

## All roads lead to Rome

### Implementation and domestic politics in Kenya and Uganda

CHRISTIAN M. DE VOS

#### Introduction

The adoption of the International Criminal Court's (ICC) founding treaty, the Rome Statute, formally initiated the ratification process that brought the ICC into existence. Perhaps more significantly, it also inaugurated a far-ranging effort to embed the Statute in the domestic legal framework of states. As one legal scholar has ambitiously characterised it, the Statute was a 'quasi-legislative event that produced a criminal code for the world'.<sup>1</sup> Conceived and led largely by the same global civil society network that had pressed for the Court's establishment,<sup>2</sup> these campaigns for national implementation have been intimately linked to the principle of complementarity. The Coalition for the International Criminal Court (CICC) notes that, 'For the principle of complementarity to become truly effective, following ratification, States must also implement all of the crimes under the Rome Statute into domestic legislation.'<sup>3</sup> Similarly, Amnesty International claims that a state that fails to enact national legislation 'would risk being considered unable and unwilling genuinely to investigate and prosecute crimes within the Court's jurisdiction'.<sup>4</sup> By

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<sup>1</sup> L. Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Leiden: Martinus Nijhoff, 2002), 263.

<sup>2</sup> See M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Oxfordshire: Routledge, 2006).

<sup>3</sup> See '< A Universal Court with Global Support > Ratification and Implementation', Coalition for the International Criminal Court webpage ('CICC webpage'), [www.iccnw.org](http://www.iccnw.org).

<sup>4</sup> Amnesty International, 'The International Criminal Court: Checklist for Effective Implementation' (July 2000), 2. The 2010 'updated' version of the checklist reiterates

connecting complementarity to implementation, the ICC, it is thought, will catalyse the development of a more robust national framework for prosecuting international crimes.<sup>5</sup>

This chapter undertakes a close examination of the Rome Statute's implementation in the domestic jurisdictions of Kenya and Uganda.<sup>6</sup> Its contention is two-fold. First, implementation has become an increasingly sophisticated exercise in applying the Statute as a 'global script' to a diverse array of national contexts.<sup>7</sup> NGOs, advisors and legal consultants who offer counsel to states on how to reform their domestic legal and constitutional frameworks have each developed Rome Statute 'model laws' and implementation 'toolkits'. This growing 'transnational expert community'<sup>8</sup> has, in turn, engendered an increasingly strict interpretation of what complementarity purportedly requires: it reflects a desire for uniformity between the Statute and its application at the domestic level.

Second, the ICC itself did not catalyse the passage of national implementation legislation in Kenya or Uganda. Rather, implementation of the Statute in both countries was accelerated in order to 'perform' complementarity for predominantly international audiences. In Uganda, the country's role as host of the 2010 Review Conference of the Rome Statute ('ICC Review Conference') hastened a legislative process that had long stagnated, while, in Kenya, the desire to publicly demonstrate a departure from the election violence of 2007–2008 'fast-tracked' implementation of the Statute there. In Uganda, however, subsequent efforts to abandon the country's long-standing amnesty program have been met with strong opposition, signalling significant discomfort with the

this same claim. See Amnesty International, 'International Criminal Court: Updated Checklist for National Implementation' (May 2010) ('AI Updated Checklist').

<sup>5</sup> See, e.g., J. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', *Journal of International Criminal Justice*, 1 (2003), 86–113.

<sup>6</sup> This chapter forms part of a broader project on whether or under what circumstances ICC interventions can, as its supporters have assumed, catalyse progressive change in post-conflict countries' domestic institutions and legal frameworks. I focus here on Kenya and Uganda in light of their similar experiences and shared common-law tradition. While the conclusions advanced may be relevant in other contexts, I do not suggest that they are representative of all ICC interventions or post-conflict countries.

<sup>7</sup> My use of 'global script' borrows from Carruthers and Halliday's use of the term as a 'formalized expression or codification of global norms'. See B. Carruthers and T. Halliday, 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes', *Law & Social Inquiry*, 31(3) (2006), 535–536.

<sup>8</sup> M. Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 135.

domestic ICC legislation's retributive framework. Similarly, in Kenya, the initiation of ICC investigations in 2009 fractured the apparent unanimity of the country's political class over the desirability of the domestic legislation it had ratified only one year prior, even as they united former political rivals Uhuru Kenyatta and William Ruto.<sup>9</sup>

The union of these two factors – uniformity of application and the power of external constituencies – was largely responsible for driving the implementation process in both countries, but it glossed over deeper political fissures about the desirability of international criminal law as a framework for domestic accountability. These political contestations were subordinated in the short term, but have never abated. Further, the focus on identical implementation of the Rome Statute at national level raises troubling questions about the African continent's equal and consensual participation in the creation of this body of law. Rather than focusing on implementation as a 'catalytic effect'<sup>10</sup> in itself, then, this chapter queries the costs that 'a liberal orthodoxy about what international criminal law should be'<sup>11</sup> might pose to other normative ideals, such as legal pluralism or deliberative, democratic debate.

This chapter proceeds in four parts. It first briefly identifies the arguments that have animated why implementation of the Rome Statute's substantive and procedural provisions should be understood as a duty of ICC member states, even when, as a legal matter, it is not clear that such an obligation exists. The second section focuses on how international NGOs and the capacity-building sector – communities of practice with a shared interest in implementation – have drawn on these arguments in their promotion of implementation guidelines and 'model laws'. I suggest that these tools have contributed to a view of implementation as an increasingly disciplinary exercise, one that privileges conformity with the Rome Statute. Through process tracing, part three turns to the particular experiences of Uganda and Kenya to show how, in each country, it was not the ICC, but the mediated influence of external actors

<sup>9</sup> On shifts in the Kenyan political order, see S. Kendall, "'UhuRuto" and Other Leviathans: the International Criminal Court and the Kenyan Political Order', *African Journal of Legal Studies*, 7 (2014), 399–427.

<sup>10</sup> See S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (New York: Cambridge University Press, 2013), 194.

<sup>11</sup> F. Mégret, 'Too Much of a Good Thing?: Implementation and the Uses of Complementarity', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (New York: Cambridge University Press, 2011), 386.

and events that pushed the implementation process forward. However, as the fourth section illustrates, key political questions that were overlooked in this process soon re-emerged. Based on these histories, the chapter concludes by focusing on three dimensions of implementation: as purity, as politics, and as a form of political theatre.

### A duty to implement?

The incorporation of treaty protections is one form that the legal protection of human rights may take at the domestic level. Implementation thus reinforces not only the primacy of states in international law but also a general rule: states, in general, have far-going freedom as to the manner in which they give effect to their international obligations. As Ward Ferdinandusse argues, however, the extent of this freedom can be ‘easily overestimate[d]’, particularly in the context of international criminal law.<sup>12</sup> Many scholars have argued that the special character of international humanitarian law distinguishes it from other crimes, thus requiring greater fidelity to the manner of its implementation at the national level. Similar arguments point to the uniquely expressivist function of international criminal law as requiring its identical enunciation in national law.<sup>13</sup>

The Rome Statute has become a growing site of contestation over the duty and scope of states to implement its provisions in their own domestic legal orders. Many commentators root a duty to implement in a purposive reading of the Rome Statute, particularly its preambular language, which recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.<sup>14</sup> For example, David Donat Cattin, secretary-general of the influential Parliamentarians for Global Action (PGA), argues that the principle of complementarity ‘implies that States shall fully implement the Rome Statute in their domestic legal orders in order to comply with their primary responsibility to realize the object and purpose of the treaty (and [Rome Statute] system)’, which is ‘to put an end to the impunity of the [individual] perpetrators of the most serious crimes of concern to the international community as a whole and to contribute to the prevention of such crimes’.<sup>15</sup>

<sup>12</sup> W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: T. M. C. Asser Press, 2006), 148.

<sup>13</sup> See, e.g., Drumbl, *Atrocity, Punishment, and International Law*, 173–179.

<sup>14</sup> Preamble, Rome Statute.

<sup>15</sup> D. Cattin, ‘Approximation or Harmonisation as a Result of Implementation of the Rome Statute’, in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of*

Yet the text of the Statute requires only that a country's domestic law facilitate cooperation with the ICC and that it criminalise offences against the 'administration of justice'.<sup>16</sup> There is no obligation as such to implement its substantive (or procedural) provisions. As Alain Pellet notes, 'neither the signatory States nor even the States Parties have any clear obligations to bring their domestic legislation into harmony with the basic provisions of the Rome Statute'.<sup>17</sup> Furthermore, as a matter of treaty interpretation, the preambular recital is not part of the Statute's operative text; rather, it merely 'recalls' a suggested pre-existing duty, not one arising from the treaty itself.<sup>18</sup> Thus, while states may be obliged to investigate or prosecute crimes based on other rules of international law, it would appear, as Sarah Nouwen has argued, that the recital 'merely reflects an aspiration, just like many of the other preambular considerations'.<sup>19</sup>

The difference between 'ordinary' and international crimes has also been advanced as a basis for domestic implementation. In the context of the ICC, the academic Jann Kleffner has been one of the strongest proponents of this position. He argues that, 'Implementation can only be considered satisfactory if it comprehensively and effectively covers the entire range of conduct criminalized by the Rome Statute, without adversely affecting pre-existing obligations under international law that go beyond the Rome Statute, and while taking into account the need to fill gaps in the legislation that may lead to impunity, such as those resulting from the absence of universal jurisdiction'.<sup>20</sup> ICC actors have endorsed Kleffner's view. Sylvana Arbia, the ICC's former registrar, writes that, 'Without [implementing legislation], states could be left in the position of prosecuting only for some of the constitutive acts of the crimes, such as murder and rape. This could undermine the basis of national prosecutions, and may invite the ICC's Judges to take jurisdiction where this might not be needed'.<sup>21</sup>

*International Criminal Law* (Leiden: Martinus Nijhoff, 2012), 361–362 (quoting combined paras. 4 and 5 of Rome Statute Preamble).

<sup>16</sup> Article 88, Rome Statute.

<sup>17</sup> A. Pellet, 'Entry Into Force and Amendment of the Statute', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1* (Oxford: Oxford University Press, 2002), 153.

<sup>18</sup> D. Robinson, 'The Mysterious Mysteriousness of Complementarity', *Criminal Law Forum*, 21(1) (2010), 94–95.

<sup>19</sup> Nouwen, *Complementarity in the Line of Fire*, 39.

<sup>20</sup> J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (New York: Oxford University Press, 2008), 112.

<sup>21</sup> S. Arbia and G. Bassy, 'Proactive Complementarity: A Registrar's Perspective and Plans', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (New York: Cambridge University Press, 2011), 65.

Distinguishing between ordinary and international crimes was critical to the criminal tribunals for Rwanda and the former Yugoslavia, both of which, unlike the ICC, enjoy primacy over national jurisdictions.<sup>22</sup> The Rome Statute, however, makes no such distinction: states are permitted to prosecute international crimes as ordinary crimes, provided that their doing so is not deliberately designed to shield perpetrators from criminal responsibility. Indeed, during the drafting of Article 20(3) on *ne bis in idem* (the principle that a person should not be prosecuted more than once for the same criminal conduct), states explicitly rejected a proposal that would have made a case admissible before the ICC where the national proceeding failed to consider the international character or grave nature of a crime.<sup>23</sup> For this reason, the Statute instead refers to the ‘same conduct’ of an accused, ‘to make clear that a national prosecution of a crime – international or ordinary – did not prohibit ICC retrial for charges based on different conduct’.<sup>24</sup> Article 93(10) further supports this interpretation, as it refers to the Court providing assistance to a state party ‘conducting an investigation into or trial in respect of *conduct* which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crimes under the national law of the requesting State’.<sup>25</sup>

Finally, implementation discourse reflects anxieties about fragmentation in international law more generally.<sup>26</sup> As Carsten Stahn and Larissa van den Herik note, ‘One of the inherent features of international criminal law is a desire for uniformity’, which ‘flows from the need for “certainty, stability and predictability” [that] is required in criminal

<sup>22</sup> Both of the ICTY and ICTR statutes explicitly allow for the retrial of persons who had already been tried by a national court if ‘the act for which he or she was tried was characterized by an ordinary crime’. See *Prosecutor v. Michel Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Rule 11 *bis* of the Rules of Procedure and Evidence, ICTR-05-86, Trial Chamber III, ICTR, 19 May 2006.

<sup>23</sup> Article 20(3), Rome Statute. As Jo Stigen notes, the ‘ordinary crime’ criterion, initially endorsed by the [ILC], ‘was proposed but rejected [in the negotiations] as it met too much resistance’. J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff, 2008), 335.

<sup>24</sup> K. Heller, ‘A Sentence-Based Theory of Complementarity’, *Harvard International Law Journal*, 53(1) (2012), 224. For a similar conclusion, see Nouwen, *Complementarity in the Line of Fire*, 50.

<sup>25</sup> Article 93(10), Rome Statute (emphasis added).

<sup>26</sup> See Conclusions of the Work of the Study Group on the Fragmentation of International Law, ‘Difficulties arising from the Diversification and Expansion of International Law’, UN Doc. A/61/10 (2006).

proceedings'.<sup>27</sup> A related concept is that the Statute establishes a common criminal floor. Cattin, for instance, sees the Statute as posing a 'minimum standard for national criminal justice systems exercising their primary responsibility: States can do more, but shall do no less, than what the Rome Statute prescribes, so as to ensure that all crimes against humanity, war crimes and acts of genocide be duly incorporated in the relevant legal order and not left unpunished'.<sup>28</sup> The fact that international criminal law enforcement is increasingly migrating from international tribunals to national courts makes the idea of minimum standards (often referred to as 'international standards') particularly attractive when the 'landscape of domestic justice is diverse and partly schizophrenic'.<sup>29</sup> To that end, 'the play between . . . unity and diversity, is one of the discursive patterns used by the [legal] discipline to deploy criticism and propose reform projects'.<sup>30</sup> Faithful domestication of the Rome Statute, as the following section details, is one such project.

### Implementation and standardisation

While implementation is itself a political process – an act of state – human rights NGOs, particularly international ones, have played a significant role in influencing debates about what domestication of the Rome Statute requires.<sup>31</sup> Many of these organisations maintain offices in ICC situation countries, creating a vital, vertical network between those sites where international criminal law is produced – The Hague, Brussels, Geneva, New York – and enacted. There now exists an array of implementation materials prepared by these organisations. As early as 2000, Amnesty International created a 'Checklist for Effective Implementation', while Human Rights Watch and the International Centre for Criminal Law

<sup>27</sup> C. Stahn and L. van dan Herik, "Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law and the Jack-in-the-Box?, in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff, 2012), 58 (citing *Prosecutor v. Aleksovski*, Judgment, IT-95-14/1-A, The Appeals Chamber, ICTY, 24 March 2003, para. 101).

<sup>28</sup> Cattin, 'Approximation or Harmonisation as a Result of Implementation of the Rome Statute', 373

<sup>29</sup> Stahn and van dan Herik, "Fragmentation", Diversification and "3D" Legal Pluralism', 39.

<sup>30</sup> A.C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', *Leiden Journal of International Law*, 22(1) (2009), 2–3.

<sup>31</sup> The CICC is one international NGO that has made implementation a centrepiece of its work; however, others like Amnesty International, Avocats Sans Frontiers, the International Federation for Human Rights (FIDH), No Peace Without Justice, PGA, and Human Rights Watch have all been similarly engaged.

Reform published similar manuals shortly thereafter.<sup>32</sup> As part of its 'Global Advocacy Campaign for the International Criminal Court', the CICC maintains a detailed, on-going chart of those states that have either enacted, or are in the process of enacting, 'Rome Statute Crimes Legislation' and/or 'Cooperation Legislation'.<sup>33</sup> The coalition also includes a resource page with links to 'model' national implementation laws, as well as 'template statutes' endorsed by various regional organisations like the Commonwealth Secretariat.<sup>34</sup>

The Commonwealth's Model Law – of particular relevance to Kenya and Uganda – is a 58-page document with prepared language that closely tracks the text of the Rome Statute. While noting that, 'there is no "one-size-fits-all" solution to the complex process of domestic implementation', the Law presents itself as 'model legislation (i.e. a textual basis to be modified and adapted to a given national system)'.<sup>35</sup> Interested states are invited to insert the name of their country at relevant points throughout the document, and to include select optional additional provisions, ranging from the appropriate penalties for crimes ('imprisonment for a term not exceeding 30 years or a term of life imprisonment when justified by the extreme gravity of the crime') to extending the law's coverage to violations of the Geneva Conventions.<sup>36</sup>

Various 'best practice' tools for implementation supplement such material. One such tool is the National Implementing Legislation Database (NILD). NILD seeks to provide users with 'access to a fully-searchable, relational database of national implementing legislation'.<sup>37</sup>

<sup>32</sup> AI Updated Checklist; Human Rights Watch, 'Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute' (September 2001) ('HRW Handbook'); ICCLR, 'International Criminal Court: Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure & Evidence' (April 2002).

<sup>33</sup> See CICC webpage.

<sup>34</sup> The Secretariat describes itself as 'provid[ing] guidance on policy making, technical assistance and advisory services to Commonwealth member countries'. For further information, see <http://thecommonwealth.org/organisation/commonwealth-secretariat>.

<sup>35</sup> Commonwealth Secretariat, 'Cover Note: International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions', SOLM(11)10, May 2011, para. 3(a).

<sup>36</sup> *Ibid.*, Annex B, Model Law to Implement the Rome Statute of the International Criminal Court. See, e.g., Part II ('International Crimes and Offences Against the Administration of Justice').

<sup>37</sup> National Implementing Legislation Database of the International Criminal Court Statute ('NILD Database'), [www.nottingham.ac.uk/hrlc/documents/projects/summaries/pdfs/projectnild.pdf](http://www.nottingham.ac.uk/hrlc/documents/projects/summaries/pdfs/projectnild.pdf). The legal academic Olympia Bekou, who has also contributed an extensive literature on complementarity and implementation, manages NILD. See, e.g., O. Bekou and S. Shah, 'Realising the Potential of the International Criminal Court: The



Part of the ICC's Legal Tools project,<sup>38</sup> NILD describes itself as 'an invaluable tool for national legislators who have not yet adopted, but are considering or drafting implementing legislation, enhancing their capability to draft effective legislation drawing upon previous experience of fellow State Parties'.<sup>39</sup> NILD further allows states that have adopted legislation to 'monitor the impact of their legislation on other States and undertake necessary amendments if the content of the Rome Statute changes, or if improvements are deemed necessary'.<sup>40</sup> One publication highlights not only NILD but also other Legal Tools projects as well – Case Matrix, a Means of Proof Digest – as examples of access to legal information. It notes that such access 'should be provided in line with this new paradigm shift towards positive complementarity that focuses on strengthening domestic capacity and empowering national actors'.<sup>41</sup>

These tools accompany the literature of NGOs, which endorses a similarly maximalist approach to implementation. According to Amnesty's implementation checklist, 'principles of criminal responsibility in national legislation should be at least as strict as ... the Rome Statute'.<sup>42</sup> This includes, for instance, that 'all crimes of accessory criminal responsibility such as aiding, abetting, and direct and public incitement as contained in Article 25 [of the Statute] should be punishable under national law'.<sup>43</sup> Conformity with the Statute has also been presented as encompassing far-reaching procedural requirements: Human Rights Watch notes that states 'should guarantee the highest international standards for fair trials at the national level', as 'these rights will ... be important in the determination of the admissibility of a case by the ICC'.<sup>44</sup> Such standards would include not only programs of victim and witness protection but even procedural regimes unique to the Rome Statute, such as a trust fund for victims or provisions for victim participation. A related issue is punishment: effective implementation, it is strongly suggested, would be inconsistent with the death penalty.<sup>45</sup>

African Experience', *Human Rights Law Review* 6(3) (2006); O. Bekou, 'Crimes at Crossroads: Incorporating International Crimes at the National Level', *Journal of International Criminal Justice* 10(3) (2012).

<sup>38</sup> See 'ICC Legal Tools', [www.legal-tools.org/en/go-to-database/](http://www.legal-tools.org/en/go-to-database/). <sup>39</sup> NILD Database.

<sup>40</sup> *Ibid.*

<sup>41</sup> M. Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher, 2011), vi.

<sup>42</sup> AI Updated Checklist, 17. <sup>43</sup> *Ibid.* <sup>44</sup> HRW Handbook, 19.

<sup>45</sup> In Amnesty's words, 'it would be inappropriate for national courts to impose a more severe penalty for a crime under international law than the one chosen by the international community itself'. AI Updated Checklist.

These documents illustrate that even where commentators and NGOs acknowledge that the Rome Statute contains no positive obligations to implement its substantive (or procedural) law provisions, the principle of complementarity is presented in a manner that nevertheless compels it. As a technique of governance, the approach to implementation is thus increasingly disciplinary: failure to abide by the purported requirements of the Rome Statute opens states up to the risk that the ICC will intervene. This view has been furthered by much academic commentary on implementation (noted above), which overwhelmingly focuses on fidelity to the Rome Statute's text.<sup>46</sup> Thus, just as the coercive pull of complementarity – welcomed by those who see its outcome as salutary – could encourage national proceedings, it might also 'induce national courts . . . to conform to a variety of modalities that mimic those found in international criminal law regarding sanction (i.e., no death penalty) and procedure (i.e., a fair trial)'.<sup>47</sup> The proliferation of 'model laws' abets this process. Indeed, as will be seen, the Kenyan and Ugandan ICC laws are themselves largely identical, insofar as they are both drawn from the Commonwealth Secretariat's model legislation.

### Implementation in practice: Uganda and Kenya

#### *Uganda: the ICC's host state*

Like many treaties that Uganda has signed but not domesticated, Nouwen argues that the government ratified the Rome Statute in June 2002 because it was 'internationally fashionable and improved the [government's] image in the eyes of European donors'.<sup>48</sup> The adoption of implementing legislation at the time appeared 'bleak', however, as it was not seen as a priority for either the executive or the legislature. Nevertheless, as a result of the attention increasingly paid to the government's conflict with the Lord's Resistance Army (LRA), and following

<sup>46</sup> As an example, see the articles gathered in the 'Symposium on National Implementation of the ICC Statute', which appeared in two parts in the *Journal of International Criminal Justice*, 2(1), March 2004 and 5(2), May 2007. In the second installment, editor Luisa Vierucci notes that, 'states tend to stick to the definition of the crimes as contained in the ICC Statute' and that this 'seems . . . to be a response to the states' inherent concern to avoid the risk of possibly adverse decisions on complementarity by the ICC'. L. Vierucci, 'National Implementation of the ICC Statute (Part II): Foreword', *Journal of International Criminal Justice*, 5(2) (2007), 419–420.

<sup>47</sup> Drumbl, *Atrocity, Punishment, and International Law*, 139.

<sup>48</sup> Nouwen, *Complementarity in the Line of Fire*, 194.

President Museveni's referral of that situation to the ICC in 2003 (making it the first country to come under the Court's jurisdiction), international human rights organisations and their national-level partners prioritised implementation of the Statute there.

After receiving authorisation to prepare a draft implementation bill, Uganda's Ministry of Justice and Constitutional Affairs assembled a first draft in 2004. It used Canada's and New Zealand's ICC legislation as examples, and the Commonwealth Secretariat reportedly provided 'technical support' and 'drafting assistance'.<sup>49</sup> Groups like PGA also 'conducted seminars and workshops on the Rome Statute for MPs, and facilitated relevant contacts for them with others, including the European Union, the ICC and local civil society'.<sup>50</sup> Yet political developments on the ground soon stalled any desire to press for the ICC Bill's passage. After the ICC's warrants for the LRA's leaders were unsealed in mid-2005, the legislation was seen, much like the Court itself, as a hindrance to the advancement of peace negotiations. As explained in a letter by the Uganda Coalition for the International Criminal Court (UCICC) for its 'Domestication Campaign 2008', the bill had 'been proposed and has lapsed in Parliament before because too many legislators feared that adopting these laws means that the ICC would take jurisdiction away from Uganda and potentially interrupt the peace process'.<sup>51</sup> Preparations for multi-party elections in 2006, along with 'backlogs in Parliament',<sup>52</sup> further delayed consideration of the bill and it ultimately lapsed with the prorogation of parliament.

A substantially similar version of the bill was reintroduced in late 2006.<sup>53</sup> The executive, however, 'prioritised commercial laws for debate' and commentators have noted that parliament was instructed to 'go slow' with the legislation because its passage was still 'thought to send the wrong message in relation to the ongoing Juba talks'.<sup>54</sup> As the then

<sup>49</sup> International Criminal Court Bill, XCVII(26), *Uganda Gazette*, 28 May 2004; e-mail communication from Ministry of Justice, Uganda (on-file).

<sup>50</sup> *Putting Complementarity Into Practice*, Open Society Foundations (2010), 61–62. See also remarks of Mr Wacha in The Eighth Parliament of Uganda, Third Reading, The International Criminal Court Bill, 2006, 10 March 2010, 10950 ('ICC Bill Third Reading').

<sup>51</sup> UCICC, Domestic Campaign 2008, 10 July 2008 (letter on-file).

<sup>52</sup> B. Afako, 'Country Study V: Uganda', in M. du Plessis and J. Ford (eds.), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected Africa Countries* (ISS Monograph Series, 2008), 94.

<sup>53</sup> International Criminal Court Bill, XCVIX(67), *Uganda Gazette*, 17 November 2006.

<sup>54</sup> Nouwen, *Complementarity in the Line of Fire*, 197. Ugandan jurist Barney Afako also describes the 'prospects of Uganda implementing a suitable national scheme in the next

deputy attorney general Freddie Ruhindi testified during parliamentary debate over what would become the 2010 act:

[T]he long time taken on deliberating on this matter was not by accident. Interestingly, we are not even recalling that the first one was a 2004 Bill, which lapsed with the Seventh Parliament. Then we came out with the Seventh Parliament. Then we came out with the 2006 Bill and at one point, you may recall that we were in very serious negotiations with the Kony group and everyone of us was actually quite reluctant to disturb that process by coming on the Floor of the House and at the end of the day derailing the process. But as we speak, that has gone bad and there is nothing to stop us from going ahead with the enactment of this law in full swing.<sup>55</sup>

Thus, whereas there were a variety of competing and superior interests during the previous six years that implementation of legislation was pending, this calculus had shifted by 2010. Peace negotiations were no longer a confounding variable, while the imminent arrival of delegates from around the world to Kampala for the first-ever 'Review Conference of the Rome Statute' provided the necessary push for adoption.<sup>56</sup>

The significance of Uganda's hosting the conference is evident from public documents. During the bill's second reading, Ruhindi noted that, 'on the sidelines of the substantive debate on this Bill, Uganda is privileged . . . [to] be hosting the first ever review conference'.<sup>57</sup> In its annual report, the Justice Law and Order Sector (JLOS) – a government mechanism operating a 'sector-wide approach' to donor-driven judicial reform – stated that, 'one of the conditions that was set by the ICC to allow [Uganda] to host the conference was domestication of the Rome Statute'.<sup>58</sup> Mirjam Blaak, Uganda's ambassador to The Hague, confirms

two years . . . as "low" (on a scale of 'unlikely – low – fair – good – highly likely'). See B. Afako, Country Study V: Uganda.

<sup>55</sup> The Eighth Parliament of Uganda, Second Reading, The International Criminal Court Bill, 2004, 10 March 2010, 10941 (Mr F. Ruhindi) ('ICC Bill Second Reading'). Notably, although the title of the second reading is 'The International Criminal Court Bill, 2004', the MPs clarified that 'the committee chairman [was] reading a report entitled, "The International Criminal Court Bill 2006"'. *Ibid.*, 10932 (remarks of Mr Kawuma).

<sup>56</sup> Nouwen, *Complementarity in the Line of Fire*, 198; see also C. Mbazira, 'Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda', in C. Murungu and J. Biegon (eds.), *Prosecuting International Crimes in Africa* (Cape Town: Pretoria University Law Press, 2011). Mbazira argues, 'It appears that the hasty passing of the overdue Bill was catalyzed by Uganda's hosting of the ICC Review Conference from 31 May to 1 June 2010', 215.

<sup>57</sup> ICC Bill Second Reading, 10931.

<sup>58</sup> 'JLOS Annual Performance Report 2009/2010' (September 2010), 65.

this view: in her words, 'It was important to have the bill signed before the review conference took place. They wouldn't have cancelled the review conference if it hadn't been, but it was an understanding that we would.'<sup>59</sup>

In the end, the act as passed in 2010 was nearly identical to the version that was put forward almost six years before.<sup>60</sup> Substantively, the ICC Act proscribes war crimes, genocide and crimes against humanity in a manner identical to the Rome Statute; the latter's definitions were incorporated by reference into the act, as were the modes of responsibility and the Statute's 'general principles of criminal law'.<sup>61</sup> This mirror imaging belied the concerns of some parliamentarians, however, who in an otherwise non-contentious debate raised questions about the scope of the Rome Statute's protection and whether Uganda was entitled to amend it. Geoffrey Ekanya, an MP from Tororo County, asked:

I want to find out from the Attorney-General and the committee chairperson, what harm would it cause to expand the definition of the Bill as regards the crimes against humanity, to include plunder. As we speak now, the international community has been facilitating some countries to plunder natural resources in Africa and I think this should be part of the crimes against humanity. I am talking about DRC, for example; I am talking about the conflicts we had in other parts of Africa. The guns come from the West to facilitate conflicts; to plunder Africa and then they take the minerals; but the Bill does not talk about those who facilitate plundering because this is what leads to conflict and finally crimes against humanity. So, would it be wrong for us to expand the definition of crimes against humanity to include the agents who facilitate plunder?<sup>62</sup>

Ekanya also expressed concern that 'certain provisions within the Rome Statute' – particularly concerning presidential immunity – were 'not in

<sup>59</sup> B. Oketch, 'Uganda Set for First War Crime Trial', Institute for War & Peace Reporting, 14 July 2010.

<sup>60</sup> See, e.g., ICC Bill Third Reading, 10950 (remarks of Mr Wacha). Mr Wacha notes that, 'the two Bills: the 2004 Bill and this particular Bill were not any different, they were the same'.

<sup>61</sup> International Criminal Court Act, 2010, *Uganda Gazette* No. 39, Vol. 103, 25 June 2010, sections 7–9; 19. Those amendments that were made focused on minor procedural issues. For instance, the act states that consent for prosecution under the ICA would be required from the Department of Public Prosecutions, rather than the attorney general. Further, jurisdiction was to vest with the Ugandan High Court, not the Magistrate Court. See Report of the Sessional Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill, 2006 ('Sessional Committee Report'), March 2010, 4–5.

<sup>62</sup> ICC Bill, Second Reading, 10935.

consonance' with Ugandan law, and urged that these questions be 'taken care of so that we and innocent people are not used as guinea pigs'.<sup>63</sup> Other MPs raised similar concerns: John Kawanga agreed that, 'at another stage we shall have to deal with commercial crime, corruption and things of the kind', while Alice Alaso asked what passage of the law would 'mean with our amnesty law', whether it would 'put the final nail on the peace process', and 'the place of traditional justice vis-à-vis the ICC Bill'.<sup>64</sup>

The interventions of these MPs raised questions about the place of the ICC Act within Uganda's broader transitional justice architecture, as well as the state's ability to tailor the Statute to suit its particular national context. In reply to Ekanya's concerns, MP Stephen Tashobya, who chaired the Committee on Legal and Parliamentary Affairs, replied (incorrectly) that 'you may not actually go beyond what [the Rome Statute] says and, therefore, you have to confine yourself' to its text.<sup>65</sup> Furthermore, as Ms Alaso's comments indicate, the bill as passed offered no provisions on alternative criminal justice proceedings, nor did it address the role of Uganda's Amnesty Committee, which had been issuing amnesties to former combatants, including those from the LRA, for the past 10 years.<sup>66</sup> Indeed, whereas the 2004 version of the ICC Bill included a proposed amendment by MP Jacob Oulanyah that would have recognised 'alternative criminal justice proceedings' in addition to 'formal' criminal proceedings,<sup>67</sup> no such proposals were later considered or debated. This suggests that, by 2010, an increasingly Hague-centric framework for punishment had taken hold, hastened by a perceived

<sup>63</sup> *Ibid.*, 10936.

<sup>64</sup> *Ibid.*, 10938–30 (remarks of Messrs Kawanga and Kyanjo); see also 10934 (remarks of Ms Alaso).

<sup>65</sup> *Ibid.*, 10936. MP Tashobya added, 'But as to whether we can amend the Rome Statute, I do not know. You are intending to expand and that will be an amendment of the Rome Statute.'

<sup>66</sup> In January 2000, Uganda adopted an Amnesty Act that provided amnesty for anyone who had engaged in armed rebellion against the government since the '26th day of January 1986' and who agreed to renounce and abandon such rebellion. The conditions for amnesty were broadly conceived, with the declaration that 'amnesty means a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'. See Amnesty Act, 2000.

<sup>67</sup> J. Oulanyah, 'Proposed new Part to ICC Bill; Part X – Alternate Proceedings', 12 December 2004 (proposed amendments on file). Oulanyah's proposal suggested a possible truth commission model, not unlike that adopted in South Africa. The 'alternative proceedings' would, for instance, 'provide a system of individual accountability', including 'public and open hearings', 'participation of victims and affected persons', 'full disclosure of all relevant facts', a 'written determination of the case', and 'sanctions'.

need to pass the legislation prior to the start of the ICC Review Conference.

A similar mindset informed the influential network of Ugandan justice sector donors. Stephen Oola notes, for example, that an initial agreement by JLOS to present to parliament in 2009 the ICC Bill together with a proposed National Reconciliation Bill – in order to generate a ‘comprehensive national discussion on Uganda’s justice needs’ – was scuttled when donor governments made it clear that they wanted the ICC Bill fast-tracked.<sup>68</sup> As a result, Oola argues that ‘the ICC Act was rushed through Parliament with little consultation and without much-needed acknowledgment of the domestic legal reality, given the existence of the Amnesty Act’.<sup>69</sup>

### *Kenya: ‘becoming a global village’?*

As in Uganda, international pressure was a key dynamic that drove the passage of Kenya’s domestic implementing legislation. Following the election of President Mwai Kibaki in 2002, the government ratified (as an executive act) the Rome Statute in 2005. Little is known about the administration’s intentions in choosing to do so other than that, in the wake of an ostensibly reformist political moment, ratification of the Statute was seen as a positive step by the new administration. One prominent Kenyan activist described the ratification as ‘one of those things you do to look good’,<sup>70</sup> while Yvonne Dutton’s analysis suggests that Kenya’s classification as a democracy in the post-Kibaki era played a role in the government’s decision to join the Court.<sup>71</sup> International NGOs also seized on the moment. The CICC, for instance, chose Kenya as a target country on which to focus its efforts, noting that ratification would send an ‘important signal to other African states who have yet to ratify about Africa’s growing commitment to international justice and the rule of law’.<sup>72</sup>

<sup>68</sup> The bill proposed, in part, the establishment of a National Truth and Reconciliation Commission to ‘facilitate the process of reconciliation within the country and to investigate the circumstances under which the gross violations and abuses of human rights were committed, including their motives, perpetrators and victims and to disclose the truth with respect to the violations in order to prevent a repeat of the violation or abuses in future’. National Reconciliation Bill, draft of 10 June 2011 (copy on file).

<sup>69</sup> See further Chapter 6 by Oola in this volume.

<sup>70</sup> Personal interview conducted in Nairobi, Kenya, 30 November 2012.

<sup>71</sup> See Y. Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Oxon: Routledge, 2013).

<sup>72</sup> CICC, ‘Global Coalition Calls on Kenya to Ratify International Criminal Court’ (11 January 2005).

At the time, Kenya did not have any laws in place that would have enabled it to prosecute international crimes as such. Neither the Kenyan Penal Code (KPC) nor the Armed Forces Act, which governs the Kenyan military, contained any such provisions, nor had a Kenyan court ever dealt with crimes against humanity, war crimes and genocide.<sup>73</sup> Following ratification, then, the Kenyan National Commission on Human Rights began drafting a bill that sought to implement provisions of the Statute domestically. At the time, however, the country was also undergoing its constitutional review process, with a referendum set for November 2005. As a result, the draft International Crimes Bill was temporarily shelved. It went through an initial reading in parliament in June 2006 but, before it could proceed further, the 2007 elections had arrived.

In the wake of the electoral violence, a process that might have otherwise proceeded as a quiet, internal manner was quickly internationalised. Following its hearings, a key recommendation of the Commission of Inquiry on Post-Election Violence (known also as the 'Waki Commission') was that implementation of the Rome Statute be 'fast-tracked for enactment by Parliament to facilitate investigation and prosecution of crimes against humanity'.<sup>74</sup> Likewise, as Antonina Okuta notes, the commission's recommendation that a special local tribunal be created to try the alleged perpetrators brought 'into sharp focus the country's national legislation as well as its capacity to handle the investigation and prosecution of international crimes'.<sup>75</sup>

As in Uganda, the Commonwealth Secretariat played an influential role in the drafting process. At the bill's second reading in May 2008, Kenya's then attorney general Amos Wako stated that the government had been 'well guided' by the United Nations and the Commonwealth Secretariat, which had 'developed model legislation to guide the countries'.<sup>76</sup> He continued:

<sup>73</sup> A. Okuta, 'National Legislation for Prosecution of International Crimes in Kenya', *Journal of International Criminal Justice*, 7 (2009), 1063. The one exception was Kenya's Geneva Conventions Act, which, like Uganda, incorporated into Kenyan law the 'grave breaches' provisions of the Geneva Conventions. This act would not have been applicable for Kenya's post-2007 election violence, however, as it did not occur in the context of an international conflict.

<sup>74</sup> Report of the Commission of Inquiry into Post-Election Violence (2008), 476.

<sup>75</sup> A. Okuta, 'National Legislation for Prosecution of International Crimes in Kenya', 1065.

<sup>76</sup> Kenya National Assembly Official Record (Hansard), The International Crimes Bill, Second Reading, 7 May 2008, 907 ('ICA Second Reading').



Mr. Speaker, Sir, we talk about the world being a global village. It is, indeed, becoming a global village, whether it is from the perspective of communications; that is telephones, mobile phones, television and so on, but for institutions such as the national State and so on. Also, from the point of view of issues relating to law and order, there can be no state as such which does not have a criminal justice system. Therefore, to the extent that the international community is developing an international criminal justice system, we are indeed and truly becoming a global village.<sup>77</sup>

Reflecting the perception that states are legally bound to implement the Statute, Wako added in his remarks that, '[B]y the mere fact we have ratified this Rome Treaty, we are, as a State, under an obligation to domesticate the Treaty, so that it has a force of law in Kenya.'<sup>78</sup>

Remarkably, the parliamentary debate on the International Crimes Act (ICA) records no opposition to its passage. The attorney general's proposal was supported by MP Martha Karua, then minister for Justice, National Cohesion and Constitutional Affairs, as well as MP Danson Mungatana, who '[took] the opportunity to thank the Attorney-General for, once again, rising to the occasion and bringing our country's laws in line with the international community, especially in criminal jurisprudence'.<sup>79</sup> MP Farah Maalim, a leading figure in the Orange Democratic Movement and himself a member of PGA, made the most extensive remarks on the bill, supporting its passage but expressing scepticism about the limitations of international criminal law. In particular, Maalim endorsed the 'need to redefine . . . the definition of the UN of what genocide is', calling for it to encompass 'cultural' and 'economic' genocide.<sup>80</sup> In his words:

It is easier for the West to arm, facilitate and finance the warlords, while they take away the timber from the Congo Forest. All these raw materials end up in the West. The money [that] is stolen from the continent often ends up in Switzerland, American and European banks. . . . Economic genocide should have been included in the Statute more than anything else. The permanent impoverishment of the black man, the slavery and the colonization that we suffered is still what keeps us where we are. There has been no compensation and responsibility for what happened. The context of the Statute tells us how little the black continent participated in the formulation of this Statute.<sup>81</sup>

<sup>77</sup> *Ibid.*, 906. <sup>78</sup> *Ibid.*, 907. <sup>79</sup> *Ibid.*, 913. <sup>80</sup> *Ibid.*, 917.

<sup>81</sup> *Ibid.*, 918. In response to MP Maalim, the attorney general replied: 'Sir, a lot was spoken about economic genocide. This Bill is not concerned with what one may call 'economic genocide'. Important as it is, it is only concerned with criminal genocide,' 927

Maalim further lamented the absence of Kiswahili ‘as one of the languages of the ICC’. He opined: ‘I have seen that they have included Russian, Spanish, Arabic, English and Chinese. There are more speakers of Kiswahili than Russian. Our own Governments, and the continental body, would have been done a lot of pride if we also had Kiswahili as one of the languages in the ICC.’<sup>82</sup>

Despite MP Maalim’s remarks, the ICA, as a model for the Ugandan legislation that followed, imports directly almost all provisions of the Rome Statute. It refers entirely to the Statute’s definition of international crimes,<sup>83</sup> while provisions on command responsibility, statutes of limitation and superior orders are likewise directly imported.<sup>84</sup> Similarly, the act provides that the maximum penalty for Rome Statute crimes is life imprisonment, even though the penal code maintains the death penalty for ordinary crimes such as murder, armed robbery and treason.<sup>85</sup>

The ICA was tabled and passed with remarkable speed, coming into operation on 1 January 2009. As in Uganda, it is one of the few international treaties to be domesticated into Kenya’s national law. Standing in support, MP Ekwee Ethuro took note of the ICA’s rapid passage:

I am aware of many of the international protocols and statutes that have been consented to by the Government, that have not seen the Floor of this House. That is not the proper way to do it. I want to believe the business of knee-jack reaction—Maybe the greatest motivation of the International Crimes Bill to even see the walls of this House, is a consideration of what we have gone through in terms of the Waki Report. . . . All the protocols and any other international protocols that the Government of Kenya has committed itself to should be domesticated.<sup>86</sup>

<sup>82</sup> *Ibid.*, 917.

<sup>83</sup> The International Crimes Act, 2008 (‘ICA 2008’), Art. 6(4). One significant difference between Kenya’s ICA and the Rome Statute is its provisions on immunity. Rather than incorporate Article 27 of the Rome Statute, which makes official capacity irrelevant to immunity, the ICA’s Section 27 only provides that the official capacity of a person shall not be used as a reason to refuse a request for the surrender of that person to the ICC. Thus, while there is no immunity for purposes of transfer or surrender to the Court, the president’s constitutional grant of immunity would prevail for the purpose of domestic prosecutions in Kenya under the ICA. A similar immunity exception was also debated in the Ugandan context; however, the provision there was ultimately defeated, again owing largely to the vigorous efforts of civil society. See M. Ndifuna, J. Apio, and A. Smith, ‘The Role of States Parties in Building the ICC’s Local Impact: Findings from Delegates’ Visits to Uganda’ (2011), which notes that the ICC Bill ‘faced delays throughout 2009–2010, reportedly in part due to efforts . . . to provide immunity for Heads of State’, 11 (on-file).

<sup>84</sup> ICA 2008, Art. 7(1)(f), (g), (k). <sup>85</sup> *Ibid.*, Art. 7(5)(b0).

<sup>86</sup> Kenya National Assembly Official Record (Hansard), The International Crimes Bill, Third Reading, 11 December 2008, 4084. MP Githae (now the Kenyan ambassador to

## Surfacing political discomforts: post-implementation domestic politics

### *Uganda: the end of amnesty?*

In Uganda, parliament's rushed support for the ICC Act's passage – seen at the time as a symbolic precondition for hosting the 2010 Review Conference – soon gave way to a deeper set of political concerns over the future of the Amnesty Act and, by extension, to the dominance of the complementarity framework. This was not surprising. Uganda had passed the Amnesty Act in 2000, within a year of its first signing the Rome Statute, but 'without considering any possible inconsistency in obligations'.<sup>87</sup> Furthermore, while some MPs had raised questions about amnesty's future in light of the ICC Act, at the time Attorney General Ruhindi had assured them that, 'International criminal justice does not throw away our own initiatives to try some of these renegades.' He noted, correctly, that 'you can actually have amnesty internally or domestically under the complementarity principle'.<sup>88</sup> Nevertheless, the possibility of conflict was apparent. What might happen, for instance, if an amnesty applicant became a target for domestic prosecution under Ugandan law?

This precise question confronted parliament only one month after the ICC Act's passage, when the executive sought a 'carve out' declaration for the eligibility of four individuals to receive amnesty: Thomas Kwoyelo, a former LRA combatant, and three of the ICC's named suspects. The Minister of State for Internal Affairs purportedly sought the exemption because these individuals 'have been engaged and continue to engage in acts that are contrary to international standards and are rebellious and injurious to the citizens of this country and the neighbouring states'.<sup>89</sup> At this point Ugandan authorities had already seized Kwoyelo and he had in fact applied for amnesty under the existing law. This led one MP who opposed the government's motion to note that it was in a 'catch-22' situation:

The minister is telling us that the fourth person [Kwoyelo] is already in the hands of the security agencies; they do not know what to do with him.

the US) likewise took the occasion to state, '[N]ow that the Attorney-General is in the mood of domesticating international agreements, we have so many of them that we have not domesticated in this country, which Kenya has ratified. I would like to ask him to bring them to this House so that we can domesticate them.' *Ibid.*

<sup>87</sup> Nouwen, *Complementarity in the Line of Fire*, 206.

<sup>88</sup> ICC Bill Second Reading, 10942.

<sup>89</sup> Request for Parliament to Approve the Declaration of Named Individuals as Persons Not Eligible for Amnesty, 13 April 2010 (on file); remarks of Mr M. Kasaija, 785.

Actually, they just want us to pass this request so that they can have this person prosecuted, because they can't grant him amnesty; they can't release him, and they can't take him to court while the peace process is going on. Why should we operate like that?<sup>90</sup>

Another MP from northern Uganda raised similar objections, expressing confusion as to the criteria used in selecting Kwoyelo for prosecution.<sup>91</sup> She added:

Now, I want to know the effects of the declaration beyond the indictment. Suppose tomorrow, Kony comes out and says, 'I want to sign for amnesty and I will stop all this suffering for the people of Sudan, DRC and for the people of Central African Republic.' What will be the political decision of Uganda, DRC and Sudan for the sake of their people, what will be the effect of this? Is this decision written in stone, or can it be undone?<sup>92</sup>

In the end, the Ministry withdrew its motion; however, the failed attempt soon inaugurated a more concerted effort to cease the issuing of amnesties entirely. Indeed, although amnesty remained strongly supported by Ugandans in the north and amongst their political representatives, its continuance increasingly conflicted with Uganda's carefully crafted image as a 'complementarity state'. JLOS, for instance, which was meant to act as a 'neutral' justice coordinator, undertook a more aggressive effort to discontinue the act, arguing that it was incompatible with Uganda's obligations under international law.<sup>93</sup>

A more urgent crisis thus presented itself in late 2012, when the Ministry of the Interior did not renew Part II of the Amnesty Act, which was the provision that empowered the commission to grant amnesties. The provision's lapsing – largely understood as a response to the Ugandan Constitutional Court's halting of Kwoyelo's trial in September 2011, on the grounds that he was entitled to amnesty<sup>94</sup> – was met with intense opposition. Oola notes that it 'angered many victims and leaders from the conflict affected sub-regions in northern

<sup>90</sup> *Ibid.*, 787 (remarks of E. Lukwago). Notably, Hon. Lukwago (now mayor of Kampala) had also served as a member of the Committee of Legal and Parliamentary Affairs that considered the ICC Bill before it went to the floor of Parliament. See Sessional Committee Report.

<sup>91</sup> *Ibid.*, 788 (remarks of B. Amongi). <sup>92</sup> *Ibid.*

<sup>93</sup> See, e.g., The Amnesty Law (2000) Issues Paper, Review by the Transitional Justice Working Group, JLOS (April 2012).

<sup>94</sup> Constitutional Petition No. 036/11, arising out of HCT-00-ICD-Case No. 02/10, 22 September 2011 (on-file). In April 2015, the Ugandan Supreme Court overturned the Constitutional Court's decision, effectively bringing Kwoyelo's case back before the International Crimes Division for further proceedings.

Uganda', so much that local leaders and domestic civil society groups petitioned the Speaker of Parliament, condemning the 'illegal and unconstitutional manner' in which the amnesty provision had been removed.<sup>95</sup> Ultimately, the matter was referred to the Parliamentary Committee on Defence and Internal Affairs, which proceeded to undertake extensive consultations with key stakeholders.

In its final, 45-page report, published in August 2013, the committee concluded that the lapsing of Part II of the Act was 'premature and out of step with the sentiments of affected communities', and recommended that it be 'restore[d] in its entirety'.<sup>96</sup> Far more than the debate over the ICC Act, the committee's report surfaces the complexity of Uganda's post-conflict landscape. It reviews, for instance, the arguments in favour of amnesty – the fact that 'the vast majority of rebels were forcibly abducted, many at a very tender age'; the concern that there is 'now no legal protection for returnees from prosecution' – and assesses the executive branch's contention that the granting of amnesty 'was inconsistent with the Rome Statute of the International Criminal Court (1998) (domesticated in Uganda in 2010)'.<sup>97</sup> It notes that JLOS and the UCICC played a leading role in advancing this argument, along with 'diverse external pressure from some of Uganda's development partners as well as agencies of the United Nations and other international commentators who have policy objections to the amnesty'.<sup>98</sup> In the committee's view, these external actors 'appear to have exerted a disproportional influence on the Executive's approach to the amnesty issue, by promoting their own policy preferences'.<sup>99</sup>

The committee's conclusions also dispel a number of the misconceptions about complementarity's obligations. It notes, for instance, that there 'is in fact no provision of [the Rome Statute] which outlaws amnesties, neither does the Statute impose any express obligations upon states to prosecute relevant crimes'.<sup>100</sup> It further notes the common view encountered by committee members that the Statute 'imposes upon states parties a general obligation to establish international crimes courts

<sup>95</sup> Oola notes that, in addition to the suspicious manner of the lapsing, it was procedurally improper: Under the Amnesty Act, the decision to renew or lapse any part of the law is at the discretion of the Minister of the Interior. Here, the chief justice and attorney general both were alleged to have improperly intervened in the process. For a more detail account of this episode, see Oola (Chapter 6).

<sup>96</sup> Report of the Committee on Defence and Internal Affairs on the Petition on the Lapsing of Part II of The Amnesty Act ('Committee Report – Amnesty Lapse'), August 2013, para. 13.1.

<sup>97</sup> *Ibid.*, para. 9.8.    <sup>98</sup> *Ibid.*, paras. 9.4, 9.6.    <sup>99</sup> *Ibid.*, para. 9.38.    <sup>100</sup> *Ibid.*, para. 9.18.

and to introduce criminal legislation in order to prosecute ICC crimes nationally'.<sup>101</sup> In perhaps its strongest passage, the report concludes:

There is . . . a broader political issue at stake here, which relates not only to Uganda, but generally to the African continent: it concerns the extent to which African values and priorities inform the content of international law. There is a greater need for African states to be more assertive in ensuring that their values are reflected in the development of international law.<sup>102</sup>

Following the committee's conclusions, the Amnesty Act was reinstated in its entirety (at the time, through May 2015).

### *Kenya: a return to the political*

The politically contested nature of amnesty in Uganda, and the relative detachment of that debate from the ICC Act's passage, resonates in the Kenyan context as well. There, the swift approval of the ICA was soon followed by political stalemate on an attendant institutional question: whether or not to establish a Special Tribunal for Kenya (STK), which would be empowered to retroactively judge alleged perpetrators of the election violence. Unlike the ICA, which saw minimal debate as to the incorporation of its substantial obligations into Kenya's legal framework, the STK Bill was deeply contested. Parliamentarians rejected the overt directives of the executive to vote in favour of the tribunal's establishment, raising questions about its comportment with the Kenyan Constitution as well as the risk of creating a parallel structure to the country's broader legal system.<sup>103</sup>

The defeat of the STK Bill was largely the product of an 'unholy alliance' between politicians who feared that genuine, independent domestic proceedings would never be possible through Kenyan courts, and those who saw such a tribunal, at the time, as a greater threat than the ICC itself.<sup>104</sup> As Lydia Kemunto Bosire notes, the failure of the Waki Commission's report to trigger a domestic judicial response 'resulted in part from the fact that domestic actors perceived the ICC to be a remote

<sup>101</sup> *Ibid.*, para. 9.21.    <sup>102</sup> *Ibid.*, para. 9.39.

<sup>103</sup> See Kenya National Assembly Official Record (Hansard), The Constitution of Kenya (Amendment) Bill, Second Reading, 3 February 2009.

<sup>104</sup> For a more detailed discussion of these dynamics, see M. Wankeyi, 'The International Criminal Court's Cases in Kenya: Origin and Impact', Institute for Security Studies Paper (No. 237, August 2012), 8–9; S. Brown with C. Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya', *African Affairs*, 111 (2012), 252–254.

threat'.<sup>105</sup> The phrase 'Don't be vague, go to The Hague' emerged as part of the country's political lexicon, ostensibly signalling a preference for the ICC's involvement, even if it signalled that the Court was seen to be the more limited threat.<sup>106</sup>

Repeated attempts by the Kenyan Parliament to withdraw from the Rome Statute and to repeal the ICA also reflect the deeply contested nature of the ICC's intervention.<sup>107</sup> At the time of the Court's summons, domestic legislation was, in fact, tabled seeking to repeal the ICA. Although the government took no action on the bill, only one parliamentarian (former justice minister Karua) opposed the motion.<sup>108</sup> Furthermore, in contrast to the 'global village' invoked by Attorney General Wako only three years before, at a special session of the Senate in December 2013 (and following a similar debate by the National Assembly in September<sup>109</sup>), senators spoke of cooperation with the ICC as 'singing the tune of the whites'; of 'playing politics with the boundaries of this country and the flag and the national anthem of our nation'; and of an 'unsupervised prosecutor who can . . . arrest people who he thinks do not suck up to international neo-colonial ideology'.<sup>110</sup>

<sup>105</sup> L. Kemunto Bosire, 'Misconceptions II – Domestic Prosecutions and the International Criminal Court' (11 September 2009), in *Debating International Justice in Africa: OTJR Collected Essays, 2008–2010* (Oxford: The Foundation for Law, Justice and Society, 2010), 125–128. In the wake of the government-sponsored bill's failure, one parliamentarian, Gitobu Imanyara, tried repeatedly to bring forward a private members' bill to establish an accountability mechanism, but his efforts never advanced to the parliamentary floor.

<sup>106</sup> While a majority of parliamentarians in fact voted in favour of the tribunal (101 to 93), passage of the bill required a two-third majority given that it necessitated a constitutional amendment. See F. Mureithi, 'How MPs Rejected the Proposed Special Tribunal for Kenya Bill', *The Star*, 12 March 2011.

<sup>107</sup> See, e.g., N. Kulish, 'Legislators in Kenya Vote to Quit Global Court', *International Herald Tribune*, 5 (6 September 2013).

<sup>108</sup> See P. Opiyo, 'Isaac Ruto: Kenya Should Pull Out of ICC', *Standard Digital*, 15 December 2010; T.O. Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns', *California Western International Law Journal*, 42(1) (2011), 1–35.

<sup>109</sup> The National Assembly is the lower house of the Parliament of Kenya, while the Senate is the upper house. Prior to the structural reforms laid out in the 2010 Constitution, the Assembly served as the country's unicameral legislature; hence, debates on the ICC Act and the establishment of a domestic tribunal only took place there. The 11th Parliament, which began in March 2013, was the first to incorporate the constitutional reforms; since that time, the various Rome Statute withdrawal motions have been debated in both houses.

<sup>110</sup> Parliament of Kenya, Convening of Special Sitting of The Senate to Debate Motion on Withdrawal of Kenya from the Rome Statute, Official Record (Hansard) ('Senate Debate'), 10 September 2013, 46 (Sen. Keter); *ibid.*, 14 and 16 (Sen. (Prof.) Kindiki).

This discourse has further cast Kenyan civil society as shadowy hands conspiring against the state and its people – ‘evil society’ in the words of Kenyatta’s 2013 presidential campaign.<sup>111</sup> Furthermore, according to the Senate Majority Leader:

What has happened ... is that a few people especially from the Non-Government Organisations (NGOs) world decided to convert the misery and the tragedy that befell our country into a money-minting business where a few citizens have converted themselves into running rings and organisations in the name of victims support. These are people who have been responsible and have been used by foreigners to cook up the stories and bring up the kind of friction that is now being witnessed before the [ICC]. As I said, we should be all ashamed as Kenyans.<sup>112</sup>

The Senate ultimately passed a motion expressing its intention to bring forward a bill that would compel the government to withdraw from the ICC. Like the ICA’s passage, however, this motion may be largely symbolic: to date, no such bill has been tabled.

### Implementation as purity, as politics and as ‘performance’

The histories recounted herein suggest three tentative fault lines around implementation of the Rome Statute and its relationship to complementarity.

#### *Implementation as purity*

Rather than a catalyst, the ICC is better understood as the axis around which much advocacy for implementation of the Rome Statute has turned. Domestic NGO coalitions were stimulated and supported by larger, international organisations who saw implementation not only as a way to facilitate cooperation with the ICC, but also as a broader step in criminal justice reform. Abolition of the death penalty and the introduction of victim participation regimes are perhaps the clearest illustration

<sup>111</sup> J. Githongo, ‘Whither Civil Society?’, *The Star*, 6 April 2013.

<sup>112</sup> Senate Debate, 22. See also Parliamentary Debates, National Assembly Official Report (Hansard), 15 October 2014, in which one MP suggests that the Open Society Initiative in East Africa is a ‘terrorist organisation’, and that NGOs such as the Africa Centre for Open Governance, Kenyans for Peace Truth and Justice, and the Kenya Human Rights Commission ‘bears the greatest responsibility for the post-election violence’. In his words, ‘The forest might be different at different times but the monkeys are always the same’ (remarks of Hon. Moses Kuria).



of such reform. The normative stake of many of these actors, however, as well as many legal academics, is to preserve the Rome Statute in its technically correct or 'pure' form, transplanting its complex substantive and unique procedural provisions into national legal frameworks. The proliferation of 'model laws' and legal tools – most of which copy the Statute in content and form – are a means towards this end.

Yet 'distortions' in implementation are an issue of legal pluralism: they are an inevitable product of importing new legal principles into an established legal system. In her work on the 'translation' of international law into local justice, Sally Engle Merry contends that the efficacy of human rights depends on their 'need to be translated into local terms and situated within local contexts of power and meaning'; they need 'to be remade in the vernacular'.<sup>113</sup> Merry helpfully defines translation as 'the process of adjusting the rhetoric and structures of . . . programs or interventions to local circumstances',<sup>114</sup> but she notes that the process can also yield replication: rather than a merger of global frames with local forms (hybridisation), they are appropriated wholesale. Similarly, Mark Drumbl notes that, 'Pressures emanating from dominant international norms [can] narrow the diversity of national and local accountability modalities.'<sup>115</sup>

Analagous to the implementation efforts detailed herein, there is little evidence of 'vernacularisation' in either Uganda or Kenya. In both countries, the Statute's core substantive and procedural provisions were copied, based almost entirely on 'model' ICC legislation that had been prepared for export. Rather than an opportunity to tailor domestic legislation to reflect more localised concerns and desires – to encompass, for instance, suggestions that it incorporate the crime of pillage or corporate liability, or to accommodate other transitional justice measures – implementation appeared instead as an exercise in mimicry. This is not accidental: as noted above, much of the academic literature has deliberately presented complementarity as requiring uniformity with the Rome Statute, while NGO implementation materials and other capacity-building programs have been similarly designed. Thus, even though international law certainly permits amendments in the form of broader protection at the national level few (if any) of these materials encourage them.<sup>116</sup>

<sup>113</sup> S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 1.

<sup>114</sup> *Ibid.*, 135. <sup>115</sup> Drumbl, *Atrocity, Punishment, and International Law*, 121.

<sup>116</sup> Indeed, the expectation that implementation must preserve the international text from distortions arising from domestic politics belies the fact that fragmentation is itself a constitutive element of treaty making. As Immi Tallgren, a diplomatic representative to

*Implementation as politics*

While often presented as a seemingly technical exercise, implementation is fundamentally a political process. In both countries, the passage of implementing legislation was alternately delayed because it was not a sufficient political priority, or passed swiftly, with large majorities, because it became important enough to external constituencies and carried little political cost. In Kenya and Uganda, the politics that predominated was initially one of wanting to be seen as compliant states: implementation was evidence of putting complementarity ‘into practice’ and a means of signalling to external constituencies the governments’ purported commitment to accountability.

At the time the acts were enacted, these priorities briefly outweighed other domestic concerns. In Uganda, what passage of the ICC Act might mean for the continued practice of granting amnesties was glossed over, but quickly returned to the political fore. Similarly, Kenya’s charged domestic politics are largely absent from the 2008 parliamentary debate on the ICA’s passage, yet the unexpected swiftness of the ICC’s intervention there radically altered the political landscape; indeed, most ‘regard the leadership of the Jubilee Alliance as a political marriage forged to protect’ Kenyatta and Ruto.<sup>117</sup> This, in turn, has led to repeated efforts to nullify the domestic legislation, withdraw from the Court and derail its proceedings.

Yet the intensity of these debates, and their relative absence from earlier discourse, suggests a decoupling from the politics of the Rome Statute’s enactment and the text of the implementation legislation itself. A focus on the ‘ceremonial conformity’<sup>118</sup> of Uganda’s ICC Act and Kenya’s ICA with the Rome Statute – an exact mapping of the latter’s substantive and procedural provisions – can be understood as a desire to gain or maintain international legitimacy, but it also reflects the power and authority of particular non-state actors – influential NGOs, legal

Rome in 1998, writes, ‘[H]ere in Rome we are slowly constructing articles by putting bits and pieces together, solving the lack of consensus by lukewarm compromises about how a particular matter should be addressed, deferring the most controversial questions in strategic choices of terms to the “application.”’ I. Tallgren, ‘We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court’, *Leiden Journal of International Law*, 12 (1999), 689.

<sup>117</sup> Chatham House, ‘The ICC Intervention in Kenya’, AFP/ILP 2013/01, February 2013.

<sup>118</sup> M. Fourcade and J. Savelsberg, ‘Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization’, *Law & Social Inquiry*, 31(3) (2006), 516 (citing J. Meyer and B. Rowan, ‘Institutionalized Organization: Formal Structure as Myth and Ceremony’, *American Journal of Sociology*, 83 (1977)).

academics, the ICC itself – to mediate the relationship between the international and national spheres. It also underscores their influence in the social construction of a new norm of complementarity, one that is increasingly freed from its legal constraints as an admissibility principle in the service of broader governance goals.

These goals may be normatively desirable; however, they also risk supplanting democratic deliberation with ‘a treaty-centred international administrative bureaucracy’, contributing to a ‘whittling down of democratic input in important aspects of national lawmaking’.<sup>119</sup> The presentation of implementation as an international duty rather than a choice (or even a priority) amongst domestic political actors has arguably contributed to such ‘whittling down’.

### *Implementation as ‘performance’*

Contrary to popular accounts, the ICC itself was not a catalyst for implementation of the Rome Statute in either Kenya or Uganda. The passage of the ICC Act did not come until eight years after the Court had formally intervened in Uganda, bringing with it an array of other transnational actors whose focus and interests were significantly broader than the ICC’s alone. Moreover, since the act’s passage, there is increasing evidence to suggest that it was the country’s role as host state for the ICC Review Conference, part of an orchestrated performance for the ‘international community’ which pushed forward legislation that had otherwise languished.

The desire to be seen as a compliant, cooperative state in the eyes of international actors likewise motivated Kenyan politics, at least in the early phase of the post-election violence. At that stage, in 2008, the imminence of ICC intervention still appeared relatively remote – indeed, it was its remoteness that led many MPs to reject the Special Tribunal bill – but passage of the ICA was seen as a politically strategic move. As a stand-alone recommendation of the Waki Commission it was an opportunity to signal a break with the past, even as the act’s own retrospective applicability to those events appeared doubtful. The ICA may have been, in the words of the director of a leading Kenyan NGO, the country’s

<sup>119</sup> Drumbl, *Atrocity, Punishment, and International Law*, 135. For a similar critique in the context of constitutional drafting, see S. Kendall, “‘Constitutional Technicity’: Displacing Politics through Expert Knowledge’, *Law, Culture and the Humanities* 11 (3) (2015).

'never again' moment but, unlike the STK, it came at a sufficiently low political cost.<sup>120</sup>

These histories suggest that, rather than a deliberative, democratic process, implementation in Uganda and Kenya is better understood as a form of political theatre. In both countries, passage of domestic ICC legislation was hailed for its swift passage with large majorities, demonstrating the entrenchment of global norms domestically and vindicating the ICC's catalytic potential. In fact, however, implementation of the Statute was accelerated in order to 'perform' complementarity for predominantly international audiences, and to signal, in the Kenyan context, a return to the 'global village'. Much like the international criminal trial itself, then, implementation of the Rome Statute served a symbolic function, even as the post-implementation domestic politics of both countries remain deeply contested.<sup>121</sup>

### Conclusion

Implementation narratives typically present the process as part of a march towards global consensus – as something above the state, rather than a part of it. 'Model' laws and toolkits facilitate this process; however, as this chapter has suggested, such questions of technique overwhelmingly privilege uniformity with the Rome Statute, often stifling deeper political debates within the state itself. Moreover, the outsized role of external actors and constituencies in these processes – most of whom regard deviation from the Statute with suspicion – raises questions about who the agents of implementation are, as well as the content and form of the domestic legislation that is enacted. Efforts to progressively narrow discussions about alternative forms of justice from the Ugandan ICC Act, or the mistaken belief that a domestic Rome Statute could not incorporate economic crimes in Kenya, suggest a view of implementation driven less by domestic political interests than in replicating the Statute as a 'global script'.

<sup>120</sup> Personal interview conducted in Nairobi, Kenya, 30 November 2012.

<sup>121</sup> On the symbolic function of the criminal trial, see M. Koskenniemi, 'Between Impunity and Show Trials', in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law, Volume 6* (The Netherlands: Kluwer Law International, 2002), 1–35. On ritual and 'performance' in the context of state transition, see also J. Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton, NJ: Princeton University Press, 1997), 20–25.

Thinking of implementation as beyond fidelity to the Rome Statute could free a space in which to think more critically about its productive potential. As this chapter has illustrated, implementation is a politically fraught and dynamic process; it continues long after legislation is formally passed. In Uganda, domestic debates over the fate of Thomas Kwoyelo and the future of the country's transitional justice process continue to evolve; in Kenya, threats by parliamentarians to repeal the ICA or withdraw from the Court reflect deeper contestation over the ICC's selective geographies and Western origins. These uneven trajectories suggest that implementation is a site for contestation but, equally, for experimentation and innovation as well. In short, implementation can be a site for states to also develop this dynamic body of law in a manner that better reflects their national interests and local contexts. All roads need not lead to Rome.