PC.
65 A person acts with deliberate intent (dolus determinatus) if he knows or considers possible that his actions will have a particular result, and it is precisely his aim to bring it about. In case of direct intent (dolus directus), the person knows for sure that his actions will have a particular result and, although not necessarily aiming for such a result, nonetheless wants or accepts it. A person is deemed to have acted with indirect intent (dolus eventualis) if he considers it possible that his actions may have a particular result and accepts the risk, Section 16, PC.
66 Tehver, 'Analysis', supra note 30, at 7 (question 8a).
67 Section 17(1), PC.
68 Section 39, PC.
69 Section 31(1), PC.
70 Section 23(1) and (2), Constitution.
71 Section 5(2), PC.
72 See Section 5(4), PC.
that the principle of *nullum crimen sine lege* is not violated in circumstances where an act was prohibited by international law at the time of commission, but was prosecuted and punished under domestic law enacted ex post facto.\(^{73}\) This view has been upheld by the European Court of Human Rights.\(^{74}\)

Finally, it may be mentioned that Estonia is a party to the 1968 Statutory Limitations Convention.\(^{75}\) The provisions of this treaty have been implemented in domestic law by the Penal Code, which provides that crimes against humanity (including genocide), war crimes, and offences for which life imprisonment is prescribed never become time-barred.\(^{76}\)

### 4. Preconditions for the Exercise of Jurisdiction

The Constitution stipulates that no one shall be tried or punished for an act of which he has been convicted or acquitted conclusively pursuant to law.\(^{77}\) This is generally understood as barring the Estonian authorities from pursuing a case where a final judgment has already been passed by an Estonian court.\(^{78}\) At the same time, the Penal Code provides that no one shall be punished more than once for the same offence, regardless of whether the punishment has been imposed in Estonia or in another state.\(^{79}\) This is clearly applicable by analogy in circumstances where a punishment was imposed by an international judicial body.

The Code of Criminal Procedure differs in wording from both the Constitution and the Penal Code, providing that criminal proceedings are precluded where a decision of ‘a court’ has entered into force in respect of a person on the same charges.\(^{80}\)

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73 See *In re Penart*, Case No. 3-1-1-140-03, Supreme Court, Judgement of 18 December 2003, Riigi Teataja III 2004, 2, 23, at para. 10 (no English translation available).


76 Section 81(2), PC.

77 Section 23(3), Constitution.

78 See Eerik Kergandberg, ‘§ 23’, in *Eesti Vabariigi põhinadus*, supra note 6, at 200–211 at 207.

79 Section 2(3), PC.

80 Section 199(1) clause 5, CCP. Somewhat inconsistently, Section 204 clause 5, CCP, stipulates that a Prosecutor’s Office *may* terminate proceedings in cases where the person has been convicted and has served the sentence in a foreign state and the punishment applicable in Estonia is not significantly more...
Foreign or international courts are not expressly mentioned and no distinction is made between acquittals and convictions. But since there is nothing suggest otherwise, it seems reasonable to assume that all of the above are included. Therefore, Estonian authorities appear to be barred from further proceedings where a person has been either acquitted or convicted by the ICC.

The Constitution prescribes a special procedure for bringing charges against certain public officials. Members of the Riigikogu, the President, Cabinet ministers, the Auditor-General, and Justices of the Supreme Court can only be charged with a crime pursuant to a proposal by the Chancellor of Justice and with the consent of the majority of the members of the Riigikogu. A similar procedure applies to the Chancellor of Justice, in whose case the proposal has to be made by the President. Charges against judges of trial and appeal courts can be brought pursuant to a proposal by the Supreme Court and with the consent of the President.

The procedure for lifting the constitutional immunities does make it possible for Estonia to take advantage of its prerogative under the principle of complementarity. Problems would arise only were the Riigikogu or the President to refuse to give their consent. This is highly unlikely, however, especially in the case of serious crimes such as those falling under the jurisdiction of the Court. In practice, the procedure has been applied with regularity, although the Riigikogu and the President admittedly have discreitional powers with regard to these decisions.

A curious problem, albeit most likely a theoretical one, may arise from what is known as parliamentary indemnity. By virtue of the Constitution, a member of the Riigikogu shall not be held legally responsible for votes cast or political statements made in the Riigikogu or in any of its bodies. This provision would seem to bar criminal proceedings against a member of the Riigikogu who had made a speech inciting to a
crime punishable under the Statute. There appears to be no provision in domestic law for setting aside this indemnity.

As far as immunities arising from international law are concerned, Estonian criminal procedural law may be applied to a person enjoying diplomatic immunity or other privileges prescribed by an international agreement ‘at the request [sic!] of a foreign state, taking into account the specifications provided for in an international agreement’.87 Although this provision is limited to international agreements, immunities arising from customary international law would have to be respected in Estonia by virtue of constitutional provisions mentioned earlier.88 There is no implementing legislation on limitations to immunities, which would therefore have to be derived directly from international law, including Article 27 of the Statute.

5. Offences against the Administration of Justice

The Penal Code criminalizes a number of ‘breaches of the duty to maintain integrity’, in particular any participation in bribery,89 as well as counterfeiting or falsification of documents by officials.90 The Code also spells out a range of crimes against the administration of justice.91 Explicit reference to the ICC has not been made in any of these provisions, but as the term ‘official’ may be interpreted broadly, the relevant sections could conceivably be applied in respect of all judicial bodies, not only domestic courts.

Although these provisions generally cover the crimes against the administration of justice as defined in the Statute, some issues remain. First, the Code places the emphasis on the creation of false evidence rather than the introduction of them in trial, which means that only presenting evidence that the party knows is false or forged is not considered a punishable offence.92 Second, obstructing the appearance of a witness

87 Section 4 clause 2, CCP.
88 See supra note 2 and accompanying text.
89 Sections 293–298, PC.
90 Section 299, PC.
91 Various acts of coercive or retaliatory violence in connection to a criminal procedure against judges, lay judges, investigators, prosecutors, defence counsels, representatives of victims, or persons close to them (Sections 302–304), as well as suspects, accused, acquitted or convicted persons, witnesses, experts, translators, interpreters or victims (Section 323); contempt of court (Section 305); elimination or fraudulent creation of evidence (Section 316); perjury (Section 320) and coercion into committing perjury (Section 322); rendering false expert opinion or providing false translation or interpretation (Section 321) and coercion into committing these act (Section 322); obstructing the appearance of a participant in the proceedings, witnesses, victims, experts, translators or interpreters (Section 317).
92 Cf. Article 70(1)(b), RS, and Section 316, PC.
is punishable under Estonian law, but other undue interference with the testimony is punishable only to the extent that it involves violence. Third, acts of impeding, intimidating, corruptly influencing or retaliating against an official of the Court are punishable as crimes against the administration of justice when they concern different forms of violence against judges, prosecutors, investigators, but also against defence counsels and representatives of victims and persons close to them. Certain acts against other officials of the Court may qualify as violence against, or defamation or insult of persons protecting the public order. Insofar as non-violent intimidation or corruption is concerned, such acts may, depending on the circumstances, be punishable as the general crime of threat or the various forms of breaches of integrity mentioned above.

6. Discretion of the Prosecution

The commencement of an investigation of crimes covered by the Statute is not premised on the consent of any political institution. Residence or presence of the suspect in Estonia is also not required for an investigation but in the trial phase the presence of the accused is generally compulsory. The court may, however, decide to proceed with the trial without the accused present if he is abroad and deliberately avoids the proceedings.

According to the principle of mandatory criminal proceedings, the authorities are generally required to conduct an investigation 'upon the appearance of facts referring to a crime', unless a statutory provision expressly precludes proceedings. How-

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93 Section 317, PC.
94 Cf. Article 70(1)(c), RS, and Section 323, PC.
95 Cf., on the one hand, Articles 70(1)(d) and (e), RS, and, on the other hand, Sections 302–304, PC.
96 Sections 274–275, PC.
97 Section 120, PC.
98 See supra note 90 and accompanying text.
99 In case of crimes committed abroad, only the Prosecutor-General’s Office (Riigiprokuratuur, in some English translations referred to as the Public Prosecutor’s Office) may initiate proceedings (Section 435(3), CCP).
100 Section 269(1), CCP.
101 Section 269(2) clause 3, CCP. Also, proceedings may be conducted without the accused present if he has been removed from the courtroom for misbehaviour (essentially contempt of court) (clause 1), if he has consented to participation in the form of video-conferencing (clause 2), or if he has caused himself to be in a state that precludes his participation (clause 4).
102 Section 6, CCP.
103 In particular, the absence of elements of the crime, expiry of statutory limitations, an amnesty, death
ever, for crimes of lesser severity, there are some exceptions. Upon application from the victim, a decision not to commence criminal proceedings will be reviewed by a Prosecutor’s Office. This decision, as well as a decision to terminate criminal proceedings, is subject to appeal to the Prosecutor-General’s Office whose decision in these matters can, in turn, be challenged before a Circuit Court of Appeal.

There are two instances where proceedings can be terminated, curiously enough, without being subject to the review of the courts. Firstly, the Prosecutor-General’s Office may, under certain circumstances, terminate proceedings if the suspect or accused has cooperated in the investigation of another crime. Secondly, and more problematically, a Prosecutor’s Office may terminate criminal proceedings in cases that do not have substantial connection to Estonia. While the rationale for the latter principle is evident—saving judicial resources—it is rather difficult to reconcile with the general resolve of the international community to fight transnational crime and to eradicate impunity. However, treaties binding on Estonia that create aut dedere aut iudicare regimes prevail over this provision of the Code of Criminal Procedure, somewhat mitigating its effects.
III. Cooperation with the Court

1. Implementation of the Duty to Cooperate in General

Provisions of domestic law on cooperation with the Court are contained in the Code of Criminal Procedure and the Rome Statute Ratification Act. The cooperation between Estonia and the Court is considered a form of international cooperation in penal matters and is governed by the same rules that apply to inter-state cooperation unless the Statute provides otherwise. As a general matter, the provisions dealing explicitly with the Court in Estonian law are few in number and limited in scope, which is somewhat mitigated by the fact that the Statute itself is a source of law in the Estonian legal system.

The Prosecutor-General’s Office is responsible for arranging the detention and arrest of a person at the request of the Court, but both arrest and provisional arrest are premised upon the consent of a preliminary investigation judge. The Cabinet decides on the extradition or surrender of Estonian nationals; with respect to any other person, the decision is taken by the Minister of Justice. It may be assumed that the same authorities will decide on conflicting requests, with reference to Article 90 of the Statute, if necessary. Although the law provides some guidelines for deciding competing requests, it does not clearly prioritize requests from the Court. As far as other forms of cooperation are concerned, the Prosecutor-General’s Office will verify whether compliance with a request is admissible and possible and forwards the request to the ‘competent legal authority’ for execution. Requests from the Court should be transmitted either through diplomatic channels or directly to the Prosecutor-General’s Office, in Estonian or in English.

110 Chapter 19, Sections 433–508, CCP.
111 Sections 433(1) and 489(1), CCP. Hence, when this report hereunder refers to ‘extradition or surrender’ it means that extradition provisions are likely to be applied mutatis mutandis to surrender.
112 Section 489(2), CCP.
113 Sections 131 et seq. and 447(2), CCP.
114 Section 36(2), Constitution, and Section 452, CCP.
115 See Section 441, CCP.
116 Section 462(2), CCP.
117 In this vein, the temporary transfer to the Court of a person detained in Estonia would be decided by the Minister of Justice, the service of summonses arranged through the court of first instance of the person’s place of residence, and any transfer of property decided by the court of first instance of the location of such property (Sections 466(1), 462(3) and 470(1), CCP).
118 See Multilateral Treaties Deposited with the Secretary-General: Rome Statute of the International
The Court has necessary legal capacity in Estonia by virtue of the direct application of Article 4(1) of the Statute. Also, Estonia ratified the Agreement on the Privileges and Immunities of the International Criminal Court (APIC) on 13 September 2004, which further bolsters the legal personality of the court vis-à-vis Estonia. The Court is allowed to sit on the territory of Estonia on the basis of Article 12 of the APIC, read in conjunction with Articles 3(3) and 4(2) of the Statute. Estonia has not made a statement under Article 23 of the APIC and thus has not limited the privileges and immunities of its own nationals and permanent residents.

2. Specific Forms of Cooperation

Estonia is able to cooperate with the Court in most of the matters listed in Article 93(1) of the Statute without major difficulties. In particular, domestic law expressly stipulates that the Prosecutor of the Court, when performing procedural acts in Estonia, has all the rights and obligations of an Estonian prosecutor and can thus conduct on site investigations. Domestic law fails to address certain issues explicitly, such as the location of items, the voluntary appearance of persons before the Court and the provision of records and documents, as well as consultations with the Court regarding various issues mentioned in Part 9 of the Statute. Other than these deficiencies, nothing in national law appears to be able to significantly complicate or delay a request for cooperation by the ICC, and there are no substantial differences in the requirements for such requests in the Statute and in domestic law.

Estonia will deny a request of assistance if rendering such assistance might endanger the security, public order, or other essential interests of the state, or if it would be in conflict with general principles of Estonian law. However, given that the Statute is directly applicable and prevails over ordinary legislation, such considerations could be upheld against requests by the ICC only as far as they may be regarded as dealing with

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120 Section 489(3), CCP.
121 Articles 93(1)(a),(c) and (i), RS; see also Tchver, ‘Analysis’, supra note 30, at 16.
122 Domestic law does insist upon a legal assessment or qualification of the offence underlying the request (Section 460(1) clause 4, CCP), but this is presumably encompassed by the phrase ‘legal basis and the grounds for the request’ in Article 96(2)(b) of the Statute. Also, an extract of the legal act on which such a qualification is based (Section 460(2) clause 1, CCP) can in all likelihood be substituted by a reference to an appropriate article of the Statute.
123 Section 436(1) clauses 1 and 2, CCP.
the protection of national security or as ‘existing fundamental principle[s] of general application’ under Articles 72, 93(3) and 93(4) of the Statute and in accordance with the limitations contained therein.

Assistance may also be refused if there is reason to believe that it is requested for the purpose of bringing charges against, or punishing, a person on account of his race, nationality or religious or political beliefs, or if his situation may deteriorate for any such reason.124 Invoking this provision against a judicial body in the establishment of which Estonia participated may prove unconvincing. At any rate, a situation falling under this provision of domestic law would have to be resolved in accordance with Article 93(3) of the Statute and in light of human rights norms binding on both Estonia and the ICC.125

3. Arrest and Surrender

There are a few grounds for refusing extradition or surrender in addition to the general grounds for refusal of assistance mentioned above.126 Most of them are inapplicable in cases of surrender to the Court due to the nature of the crimes under its jurisdiction, and the remaining few (in particular ne bis in idem considerations or amnesties) cannot be applied insofar as they are in conflict with the Statute.

The admissibility of a request for surrender—premised on the initiation of criminal proceedings and the issuance of an arrest warrant, or the entry into force of a prison sentence—is verified by Harju County Court, one of four first instance courts of general jurisdiction.127 The County Court does not independently ascertain whether an arrest warrant was properly issued but, as a matter of practice, refers in this regard to the Ministry of Justice, which confirms whether the warrant emanates from a competent authority. At the admissibility hearing, the judge will explain the request and the course of the proceedings, and also hear on the matter the person subject to the request, his counsel, and the prosecutor.128 Upon deciding the admissibility of a request for extradition or surrender, the presiding judge may place the person under arrest; without the consent of a judge it is only possible to detain the person for a maximum of 48 hours.129

124 Section 436(1) clause 3, CCP.
125 See also Article 21(3) of the Statute, expressly prohibiting discriminatory application of law by the Court.
126 Sections 440(1–3), CCP.
127 Sections 438, 446, 450 and 451, CCP.
128 Section 450(4), CCP.
129 Sections 447(1) and 451(2) clause 5, CCP, and Section 21(2), Constitution.
The various stages of extradition or surrender are to be carried out without delay or under strict statutory time limits. In urgent cases, a preliminary investigation judge may place a person under provisional arrest before the formal request for extradition or surrender has arrived provided that prima facie grounds for extradition or surrender exist and that assurance of the prompt dispatch of the relevant documents is received. A person placed under provisional arrest may be released if the formal request for extradition or surrender has not been received within 18 days and shall be released if the request has not been received within 40 days. This does not conform to Article 92(2) of the Statute read in conjunction with Rule 188 of the Rules of Procedure and Evidence, which stipulate that a provisionally arrested person may be released if the appropriate documents have not been received within 60 days. The Rules prevail, however, as an international obligation of Estonia. Domestic law does not establish a procedure of interim release as understood in the Rome Statute, but the court order placing a person under arrest is subject to an appeal to the Circuit Court.

The Constitution stipulates that a person can be detained pursuant to a procedure provided for by law for, inter alia, the purpose of extradition to a foreign state. This provision should be interpreted so as to include surrender to the ICC. The commencement of surrender procedures is thus sufficient ground for arresting a person and the general rule of the Statute that persons awaiting trial should be detained can be complied with.

The Code of Criminal Procedure envisages that requests for surrender be carried out in accordance with the rules generally applicable to arrest. It would appear, though, that the provisions regulating arrest with a view to extradition would be more appropriate, given that the procedure for the latter is swifter and is carried out without regard to the general grounds justifying arrest (the prevention of a crime and the flight risk of the accused).

Estonia will refuse extradition or surrender if a person has already been convicted or acquitted of the same charges in Estonia. It is expressly prohibited to place a person under arrest with a view to extradition or surrender if legal impedi-
ments to extradition or surrender—based, e.g., on *ne bis in idem* considerations—have become evident.138

Domestic law does not explicitly provide that the surrender of an arrested person may be postponed pending a ruling by the Court on admissibility. The Ministry of Justice may postpone a surrender if it is necessary for conducting criminal proceedings in Estonia with regard to the person in question or for carrying out a sentence.139 The Minister is also competent to grant permission for the transit of a person extradited or surrendered by third states through the territory of Estonia, the person being held in custody during transit.140

Other than what has been observed above, no provisions of national law can be identified that could create unnecessary legal obstacles to the execution of a request for arrest and surrender and there are no substantial differences in the requirements for such requests in the Statute and in domestic law.141 As a general matter, the extradition or surrender of an Estonian national is permitted, but it must take place under the conditions prescribed by an international agreement—in case of surrender, the Rome Statute—and requires a decision of the Cabinet.142 However, the immunities of the members of the Riigikogu and certain high public officials, as discussed earlier,143 also apply to arrest and surrender to the Court.144

When it comes to exceptions from state or diplomatic immunity of the nationals of other states, there is also no specific implementing legislation. However, Estonia holds the position that according to Article 27 of the Statute, State Parties have waived in advance the immunities of their officials in respect of all possible proceedings under the Statute and before the Court. Therefore, Estonia deems itself to be in a position to arrest and surrender nationals of State Parties who would otherwise enjoy immunities. Nationals of third States may only be arrested and surrendered with the consent of the appropriate State in conformity with Article 98(1) of the Statute. An exception can be foreseen in circumstances where the Security Council, in conjunction with a referral of a situation to the ICC, were to demand the arrest and surrender of a foreign official enjoying immunity. In such a case, Estonia would have to comply with 138 Section 447(4), CCP.

139 Section 453(1), CCP.

140 Section 456, CCP.

141 See Section 442(2), CCP. Observations made in *supra* note 123 apply here as well.

142 Section 36(2), Constitution.

143 See *supra* notes 82–86 and accompanying text.

144 The immunities mentioned are constitutional in nature and the underlying rules can be modified only by means of an amendment to the Constitution. For the amendment procedure, see Chapter XV (Sections 161–168), Constitution. Amendments were not deemed necessary at the time of ratification of the Statute for the reasons indicated in *supra* text accompanying notes 82–86.
the demand according to Articles 25 and 103 of the United Nations Charter even if it would conflict with the obligations under other international agreements.

The fact that the Court may impose life imprisonment or imprisonment for up to 30 years does not create an obstacle to the execution of a request for surrender, because life imprisonment is prescribed as a punishment for certain crimes in Estonia.145

4. Enforcement of Sentences

Estonia has not received prisoners from the United Nations ad hoc tribunals. The authors deem the acceptance of sentenced persons from the ICC unlikely in the foreseeable future as Estonia is struggling with a relatively high prison population146 and a shortage of detention facilities. The enforcement of orders by the Court concerning fines and forfeiture measures is likely to be carried out under the provisions of the Code of Criminal Procedure dealing with the recognition and execution of judgments of foreign courts.

IV. Conclusion

The general attitude on implementation that has prevailed among Estonian lawyers to date—that the Rome Statute does not require implementation in domestic law—is not entirely justified. As has been shown in the discussion above, while direct application of the Statute does solve a great many problems, some outstanding issues still remain.

Although international crimes are generally well implemented in Estonia, crimes against humanity are somewhat loosely defined, and some war crimes not entirely satisfactorily covered. In most instances, the war crimes in question would nonetheless be punishable as ordinary offences, aggravated by the fact that they were committed in time of war. This does not entirely solve the problem, as the command responsibility provision in the Penal Code is expressly limited to the part of the Code that defines international crimes as such.147 It is of particular concern that enlisting or conscripting children in the armed forces does not constitute a war crime under Estonian law. This is a problem that goes beyond the purview of criminal law as Estonia has, to date, failed to ratify the Protocol on Children in Armed Conflict that it signed on 24

145 Section 45(1), PC.
146 The prison population rate is about 340 prisoners per 100,000 inhabitants, which is the highest of all the European Union countries: Roy Walmsley, World Prison Population List (6th edn, King's College London, 2005).
147 See supra note 48 and accompanying text.
September 2003.\textsuperscript{148} The Ministry of Justice has conceded that the definition of crimes against humanity should be reviewed and the war crimes of starvation of civilians and use of child soldiers more concretely implemented.\textsuperscript{149}

When it comes to offences against the administration of justice, a savings clause should be added to the Penal Code in the interests of clarity, providing that the provisions thereof dealing with the administration of justice apply equally to the national judicature and international tribunals.

As far as cooperation with the Court goes, it neither seems to be particularly hindered nor especially facilitated by domestic law. Implementation of the duty to cooperate with the Court is done in passing at best and in a rather cryptic form. Because international cooperation in judicial matters with other states is by and large carried out on the basis of various international agreements, domestic legislation on the issue is minimal. Applying this limited regulatory framework to cooperation with the Court mutatis mutandis is perhaps not the best of solutions.

Having said that, it must be emphasized that Estonia is actively involved in the various aspects of the work of the Court, having been elected member of the Bureau of the Assembly of States Parties in late 2005 and taking part in numerous meetings dealing with issues relevant to the Court, particularly in the framework of the European Union.\textsuperscript{150} Therefore it could be argued that the shortcomings of domestic law pointed out in this article are incidental or due to a different interpretation of the required level of implementation.


\textsuperscript{149} Ministry of Justice Memo, supra note 51.

\textsuperscript{150} Ibid.