A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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CHAPTER SIX
Implementation and Domestic Politics

While the adoption of the Rome Statute formally initiated the ratification process that brought the ICC into existence, it also inaugurated a far-ranging effort to embed the Statute in the legal framework of states. As one legal scholar has ambitiously characterized it, the Statute was a "quasi-legislative event that produced a criminal code for the world."[700] Conceived and led largely by the same network of global civil society actors that had campaigned for the ICC's establishment, these campaigns for national implementation have again been intimately linked to the complementarity-as-catalyst framework. The 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."[701] Similarly, Amnesty International claims that a state that fails to enact national legislation risks "being considered unable and unwilling genuinely to investigate and prosecute crimes within the Court's jurisdiction."[702]

As with the creation of domestic "complementarity" courts, implementation reflects a broader interest in routing governance objectives through international criminal law.[703] To that end, this chapter continues the close examination of Kenya, Uganda, and the DRC by exploring the Rome Statute's implementation in each of these three jurisdictions. Its contention is two-fold. First, implementation has become an increasingly sophisticated and technocratic exercise in applying the Statute as a "global script"[704] to a diverse array of national contexts. Rome Statute "model laws" have emerged and a variety of international NGOs, advisors, and consultants—a growing "transnational expert" community of practice[705]—offer counsel to states on how best to harmonize their domestic legal and constitutional orders with the purported requirements of the Statute. This emphasis on harmonization has, in turn, contributed to an increasingly strict interpretation of what complementarity purportedly requires.

Second, while the ICC's intervention in these countries accelerated advocacy campaigns for the passage of national implementation legislation, it was not the direct catalyst for implementation in either Kenya or Uganda (the DRC has not yet passed such legislation.) Rather, other events, geared predominantly towards international audiences, precipitated the Statute's implementation. In Uganda, the country's role as host of the 2010 Review Conference of the Rome Statute hastened a legislative process that had long stagnated, while, in Kenya, the desire to publicly demonstrate a departure from the election violence of 2007-08 led parliamentarians to "fast-track" implementation following the Waki Commission's recommendation.

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[700] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Martinus Nijhoff, 2002), 263.
[701] Coalition for the International Criminal Court (CICC), at http://www.iccnow.org/?mod=ratimp.
[702] Amnesty International, "The International Criminal Court: Checklist for Effective Implementation" (2000).
[703] For instance, the CICC states that, "implementation of the Rome Statute provides an opportunity to reinvigorate reforms of the criminal and procedure codes, which, in the long term, will strengthen rule of law, peace, and security globally." See CICC, at http://www.iccnow.org/?mod=romeimplementation.
[704] My use of the term "global script" borrows from Carruthers and Halliday's use of the term as a "formalized expression or codification of global norms." See Bruce G. Carruthers and Terence C. Halliday, "Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes," *Law & Social Inquiry*, 31(3) (2006), 535-536.
[705] Drumbl, *Atrocity, Punishment, and International Law*,135.

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. In Uganda, subsequent efforts to abandon the country's long-standing amnesty program have been met with strong opposition, signaling significant discomfort with the domestic legislation's retributive framework. Similarly, in Kenya, the initiation of ICC investigations in 2009 fractured the apparent unanimity of political elites over the desirability of the domestic legislation that had been ratified only one year prior, even as it united former political rivals Kenyatta and Ruto.[706] By contrast, in the DRC, domestic politics have continually thwarted the efforts of a dedicated minority to press for comprehensive implementing legislation. While the release of the UN's 2010 "mapping report" lent a similar urgency (and opportunity) for domestic political actors to be seen as "doing something" for a primarily international audience, implementation legislation has been unsuccessful to date as Congolese parliamentarians continue to regard these efforts with suspicion.

Furthermore, whereas passage of Rome Statute legislation in Kenya and Uganda was initially swift, later developments in both countries share with the DRC a growing suspicion about the aims and purpose of international criminal law, seeing it less as a catalyst for reform than a tool of exclusion. Indeed, 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 merely as something the ICC did (or did not) catalyze, then, this chapter also illustrates the costs that "a liberal orthodoxy about what international criminal law should be" might pose to other normative ideals, such as legal pluralism or deliberative, democratic debate.[707]

This chapter proceeds in five parts. Drawing on the arguments that have animated why implementation of the Rome Statute should be understood as a duty of ICC member states, the first section focuses on how international NGOs and the capacity building sector—communities of practice with a shared interest in embedding the ICC's normative framework—have drawn on these arguments in their promotion of implementation guidelines and "model laws." I suggest that these tools, while not without value, have contributed to a view of implementation as an increasingly disciplinary exercise, one that privileges conformity with the Rome Statute. Part two turns to the particular experiences of Uganda and Kenya to show how it was not the ICC's intervention itself, but again the mediated influence of external actors and events that pushed the formal implementation process forward. However, as the third section illustrates, key political questions that were overlooked in this process soon re-emerged. The fourth section dwells on the experience of the DRC, noting some initial similarities with Kenya and Uganda in the relationship between implementation and political action, but also fundamental differences. Based on these histories, the chapter concludes by focusing on three dimensions of implementation: as purity, as politics, and as "performance," i.e., a form of political theatre.

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[706] On shifts in the Kenyan political order, see Sara Kendall, "'UhuRuto' and Other Leviathans: the International Criminal Court and the Kenyan Political Order," *African Journal of Legal Studies* 7 (2014), 399-427.

[707] Mégret, "Too Much of a Good thing? Implementation and the uses of Complementarity," 386.

1. Implementation, Standardization, and Compliance

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.[708] Notwithstanding this principle, chapter two examined how complementarity became, over time, a site of influence for norm entrepreneurs to argue that member states are obliged to implement the Rome Statute's provisions in their domestic legal orders. This duty is rooted in a purposive reading of the 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."[709] Yet, as noted, the text of the Statute requires only that a country's domestic law facilitate cooperation with the ICC and that it criminalize offenses against the "administration of justice"; there is no obligation as such to implement its substantive (or procedural) provisions.[710]

The difference between "ordinary" and international crimes has also been advanced as a basis for domestic implementation; however, while this distinction was critical to the criminal tribunals for Rwanda and the former Yugoslavia,[711] the Rome Statute 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, as illustrated by the Statute's drafting history, 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.[712] Recalling the "same conduct" test that has emerged in ICC jurisprudence (explored at greater length in chapter three), the Statute refers instead to the conduct of an accused, "to make clear that a national prosecution of

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[708] As Ward Ferdinandusse argues, however, the extent of this freedom can be, "easily overestimate[d]," particularly in the context of international criminal law. Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Academisch Proefschrift, 2005), 148. 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.

[709] Para. 6, Rome Statute. As two NGOs noted, for instance, in an *amicus curiae* submission to the Court in the case against the LRA, "The use of ordinary offenses in lieu of international crimes itself fails to capture the gravity and aggravated nature of the international crimes." *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Amicus Curiae submitted by The Uganda Victims' Foundation and the Redress Trust, ICC Pre-Trial Chamber II (15 November 2008).

[710] Article 88. Further, as a matter of treaty interpretation, the preambular recital is not part of the Statute's operative text; rather, it "recalls" a suggested pre-existing duty, not one arising from the treaty itself. While states may be obliged to investigate or prosecute crimes based on other rules of international law, the Statute itself does not so oblige. See Robinson, "The Mysterious Mysteriousness of Complementarity," 94-95.

[711] Further, 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 ICTR, *The Prosecutor v. Michel Bagaragaza*, Decision on Rule 11 *bis* Appeal, ICTR-05-86-AR11bis, Appeals Chamber, 30 August 2006.

[712] 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." Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 335.

a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct."[713]

Such threat-based approaches to complementarity have been central to the ICC-as-catalyst framing. More broadly, however, implementation discourse also reflects anxieties about fragmentation in international law.[714] 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 proceedings."[715] A related concept is that the Statute establishes a common criminal floor—it reflects the international community's desire "to maintain some semblance of 'uniformity' in the way the world combats" international crimes.[716] 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."[717] If complementarity means that accountability will (and should) increasingly migrate from the ICC to national courts, then the idea of minimum, or "international," standards is attractive, particularly when the "landscape of domestic justice is diverse and partly schizophrenic."[718] 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."[719]

Faithful domestication of the Rome Statute is one such project. Indeed, while implementation is a political process—an act of state—human rights NGOs have been perhaps the most influential contributors to popular understandings of what domestication requires.[720] As a report of the Southern Africa Litigation Centre notes, "implementing legislation has been a key focus area of civil society," and "CSOs have been instrumental in the drafting and adoption process [of implementing legislation]."[721] There now exists an array of implementation materials prepared by such organizations. As early as 2000, Amnesty International created a "Checklist for Effective Implementation," while Human Rights Watch and the International Centre for Criminal Law Reform published similar manuals shortly thereafter.[722] As part of its "Global

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[713] Heller, "A Sentence-Based Theory of Complementarity," 224.
[714] 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).
[715] Carsten Stahn and Larissa van dan Herik, "'Fragmentation,' Diversification and '3D' Legal Pluralism: International Criminal Law and the Jack-in-the-Box?," in *The Diversification and Fragmentation of International Criminal Law*, 58 (citing Appeals Chamber, *Prosecutor v. Aleksovski*, Judgment, 24 March 2003, IT-95-14/1-A, para. 101).
[716] Ada Sheng, "Analyzing the International Criminal Court Complementarity Principle Through a Federal Court Lens," *ILSA Journal of International and Comparative Law* 13 (2006), 426.
[717] Cattin, "Approximation or Harmonisation as a Result of Implementation of the Rome Statute," 373.
[718] Stahn and van dan Herik, "'Fragmentation,' Diversification and '3D Legal Pluralism," 39.
[719]Anne Charlotte Martineau, "The Rhetoric of Fragmentation: Fear and Faith in International Law," *Leiden Journal of International Law* 22(1) (2009), 2-3.
[720] 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.
[721] Southern Africa Litigation Centre, "Positive Reinforcement: Advocating for International Criminal Justice in Africa," 45.
[722] AI Updated Checklist; Human Rights Watch, "Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute" (September 2001) ("HRW Handbook"); ICCLR,

Advocacy Campaign for the International Criminal Court," the CICC maintains a detailed chart of those states that have either enacted, or are in the process of enacting, "Rome Statute Crimes Legislation" and/or "Cooperation Legislation."[723] The Coalition also includes a resource page with links to "model" national implementation laws, as well as "template statutes" endorsed by various regional organizations like the Commonwealth Secretariat.[724]

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)."[725] 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.[726]

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."[727] Part of the ICC's Legal Tools project,[728] 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."[729] One publication highlights not only NILD but 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."[730]

"International Criminal Court: Checklist of Implementation Considerations and Examples Relating to the Rome Statute and the Rules of Procedure & Evidence" (April 2002).

[723] See CICC webpage.

[724] 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.

[725] Commonwealth Secretariat, "Cover Note: International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions," SOLM(11)10, May 2011, para. 3(a).

[726] 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").

[727] National Implementing Legislation Database of the International Criminal Court Statute ("NILD Database"), http://www.nottingham.ac.uk/hrlc/documents/projectsummaries/pdfs/projectnild.pdf. NILD is managed by the legal academic Olympia Bekou, who has contributed an extensive literature on complementarity and implementation. See, e.g., Olympia Bekou and Sangeeta Shah, "Realising the Potential of the International Criminal Court: The African Experience," *Human Rights Law Review* 6(3) (2006), 499-544; Olympia Bekou, "Crimes at Crossroads: Incorporating International Crimes at the National Level," *Journal of International Criminal Justice* 10(3) (2012), 677-691.

[728] See "ICC Legal Tools," http://www.legal-tools.org/en/go-to-database/.

[729] NILD Database.

[730] Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher, 2011), vi; see also Morten Bergsmo, Olympia Bekou, and Annika Jones, "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools," *Goettingen Journal of International Law* 2(2) (2010).

These tools accompany the literature of NGOs, which, consist with the framing of complementarity as a catalyst for "compliance," 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."[731] 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."[732] Conformity with the Statute has also been presented as encompassing far-reaching procedural requirements: Human Rights Watch notes that whether states "guarantee the highest international standards for fair trials at the national level" will "be important in the determination of the admissibility of a case by the ICC."[733] 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.[734]

Thus, even where commentators and NGOs acknowledge that the Rome Statute contains no positive obligations to implement its substantive (or procedural) law provisions, complementarity is framed in their literature in a manner that nevertheless compels it. As a technique of governance, then, the approach is increasingly disciplinary and coercive: 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 and in previous chapters), which overwhelmingly focuses on fidelity to the Rome Statute's text.[735] Thus, just as the coercive pull of complementarity could catalyze 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)."[736] 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.

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731 AI Updated Checklist, 17.

732 Ibid.

733 HRW Handbook, 19.

734 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.

735 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." Luisa Vierucci, "National Implementation of the ICC Statute (Part II): Foreword," *Journal of International Criminal Justice* 5(2) (2007), 419-20. For a critique of Rome State implementation from a gender perspective, see Bonita Meyersfeld, "Implementing the Rome Statute in Africa: Potential and problems of the prosecution of gender crimes in Africa in accordance with the Rome Statute," in Kai Ambos and Ottilia A. Maunganidze (eds.), *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Göttingen Studies in Criminal Law and Justice, 2012).

736 Drumbl, *Atrocity, Punishment, and International Law*, 139. My discussion of implementation here can be likened to Drumbl's use of the term "legal transplants," which, he argues have a "homogenizing effect on the kind of sanction visited upon atrocity perpetrators," 70.

2. Implementation in Practice: Uganda and Kenya

2.1 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."[737] 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 LRA, and following President Museveni's referral of that situation to the ICC in 2003, international human rights organizations and their national-level partners prioritized implementation of the Statute there.

After receiving authorization to prepare a draft implementation bill, Uganda's Ministry of Justice and Constitutional Affairs assembled a first draft in 2004. It used Canada and New Zealand's ICC legislation as an example, and the Commonwealth Secretariat reportedly provided "technical support" and "drafting assistance."[738] 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."[739] Notably, the rationale for the legislation was intended less as a potential basis for challenging the admissibility of any future ICC cases, but rather to "provide a legal framework for the ICC intervention"[740] and to "smooth the progress of Court proceedings."[741]

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."[742] Preparations for multi-party elections in 2006, along with "backlogs in Parliament,"[743] 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.[744] 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

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737 Nouwen, *Complementarity in the Line of Fire*, 194.
738 International Criminal Court Bill, XCVII(26) *Uganda Gazette*, 28 May 2004; e-mail communication from Ministry of Justice, Uganda (on-file).
739 *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").
740 Barney Afako, "Country Study V: Uganda," in *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected Africa Countries*, 93.
741 Ibid., 196.
742 UCICC, Domestic Campaign 2008, 10 July 2008 (letter on-file).
743 Afako, "Country Study V: Uganda," 94.
744 International Criminal Court Bill, XCVIX(67), *Uganda Gazette*, 17 November 2006.

was still "thought to send the wrong message in relation to the ongoing Juba talks."[745] As the then 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.[746]

Thus, whereas there were a variety of competing and superior interests during the previous six years that implementation 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.[747]

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."[748] 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."[749] Mirjam Blaak, Uganda's ambassador to The Hague, confirms 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."[750]

In the end, the Act as passed in 2010 was nearly identical to the version that was put forward almost six years before.[751] Substantively, the ICC Act proscribes war crimes, genocide, and crimes against humanity in a manner identical to the Rome Statute; the

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[745] Nouwen, *Complementarity in the Line of Fire*, 197. Ugandan jurist Afako also describes the "prospects of Uganda implementing a suitable national scheme in the next two years … as "low" (on a scale of 'unlikely – low – fair – good – highly likely')." See Afako "Country Study V: Uganda."

[746] 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).

[747] Nouwen, *Complementarity in the Line of Fire*, 198; see also Christopher Mbazira, "Prosecuting international crimes committed by the Lord's Resistance Army in Uganda," in Chacha Murungu and Japhet Biegon (eds.), *Prosecuting International Crimes in Africa* (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.

[748] ICC Bill Second Reading, 10931.

[749] "JLOS Annual Performance Report 2009/2010" (September 2010), 65.

[750] Bill Oketch," Uganda Set for First War Crime Trial," *Institute for War & Peace Reporting*, 14 July 2010; personal interview with Ambassador Blaak, The Hague, 25 May 2011.

[751] 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."

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."[752] The Act also grants the Ugandan High Court first-instance jurisdiction to hear cases of war crimes, crimes against humanity, and genocide.[753] Those amendments that were made focused on minor procedural issues.[754] 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. Geofrey 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?[755]

Ekanya also expressed concern that "certain provisions within the Rome Statute"—particularly concerning presidential immunity—were "not in 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."[756] 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."[757]

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.[758] Furthermore, as Ms. Alaso's

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[752] 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.

[753] The legislation makes no reference to the specialized division that has become the ICD, even though that division was established by administrative decree in 2008, two years before the ICC Act became law (see further chapter five).

[754] For instance, the Act states that consent for prosecution under the ICA would from the Department of Public Prosecutions, rather than the Attorney General. Further, jurisdiction vests with the Ugandan High Court, not Magistrates' Courts.

[755] ICC Bill, Second Reading, 10935.

[756] Ibid., 10936.

[757] Ibid., 10938-30 (remarks of Messrs. Kawanga and Kyanjo); see also 10934 (remarks of Ms. Alaso).

[758] 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."

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.[759] Indeed, whereas the 2004 version of the ICC Bill included a proposed amendment by MP Jacob Oulanyah that would have recognized "alternative criminal justice proceedings" in addition to "formal" criminal proceedings,[760] no such proposals were later considered or debated. Similarly, whereas previous versions of the bill had provided for application of the death penalty, the 2010 Act provides that the maximum applicable penalty is life imprisonment.[761] Although the Ugandan Penal Code (UPC) recognizes the death penalty as a permissible form of punishment, according to the parliamentary committee that reviewed the 2010 Bill, such "inconsistency" between it and the Rome Statute required amending the maximum penalty available for "extremely grave crimes."[762] Thus, by 2010, an increasingly Hague-centric framework for punishment had taken hold.[763]

Hastened by a perceived 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.[764] 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."[765]

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[759] See Amnesty Commission, "The Amnesty Act: An Act of Forgiveness," 15-24 ("The Amnesty Commission").

[760] Jacob 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."

[761] International NGO's that had pushed the implementation bill saw the exclusion of capital punishment as the result of their "input and advocacy." E-mail communication, March 15, 2010.

[762] Report of the Sessional Committee, 4-5.

[763] Uganda's ICC Act did not incorporate provisions for victim participation similar to those of the Rome Statute, even though many NGOs had lobbied to include participatory rights in Ugandan proceedings. A special session of the Legal and Parliamentary Affairs Committee of the Ugandan Parliament was held in July 2009, co-sponsored by the PGA and attended by ICC Judge Daniel Nsereko, which included proposals to amend the proposed legislation with specific provisions on victims' participation, protection and reparations. These were themselves extracted from a similar ICC domestication law passed in Uruguay in 2006, referred to by the PGA as an "exemplary incorporation of the rights of victims of Rome Statute crimes into a national system." See Note from PGA to the Legal and Parliamentary Affairs Committee, Parliament of Uganda, and Other Concerned Legislators and Members of PGA in the Parliament of Uganda (on-file).

[764] 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).

[765] See Oola, "In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda."

2.2 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 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,"[766] 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.[767] 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."[768]

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.[769] 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 internationalized. Following its hearings, a key recommendation of 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."[770] 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."[771]

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[766] Personal interview conducted in Nairobi, Kenya, 30 November 2012.
[767] See Yvonne Dutton, *Rules, Politics, and the International Criminal Court: Committing to the Court* (Routledge Press, 2013).
[768] CICC, "Global Coalition Calls on Kenya to Ratify International Criminal Court" (11 January 2005).
[769] Antonina 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. Of course, this Act would not have been applicable for Kenya's post-2007 election violence, as that did not occur in the context of an international conflict.
[770] CIPEV Report, 476. See also Karuti Kanyinga, "Hobbling along to Pay-offs: The Kenya Grand Coalition Government" (April 2009) (on-file). Kanyinga argues that "fast tracking" was part of a broader political dispensation post-2008, in which longstanding debates about constitutional reform that has been "paralyzed … for over 10 years" were "fast tracked during the crisis," 9.
[771] Okuta, "National Legislation for Prosecution of International Crimes in Kenya," 1065.

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."[772] He continued:

> 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.[773]

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."[774]

Unlike the narrowly defeated STK Bill, the parliamentary debate on the International Crimes Act (ICA) records no opposition to its passage. The Attorney General's proposal was supported by Martha Karua (architect of the failed Bill and then Minister for Justice, National Cohesion and Constitutional Affairs), as well as MP Danson Mungatana (an STK opponent), 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."[775] 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 skepticism 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.[776] 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.[777]

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[772] Kenya National Assembly Official Record (Hansard), The International Crimes Bill, Second Reading, 7 May 2008, 907 ("ICA Second Reading").
[773] Ibid., 906.
[774] Ibid., 907.
[775] Ibid., 913.
[776] Ibid., 917.
[777] 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."[778]

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 (none of which were previously provided for in the KPC), [779] while provisions on command responsibility, statutes of limitation, and superior orders are likewise directly imported.[780] Similarly, the Act provides that the maximum penalty is life imprisonment, even though the ordinary penal code maintains the death penalty for crimes such as murder, armed robbery, and treason.[781]

The ICA was tabled and passed with remarkable speed, coming into operation on January 1, 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.[782]

3. Surfacing Political Discomforts: Post-Implementation Domestic Politics

3.1 Uganda: The End of Amnesty?

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[778] Ibid., 917.

[779] 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 2009-10, reportedly in part due to efforts … to provide immunity for Heads of State," 11 (on-file).

[780] ICA 2008, Art. 7(1)(f), (g), (k).

[781] Ibid., Art. 7(5)(b0).

[782] ICA Third Reading, 4084. MP Githae (now the Kenyan ambassador to the U.S.) 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

In Uganda, Parliament's rushed support for the ICC Act's passage—seen at the time as a necessary and 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."[783] 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."[784] 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 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."[785] At this point, as noted in chapter five, Ugandan authorities had seized Kwoyelo and he had already 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. 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?[786]

Another MP from northern Uganda raised similar objections, expressing confusion as to the criterion used in selecting Kwoyelo for prosecution.[787] 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?[788]

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[783] Nouwen, *Complementarity in the Line of Fire*, 206.
[784] ICC Bill Second Reading, 10942
[785] 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.
[786] 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.
[787] Ibid., 788 (remarks of B. Amongi).
[788] Ibid.

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.[789] Organizations like Amnesty International took a similarly hard line. Following the Constitutional Court's decision halting the Kwoyelo trial, it issued a statement calling the decision a "setback" for accountability and urged the Ugandan government to "revoke any amnesty applicable to crimes under international law."[790]

A more urgent crisis thus presented itself in mid-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.[791] 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—was met with intense opposition. Oola notes that it "angered many victims and leaders from the conflict affected sub-regions in northern 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.[792] Ultimately, the matter was referred to the Parliamentary Committee on Defense 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 step with the sentiments of affected communities', and recommended that it be "restore[d] in its entirety."[793] 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 favor 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)."[794] 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."[795] In the

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[789] See, e.g., The Amnesty Law (2000) Issues Paper, Review by the Transitional Justice Working Group, JLOS (April 2012).
[790] Amnesty International Public Statement, "Court's decision a setback for accountability for crimes committed in northern Uganda conflict," AFR 59/015/2011, 23 September 2011.
[791] Statutory Instruments 2012 No. 34, The Amnesty Act (Declaration of Lapse of the Operation of Part II) Instrument, 2012 (23 May 2012, issued by MP Hilary Onek, Minister of Internal Affairs) (on-file).
[792] 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, "In the Shadow of Kwoyelo's Trial: The ICC and Complementarity in Uganda."
[793] 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.
[794] Ibid., para. 9.8.
[795] Ibid., paras. 9.4, 9.6.

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."[796]

The Committee's conclusions also dispel a number of the misconceptions about complementarity's purported 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."[797] 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 and to introduce criminal legislation in order to prosecute ICC crimes nationally."[798] 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.[799]

Following the Committee's conclusions, the Ugandan government reinstated the Amnesty Act in its entirety. It remains in effect until May 2015.

3.2 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 the attendant institutional question of whether or not to establish, as the Waki Commission had also stipulated, a Special Tribunal for Kenya that would be empowered to retroactively judge alleged perpetrators of the election violence. As previously noted, the defeat of the STK 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. The phrase "Don't be vague, go to The Hague" emerged as part of the country's political lexicon, ostensibly indicating a preference for the ICC's involvement, even if it signaled that the Court was the more limited threat.

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 favor of the STK, 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. 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.[800] At the time of the Court's summons, domestic legislation was, in fact, tabled seeking to repeal the ICA.

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796 Ibid., para. 9.38.
797 Ibid., para. 9.18.
798 Ibid., para. 9.21.
799 Ibid., para. 9.39.
800 See, e.g., Nicholas Kulish, "Legislators in Kenya vote to quit global court," *International Herald Tribune*, 5 (6 September 2013).

Although the government took no action on the bill, only one parliamentarian (former Justice Minister Karua) opposed the motion.[801] 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), 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."[802]

This discourse has increasingly cast civil society as shadowy hands conspiring against the Kenyan state and people—"evil society" in the words of Kenyatta's 2013 presidential campaign.[803] 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.[804]

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 bill has been tabled.

4. Democratic Republic of Congo: Resistance and Contestation

The DRC was the 60th state to ratify the Rome Statute, thus formally bringing the ICC into existence. It is unclear whether this symbolic threshold played a role in President Kabila's decision to ratify the Statute in 2002; however, the symbolism has itself been summoned by many advocates in their long-standing effort to have the Congolese Parliament pass implementing legislation. For example, Olivier Kambala notes that, "it was the [DRC's] 60th ratification that triggered the Statute's entry into force—and made the human rights community applaud the birth of something

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[801] See Peter Opiyo, "Isaac Ruto: Kenya Should Pull Out of ICC," *Standard Digital*, 15 December 2010; Thomas Obel 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).
[802] 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; comments at 46 (Senator Keter) and 14,16 (Senator (Prof.) Kindiki). Unlike previous legislative debates on the ICC Act and the establishment of the STK, the various Rome Statute withdrawal motions have been debated in both the Senate and the National Assembly, following the introduction of a bicameral legislature in March 2013.
[803] John Githongo, "Whither Civil Society?," *The Star*, 6 April 2013.
[804] 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).

impossible to envision fifty year earlier."[805] The publication in June 2010 of the United Nations' long awaited mapping exercise of crimes committed between 1993 and 2003 also brought renewed international pressure for accountability, including for national implementation of the Statute. The performative dimension of implementation thus loomed large in the DRC as well.

Unlike Kenya and Uganda, however, international crimes have been crimes under Congolese law since well before the ICC's establishment. Genocide, war crimes, and crimes against humanity were first codified in the 1972 Code of Military Justice (*code de justice militaire*) and the Parliament enacted new criminal (*code penal militaire*) and judicial codes (*code judiciaire militaire*) for the military in 2002.[806] The preamble to the revised Military Criminal Code (MCC) further acknowledges that the DRC ratified the Statute, even if the definitions of crimes under Congolese law depart from it in certain respects.[807] Not unlike the "mirroring" effect observed in Uganda and Kenya's domestic ICC legislation, most of the limited commentary on the DRC has drawn attention to these differences. Scholars have noted, for instance, that the conscription of minor children into the armed forces is not criminalized under the MCC; that the Code "seemingly merges the current normative understandings of crimes against humanity and war crimes"; and that "the domestic law of crimes against humanity in the DRC is not as clearly defined as the current norms of international law."[808] At the same time, the MCC also offers more expansive definitions than the Rome Statute. Political groups are a protected class under the DRC's definition of genocide, while the "destruction of natural heritage" and "universal culture" may constitute crimes against humanity.[809]

Draft implementation legislation for the DRC—intended to transpose the Rome Statute's definitions into the *code pénal ordinaire*—existed well before 2010 as well. Cooperation legislation was drafted as early as 2002 and later revised in 2003 "after consultation with a variety of entities, including civil society."[810] A later version of a government-led *projet de loi* was also published in 2005, following "a number of expert meetings supported by Human Rights First, Human Rights Watch, the NGO Coalition for the International Criminal Court, and the African Association for the Defense of Human Rights, a Congolese non-governmental organization."[811] Despite these numerous campaigns, this legislation was never put on the parliamentary agenda. Godfrey Musila

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[805] Olivier Kambala wa Kambala, "International Criminal Court in Africa: *'alea jacta est,*" Oxford Transitional Justice Research Working Paper Series (12 July 2010). Several interlocutors expressed similar sentiments to the effect that the "ICC exists thanks to the DRC; it brought the Court into existence."

[806] Thus, under Congolese law, Rome Statute crimes committed during any period prior to 2003 would fall under the 1972 Code, while crimes committed post-2003 would fall under the 2002 codes or, as some domestic courts have determined, the Rome Statute. The 2002 criminal code is Loi No. 024/2002 du 18 Novembre 2002 Portant Code Pénal Militaire ("2002 Code Pénal Militaire"); it is included in a compendium of the DRC's criminal law, published as "Code Pénal Congolais: Décret du 30 janvier 1940 tel que modifie jusqu'au 31 décembre 2009 et ses dispositions complémentaires" (2010) (on-file). The judicial code is Loi No. 023/2002 du 18 Novembre 2002 Portant Code Judicaire Militaire, at http://www.leganet.cd/Legislation/Droit%20Judiciaire/Loi.023.2002.18.11.2002.pdf.

[807] See Règlement du 10 septembre 2010 relatif aux éléments de crime, para. 1 (in "Code Pénal Congolais").

[808] See, e.g., Antonietta Trapani, ""Bringing National Courts in Line with International Norms: A Comparative Look at the Court of Bosnia and Herzegovina and the Military Court of the Democratic Republic of Congo," *Israel Law Review* 46(2) (July 2013), 239-240; Labuda, "Applying and 'Misapplying' the Rome Statute"; UN Mapping Report, paras. 820-825.

[809] See 2002 Code Pénal Militaire, Arts. 164, 169(9), 169(10).

[810] Musila, "Between rhetoric and action," 16. Earlier versions of this legislation (from 2001 and 2002) are appendixed in Musila's monograph; see Appendices 3 and 4.

[811] Ibid.

suggests that this may be attributed to the law "not [being] considered a priority in view of other issues that … occupied the government and legislators' time," as well as "perceptions among some people that the ICC's work ... is a project of the executive, directed at destroying its political enemies."[812] (The arrest and transfer of Kabila's main political rival, Jean-Pierre Bemba Gombo, to The Hague in 2008 did little to allay such perceptions.) Furthermore, the 2004 signing of a comprehensive Agreement on Judicial Cooperation between the government and the Office of the Prosecutor—similar to cooperation agreements signed with the OTP in Kenya and Uganda—may have obviated the perceived need for more comprehensive legislation.[813]

Discussion of domestic implementation thus remained stalled in the DRC until the release of the UN's mapping report in 2010.[814] (Again reflecting a duty-based understanding of complementarity, the report noted that, "by ratifying the Rome Statute, the DRC subscribed to the *obligation to adapt* its domestic legislation to the law enshrined in the Statute."[815]) Several months after the report's release, however, proposed implementation legislation (*proposition de loi de mise en oeuvre*) finally emerged on the National Assembly's agenda. Two MPs, the Honorable Mutumbe Mbuya and Professor Nyabirungu mwene Songa, a well-known Congolese intellectual and human rights activist,[816] had first introduced this legislation in March 2008, but no previous action had been taken on it.[817]

Patryk Labuda, who closely followed the legislative process for the *propositon*, notes that the bill had four main objectives: (1) to incorporate the Rome Statute's classification of international crimes into domestic criminal law (the bill "copied most of" the Statute's definition of crimes); (2) to transfer jurisdiction over international crimes to civilian courts, not military tribunals; (3) to provide for a greater number of fair trial guarantees, "especially relating to defendant rights, victim participation and witness protection"; and (4) to establish a "coherent framework regulating collaboration between the ICC's field units and domestic Congolese judicial and governmental authorities."[818] In addition to these practical objectives, compliance and complementarity were again rhetorically marshaled in support of the legislation's passage. A briefing note prepared by the ICTJ states that "[y]ears have lapsed" since the DRC ratified the Rome Statute, "but the DRC government has yet to meet its legal obligation to incorporate the statute into

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[812] Ibid., 16, 17.
[813] Judicial Cooperation Agreement between the Democratic Republic of Congo and the Office of the Prosecutor of the International Criminal Court (reproduced as Appendix 2 in Musila, "Between rhetoric and action," 81-90).
[814] While this chapter focuses on the 2010-11 parliamentary period, there have been other efforts to pass such legislation. Most recently, in June 2015 (with presidential elections again looming), the National Assembly voted for the adoption of a "Law to Implement the Rome Statute" in the domestic legal order, which, at the time of writing, awaits Senate approval. See Patryk Labuda, "Whither the Fight Against Impunity in the Democratic Republic of Congo?" (24 June 2015), at http://justicehub.org/article/whither-fight-against-impunity-democratic-republic-congo.
[815] UN Mapping Report, para. 1022 (emphasis added).
[816] Nyabirungu has been an important figure in Congo's legal and political landscape and has been the focal point for a number of international organizations engaged in domestic complementarity efforts. He and mwene Songa both are also members of Parliamentarians for Global Action. Interview with ICTJ staff, Kinshasa, 21 June 2011; interview with PGA consultant, Kinshasa, 27 June 2011.
[817] See ICTJ, "The Democratic Republic of Congo Must Adopt the Rome Statute Implementation Law" (April 2010) ("Two Congolese members of parliament introduced a draft bill before the National Assembly, Congo's lower house, in March 2008.").
[818] Labuda, "Applying and 'Misapplying' the Rome Statute."

national law."[819] Further, adopting such legislation "is essential to ensure complementarity between domestic Congolese courts and the ICC" and to "strengthen the country's legal system."[820]

Despite having languished for two and a half years, "heated" and "stormy" debates on the draft bill were held within the Assembly in November 2010 whereupon, under Congolese parliamentary procedure, it was declared admissible (*recevable*) and transferred to the National Assembly's PAJ Committee for further consideration.[821] In spite of its advancement, the debates on the law – as with the competing Special Chambers/Court legislation – underscored the opposition expressed by many MPs, reflecting a critical discourse akin to the post-implementation discomforts later seen in Kenya and Uganda. The involvement of outside actors in advocating for the bill's passage was both seen and described as a form of neo-colonialism and a threat to national sovereignty.[822] Again, a particular point of contention was punishment: the DRC legislation, at least in its earlier iteration, prohibited the application of the death penalty. By contrast, under the MCC, Congolese military courts have discretion to impose the death penalty for crimes against humanity, genocide, as well as certain war crimes.[823] Most Congolese MPs found this provision unacceptable and it became a central point of contention during the Assembly's debate.[824]

Such opposition has largely been presented as a distraction to the substantive issues raised by the bill. As elsewhere, however, many proponents of the ICC's normative framework did see implementation of the Statute as an opportunity to push for abolition of the death penalty. Indeed, a bill to that effect was introduced at the same time as the Rome Statute implementation bill, which, though unsuccessful, was supported by a prominent Congolese NGO on the grounds that it was "a valuable opportunity for the DRC to conform with international instruments it had ratified, notably the Rome Statute of the ICC."[825] Another NGO circulated an advocacy paper during the time of the debate urging passage of the law, in part, because:

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[819] ICTJ, "The Democratic Republic of Congo Must Adopt the Rome Statute Implementation Law." The ICTJ also states that it, ASF, and the Konrad Adenauer Foundation convened in 2008 "and issued a memorandum of suggested amendments to the draft bill to maximize conformity with the Rome Statute." Ibid.

[820] Ibid.

[821] The debates were characterized as such in the following press releases: CICC Press Release, "Global Justice Coalition Welcomes Advances in the Criminal Law Reform in the Democratic Republic of Congo," 9 November 2010; CN-CPI Press Release, "The DRC Coalition for the ICC welcomes the admission of the law proposal on the implementation of the Rome Statute," 5 November 2010.

[822] See Kambale, "Mix and Match."

[823] See 2002 Code Pénal Militaire, Arts, 65, 164, 167, 169, 171, 172.

[824] See, e.g., PGA Press Release, "La loi de mise en oeuvre du statut de Rome déclare recevable par l'Assemblée Nationale de la République Démocratique du Congo," 4 November 2010. The release notes that the "intense" debate lasted more than 2½ hours with a total of 15 interventions, which "attracted criticism" for not retaining the death penalty as a form of punishment (author's translation).

[825] See Ligue Pour la Paix et les Droits de l'Homme, Commique de Presse No. 006/CN/LIPADHO/2010, "La Majorité des Députes s'opposent a l'abolition de peine capital," 18 November 2010 (author's translation). On the fate of this bill and its imbrication with debates over Rome Statute legislation, see also Lievin Ngondji Ongombe, "RDC: la peine de mort, l'adoption de la loi de mise en oeuvre du statut du Rome," in Kai Ambos and Ottilia A. Maunganidze (eds.), *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Göttingen Studies in Criminal Law and Justice, 2012).

> The definitions of international crimes are different in the Rome Statute and the Congolese military judicial code. Moreover, the sentences are not the same in both systems (death penalty and no sentence for war crimes in the DRC.)[826]

Similarly, a 2009 concept paper by the PGA for an "international parliamentary conference on justice and peace" includes the following:

> It is time for the DRC to undertake this historic step to implement the Rome Statute of the ICC and equip itself with a strong arsenal of laws against impunity, and this legislation could also represent a definitive step towards abolishing the death penalty, even if the Rome Statute itself leaves to each State Party the sovereign decision to legislate on penalties for international crimes that are adjudicated before domestic Courts.[827]

Punishment was thus an integral part of the implementation debate in the DRC. As with insisting on "international standards," advocates and norm entrepreneurs saw in implementation an opportunity to route broader political objectives through the principle of complementarity.

Even with the draft implementation law advancing to the PAJ, it remained a relatively low political priority. It was not until June 2011—eight months after having been declared *recevable*—that a special sub-committee of the PAJ finally convened, to review and revise the bill.[828] By this point, however, the executive was vigorously advancing its separate *projet de loi*. As noted, despite the pressure being placed on them by the executive, Congolese MPs declined to vote on that draft law's admissibility. Unlike Kenya and Uganda, where legislative actors assented to hastily presented legislation, Congolese MPs objected to the railroading of the specialized chambers bill. This led to a further political divide between the legislative and executive branch: Parliament refused to endorse the government's *projet de loi*, and government largely ignored the Rome Statute implementing bill.[829] Indeed, although the government presented a revised version of the Special Court bill to the Senate in August 2011 under an exceptional procedure, the implementation bill of MPs Mbuya and Mwene Songa was not included as part of that legislative package. In the end, no formal vote on it was ever taken.

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[826] Le Club des Amis du Droit du Congo, "The Repression of International Crimes by Congolese Jurisdictions" (December 2010) (on-file). See also UN Mapping Report, para. 63 (noting, in reference to a proposed hybrid mechanism that, "Such a mechanism should also … not include the death penalty among its sentences, in compliance with international principles").

[827] Parliamentarians for Global Action, "International Parliamentary Conference on Justice and Peace in the Democratic Republic of Congo, the Great Lakes Region and Central Africa," 10-12 December 2009, at http://www.pgaction.org/pdf/pre/Kin%20TOR%20EN.pdf, p. 3. As noted in the terms of reference, this event was co-organized with, *inter alia*, the ICTJ, ASF, the Konrad Adenauer Foundation, and the DRC's National Coalition for the International Criminal Court.

[828] République Démocratique du Congo, Assemblée Nationale, Commission Politique, Administrative et Judiciaire, "Proposition de loi modifiant et complétant le Code Pénal, le Code de Procédure Pénale, le Code Judiciaire Militaire et le Code Pénal Militaire en vue de la mise en œuvre du Statut de Rome de la Cour Pénale Internationale" (June 2011) (on-file). At the bottom of this document, March 2008—the original date on which the legislation was introduced by Mutumbe Mbuya and mwene Songa—appears to be crossed out and replaced with June 2011.

[829] See Human Rights Watch, "DR Congo: Commentary." HRW underscores the "importance of harmonizing the draft legislation creating specialized chambers and the draft ICC implementing legislation," and states, "We rely on the Congolese government to urge Parliament to also pass the ICC implementing legislation, which contains important features such as incorporating definitions of Rome Statute crimes into Congolese law, and arrangements for effective cooperation with the court."

5. Implementation Reconsidered

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

5.1 Implementation as Purity

Rather than a catalyst for Rome Statute domestication, complementarity is better understood as the axis and rationale around which advocacy for implementation has turned. Domestic NGO coalitions were stimulated and supported by larger, international organizations who saw implementation not only as a way to facilitate cooperation with the ICC or enable domestic prosecutions, but also as a step in broader criminal justice reform. Abolition of the death penalty and the inclusion of domestic victim participation regimes are perhaps the clearest illustration of such reform efforts. The normative stake of many of these actors, however, as well as 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—can be understood as 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.[830] In her work on the "translation" of international law into local justice, the anthropologist 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."[831] Merry helpfully defines translation as "the process of adjusting the rhetoric and structures of … programs or interventions to local circumstances,"[832] but she notes that the process can also yield replication: rather than a merger of global frames with local forms (hybridization), they are appropriated wholesale. In a similar vein, Drumbl notes that, "Pressures emanating from dominant international norms [can] narrow the diversity of national and local accountability modalities."[833]

Analogized to the implementation efforts detailed herein, there is little evidence of vernacularization at work in Kenya or Uganda. 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 localized 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 was instead an exercise in mimicry. Rather than being "remade in the vernacular," domestic versions of the Rome Statute, much like the domestic complementarity courts described in chapter five, largely mimic international juridical and institutional forms. By contrast, whereas the DRC's revised MCC reflects greater hybridity, the little attention these laws have

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[830] On the relationship between "legal transplantation" and ICL, see Cassandra Steer, "Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law," in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014).

[831] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006), 1.

[832] Ibid., 135.

[833] Drumbl, *Atrocity, Punishment, and International Law*, 121.

received focus on their departures from international—understood as "minimum"—standards.

This lack of attention is not accidental. As noted previously, much of the academic literature has deliberately presented complementarity as requiring uniformity with the Rome Statute, while the ICC itself has adopted the language of the "mirror" between it and national jurisdictions. NGO implementation materials and other capacity-building programs have been similarly designed. 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.

6.2 Implementation as Politics

While often presented as a seemingly technical exercise, implementation is fundamentally a political process. In Uganda, the passage of implementing legislation was delayed because it was not a sufficient political priority (indeed, it was at odds with other political priorities) and then passed swiftly because it became important enough to external constituencies and carried little political cost. A similar dynamic animated the Kenyan experience following the release of the Waki Commission's report. In both countries, then, the politics that enabled implementation were one of wanting to be seen as compliant states: implementation was evidence of putting complementarity "into practice" and a means of signaling to external constituencies the governments' purported commitment to accountability.

At the time the acts were passed, 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 (and remains at) 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 has since radically altered the political landscape; indeed, most "regard the leadership of the Jubilee Alliance as a political marriage forged to protect" Kenyatta and Ruto from the Court.[834] This, in turn, has led to repeated efforts to nullify the domestic legislation, withdraw from the ICC, and derail its proceedings.

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 legislation itself. A focus on the "ceremonial conformity"[835] of Uganda's ICC Act and Kenya's ICA with the Rome Statute—their near symmetry with 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 influence of private, non-state actors—influential NGOs, legal academics, ICC staff— to mediate the relationship between the international and national spheres.[836] 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

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[834] Chatham House, "The ICC Intervention in Kenya," AFP/ILP 2013/01, February 2013.
[835] Marion Fourcade and Joachim J. Savelsberg, "Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization," *Law & Social Inquiry* 31(3) (2006), 516.
[836] For a trenchant critique of a similar power dynamic in the context of post-Soviet countries, see Mertus, "From Legal Transplants to Transformative Justice," 1377-1384.

supplanting democratic deliberation with what Drumbl has called "a treaty-centered international administrative bureaucracy," contributing to a "whittling down of democratic input in important aspects of national lawmaking."[837] 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."

Unlike Kenya and Uganda, complementarity's coercive power was largely absent in the DRC, in favor of what was intended to be from the outset a more "positive" arrangement. However, here, too, political considerations were the primary drivers of domestic action: with presidential elections on the horizon, the need to be seen as "doing something" led Kabila's administration to push strongly for a Special Chambers/Court bill of the sort that the UN's report had recommended, while the parliamentary *proposition de loi* (as well as the UN's recommendation for another truth commission) withered. Yet the DRC, which could otherwise be seen as a "failure" for not yet having ICC legislation in place, has also approached implementation more deliberatively, raising pertinent questions about the impact of legal transplants (and their political economy) on domestic institutions. Furthermore, even as the trappings of complementarity might appear to be absent in the DRC—there is no dedicated international crimes division, there is no Rome Statute legislation as such—it has nevertheless prosecuted the most conflict-related cases to date.

6.3 Implementation as "Performance"

Contrary to popular accounts, the ICC itself was not a catalyst for implementation of the Rome Statute. The passage of Uganda's ICC Act did not come until eight years after the Court had formally intervened there but, crucially, the ICC's arrival brought with it an array of transnational non-state actors who summoned complementarity (and the "shadow" of the Court) to pursue broader reform projects. Moreover, it is now clear that it was Uganda's role as host state for the ICC Review Conference, part of an orchestrated performance for international donors, which pushed forward legislation that had otherwise languished. In this sense, the conference itself was the catalyst for the ICC Act. Its passage also dovetailed with a new chapter in the relationship between Uganda and the principle of complementarity. Whereas complementarity—understood as jurisdictional rivalry with the ICC—was the dominant logic for the creation of a specialized court in 2008, by 2010 the principle had a new meaning: Uganda's law and institutions would complement The Hague, not compete with it.

The desire to be seen as a compliant, cooperative state in the eyes of international actors likewise motivated Kenyan politicians, at least in the early phase of the post-election violence. At that stage, in 2008, the imminence of ICC intervention still appeared quite remote—indeed, it was the 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 standalone 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

[837] Drumbl, *Atrocity, Punishment, and International Law*, 135. For a similar critique in the context of constitutional drafting, see Sara Kendall, "'Constitutional Technicity': Displacing Politics through Expert Knowledge," *Law, Culture and the Humanities* 11(3) (2015).

Kenyan NGO, the country's "never again" moment but, unlike the STK, the political price it threatened to extract was low.

Similarly, although the DRC remains without a Special Chambers or implementing legislation, the most concerted efforts to pass both came in the wake not of the ICC's initiation of its investigations, but the release of the UN Mapping Report seven years later. While the Court's work was symbolically summoned to press the need for accountability that the report's recommendations raised anew, the opposition of many Congolese parliamentarians to much of this proposed legislation reflected a deeper resistance in the DRC to international intervention. Congolese parliamentarians raised many of the same concerns about implementation—the risk of exceptionalism, the threat to constitutionalism, an encroachment on sovereignty—which Kenyan and Ugandan politicians would raise later as well.

These histories suggest that implementation is better understood not as an effect of the ICC's intervention but a form of political theatre.[838] In both Kenya and Uganda, 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 served a symbolic function, even as the post-implementation domestic politics of both countries remain deeply contested.

6. Conclusion

Implementation narratives often present the process as part of a progress 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. The outsized role of external actors and constituencies in these processes (most of who regard deviation from the Statute with suspicion) thus 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, suggests a view of implementation driven less by domestic political interests than replicating the Statute as a "global script."

Furthermore, despite the passage of Rome Statute legislation in both Kenya and Uganda, implementation appears to have had little influence on national investigations and prosecutions. Of the handful of cases related to the ICC referrals that have been prosecuted domestically, they have been for ordinary crimes. Similarly, in the DRC, judges have drawn interpretive guidance from the Rome Statute in the adjudication of international crimes but the codification of these crimes domestically long predated the

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838 On the symbolic function of the criminal trial, see Martti 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, John Borneman, *Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe* (Princeton: Princeton University Press, 1997), 20-25.

Statute, and ICC legislation itself has not been the source of law for prosecutions before Congolese military courts.