Examining the domestic legal framework in selected African States that form part of the situational docket of the International Criminal Court

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Abstract

Against the backdrop of recent calls for reforms at the International Criminal Court (ICC), this paper examines the domestic legal framework in selected African States that form part of the situational docket of the Court as of the time of writing. Particularly, the paper assesses the missing gaps that cause lags in cooperation with the ICC, in the experience of African States and structural and other issues that should be revisited. Building on the cases of Kenya, Uganda, Côte d'Ivoire, Sudan, and Central African Republic (CAR), the paper establishes that African States have varying degrees of domestic legal reforms towards compliance with the ICC's system of justice, and have made missteps that undermine their abilities to effectively confront impunity for alleged perpetrators of atrocity crimes. The States' compliance levels are dependent on their methods of implementing the Rome Statute, and the political contexts under which the legal reforms unfold. Beyond the shortcomings in legal reform, the African States are confronted with rival normative frameworks, including amnesty, reconciliatory tones, and traditional justice mechanisms that have implications on their abilities to perform their primary responsibilities in accountability for core international crimes. As a remedial action to the States' inadequacies in implementing the provisions of the Rome Statute, this paper recommends concerted efforts towards activating national and regional advocacy on ratification of recent amendments to the Statute in order to enhance their complete criminalization of core international crimes. The paper also calls for the activation of 'positive complementarity' as a framework for addressing state capacity gaps, including training national officials in drafting amendments to the ICC implementing legislations, and improving the understanding of national legislators on the missing links in their respective legal orders, and the need for amendments.

Keywords: International Criminal Court, Africa, domestic reforms, positive complementarity.

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1 Introduction

Although the International Criminal Court (ICC) sits at the centre of the global war on impunity for alleged perpetrators of atrocity crimes (genocide, crimes against humanity, war crimes and the crime of aggression), States have the primary responsibility of investigating and prosecuting such serious perpetrators. The treaty establishing the ICC – the Rome Statute (or the "Statute") – has produced a criminal justice system that relies heavily on national courts based on the Statute's foundational principle of complementarity.[1] As such, the Statute confers the primacy of jurisdiction for core international crimes to national institutions, with the ICC only stepping in as a Court of 'last resort.'

Nonetheless, as a formal matter, States have no obligations to enact implementing legislations of the Rome Statute in this 'total war on impunity.' While the duty to prosecute alleged perpetrators of core international crimes is mentioned in the Preamble of the Rome Statute, it is not binding. Yet still, as a practical matter, it is implied in the commitments undertaken that States should have domestic laws 'that are adequate, in both substantive and procedural terms',[2] whether they follow either the monist or dualist legal system, to enable them to fulfil their primary responsibilities in the ICC's system of justice.

More so, the alternative of prosecuting core international crimes as 'ordinary' is not convincing. Ordinary criminal law provisions are not always well suited to prosecute all those forms of conduct encompassed under the ICC Statute's substantive provisions.[3] In this sense, the prosecution of core international crimes as 'ordinary' does not produce the same stigmatisation or significance as the former would.[4]

National implementation of the Rome Statute enables States to perform their primary duties to investigate crimes whose jurisdiction could potentially be claimed by the ICC, and consequently escape being rendered unable.[5] In this regard, inability could be attributed to inadequacies in domestic law, 'which might render the national judicial system substantially or unavailable,' thus rendering the cases admissible at the ICC.[6] In other words, States' failure to enact implementing legislation of the Rome Statute limits the possibilities of bringing to justice alleged perpetrators of core international crimes.[7] If many States were to follow this trend, the ICC is likely to be overwhelmed by the number of cases that pass the admissibility tests before it. Such an eventuality is counter-intuitive to the principle of

1 Julio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', *Journal of International Criminal Justice* 5 (2) (2007): 421–440; Art.1 and 17 of the Rome Statute.

2 Ibid.

3 Olympia Bekou, 'National Implementation of the ICC Statute to Prosecute International Crimes in Africa', in *The International Criminal Court and Africa*, ed. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 274.

4 Ibid, 275.

5 Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court: National implementation in Africa* (Cham: Springer, 2017), 62.

6 Ibid, 62; Article 17(3) of the Rome Statute.

7 Bekou, supra n 3.

complementarity, which grants the primacy of jurisdiction over core international crimes to national institutions.

Against the backdrop of recent calls for reforms at the ICC,[8] this paper examines the domestic legal framework in a selection of African States that form part of the situational docket of the Court as of the time of writing. In so doing, the paper assesses whether there has been domestic implementing legislation of the Rome Statute in the African situations, and the challenges arising in that regard. Questions that are addressed are whether there are missing gaps that cause lags in cooperation with the ICC, in the experience of African States, and whether structural and other issues should be examined and revisited.

Since the ICC's establishment in 2002, Africa has provided the highest number of its active situations, including Uganda, Sudan, the Democratic Republic of Congo (DRC), Kenya, Libya, Central African Republic (CAR), Mali, and Côte d'Ivoire. Whereas the ICC's interventions in Africa have elicited mixed reactions,[9] the question that begs answering is whether African States' contact with the Court has led to reforms in their national legal systems so that they would avoid deference to the Court in future. Reforming the legal frameworks in African States is particularly important in satisfying the principle of complementarity and fostering cordial relations with the ICC. In the absence of domestic abilities to investigate and prosecute alleged perpetrators of core international crimes, the Court is likely to continue intervening in African situations that satisfy the admissibility test, albeit with continued pan-Africanist pushbacks[10] as witnessed earlier during the Court's foremost interventions on the continent.[11]

While several African States formed part of the situational docket at the ICC as of the time of writing, this paper focuses on a few States following a case selection matrix. Case selection is premised on striking a balance on States' geographical locations (West, East, Central, and North Africa), the modes of the ICC's trigger of jurisdiction (state-referrals, the United Nations Security Council (UNSC) referrals, and the Office of the Prosecutor's (OTP) *proprio motu* (own motion) provision), and States' legal traditions (common law, civil law, and *sharia* (Islamic) law). For the ICC's case origination, preference is given to first-case scenarios owing to their precedent-setting qualities.

8 Assembly of State Parties, 'Review of the International Criminal Court and the Rome Statute System,' December 2019, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res7-ENG-ICC-Review-resolution-10Dec19-cln%20AM%201658.pdf (accessed 7 January 2023); International Criminal Court, 'ICC Judges Agree on Reforms in Response to Independent Expert Review at Annual Retreat,' 19 September 2022, https://www.icc-cpi.int/news/icc-judges-agree-reforms-response-independent-expert-review-annual-retreat-0 (accessed 7 January 2023).

9 Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa, 'After Nuremberg: Exploring Multiple Dimensions of the Acceptance of International Criminal Justice,' International Nuremberg Principles Academy, 2017, https://www.nuremberga-cademy.org/resources/acceptance-online-platform/publications/online-edited-volume/ (accessed 7 January 2023); Peter Brett and Line Engbo Gissel, *Africa and the Backlash Against International Courts* (London: Zed Books, 2020).

10 Kamari Maxine Clarke, *Affective justice: The International Criminal Court and the Pan-Africanist pushback* (Durham and London: Duke University Press, 2019).

11 Ibid.

As a result, Uganda, Kenya, and Sudan have been selected as the ICC's first state-referral, *proprio motu* (own motion) and the UNSC referral situations, respectively. Furthermore, both Uganda and Kenya practice common law and are situated in East Africa; Sudan's selection is premised on its location in North Africa and the *Sharia* legal system. In order to complete the African geographical and legal landscape, CAR and Côte d'Ivoire merited case selection as civil law traditions, and locations in Central and West Africa, respectively. However, it is important to note that the five cases selected are not representative of their respective regions and legal systems, as each has its unique political context under which the Rome Statute is implemented. Yet still, the few cases selected provide an impression of the status of national implementation of the relevant provisions of the Rome Statute in Africa, and from which meaningful implications could be drawn.

Case selection matrix

Country	Modes of the ICC's intervention	Region	Legal system
1. Uganda	State-referral	East	common law
2. Sudan	UNSC referral	North	Sharia
3. Kenya	Proprio motu	East	common law
4. Côte d'Ivoire	Proprio motu	West	civil law
5. CAR	State referrals (2)	Central	civil law

The review of the status of affairs in the selected African States that form the situational docket at the ICC (as of the time of writing) began with an examination of the pathways that they adopted towards adjusting their legal orders with those of the Rome Statute. These include temporal dimensions of reforms that speak to the context in which the ICC's normative framework diffuses and the various approaches (individual or model approach, and variants of express criminalisation) that have implications on the scope of States' implementing legislations.

Next was the evaluation of the States' enactment of the provisions of the Rome Statute that primarily enable the global war on impunity for alleged perpetrators of atrocity crimes. These are 1) criminalisation of core international crimes as stipulated in Article 5 of the Statute; 2) elimination of obstacles to investigations and prosecutions (such as the principles of individual criminal responsibility, the irrelevance of official capacity and non-applicability of statutes of limitation); 3) cooperation with the ICC; 4) witness protection; 5) victim-centeredness; and 6) penalties. In so doing, relevant legal sources (such as statutes, constitutions, regulations, and so forth) were reviewed vis-à-vis their implementation of, and alignment with the Rome Statute.

Taking the relevant sections of the Rome Statute as points of reference, the selected African States were examined regarding their implementation of, and alignment with each of the six primary provisions highlighted above. Such an assessment was also enriched by reviewing the existing literature on the ICC and the States' implementation of the Statute such as journal articles, media sources,

reports from governmental and non-governmental organisations (NGOs) and commentaries on relevant provisions of the Statute.

Consequently, the assessment establishes that the selected African States that form part of the situational docket at the ICC (as of the time of writing), have varying levels of domestic legal compliance with the Court's system of justice, and have made missteps that undermine their abilities to effectively confront impunity for alleged perpetrators of atrocity crimes. To illustrate, although the core international crimes are generally prohibited in the States' respective legislations, their definitions are problematic in some cases, particularly in States that opted for individual and dynamic criminalisation approaches such as Sudan and CAR. Moreover, most States are yet to eliminate all the obstacles to prosecutions, as a few others (Sudan and Côte d'Ivoire) have no legislation on cooperation with the ICC. At the same time, victim-centeredness and witness protection portend as 'judicial afterthoughts' in most of the States. Furthermore, the death penalty is still imposed in some States despite international abolition trends,[12] and the Statute's signal that even 'the most serious crimes of concern to the international community as a whole'[13] do not warrant it.

Beyond the shortcomings in legal reform, the African States are confronted with rival normative frameworks that affect their abilities to comply with the Rome Statute justice system. In all the States under study, the traction of restorative justice has engendered the adoption of amnesty, reconciliatory tones and traditional justice mechanisms that undermine the opportunities for putting to 'test' the legal reforms that come with the national implementing legislation of the Rome Statute.

This introduction is followed by discussions of the pathways in States' implementation of the Rome Statute, which include the temporal dimensions that reveal the contexts under which the Statute diffuses, and the approaches that States adopt in aligning their legal orders with the Statute. The paper then turns to national implementation of the provisions of the Statute that primarily enable the global war on impunity for alleged perpetrators of atrocity crimes, namely: 1) incorporation and definition of Article 5 crimes; 2) elimination of obstacles to prosecutions; 3) cooperation with the ICC; 4) witness protection; 5) victim centeredness; and 6) penalties. Afterwards, the paper goes beyond the legal reforms to assess the rival normative frameworks in the States under study that undermine their motion towards prosecuting alleged perpetrators of atrocity crimes. The paper then concludes with a summary of each of the States' missteps in implementing legislation and proposes some policy recommendations to address them.

12 United Nations, 'UN Experts Call for Complete Abolition of the Death Penalty as 'Only Viable Path,'' 10 October 2022, https://news.un.org/en/story/2022/10/1129382 (accessed 7 January 2023).

13 Preamble of the Rome Statute.

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2 Pathways in States' Implementation of the Rome Statute

With regard to the incorporation of international law, States are said to operate under either monist or dualist legal traditions. While the monist tradition implies that when a State ratifies an international treaty 'the self-executing provisions of that treaty apply directly and prevail over conflicting domestic provisions,'[14] the dualist tradition requires the incorporation of legislation to give effect to international treaties at the national level.[15] The implication is that the argument could be made that for States that follow the monist tradition, implementation legislation is unnecessary, as the Rome Statute 'would be directly applicable in the domestic legal order,' and would triumph over any conflicting domestic legislation.[16] However, the 'pure' form of monism is rarely practised, given that most States operate between the extremes of monism and dualism.[17] Furthermore, for States that follow the 'pure' monist legal tradition, it is difficult to determine how the Rome Statute could be applied without specific legislative authority.[18] For example, the cooperation regime requires legislation, pursuant to Article 88 of the Rome Statute that expressly calls upon States to 'ensure that there are available procedures under their national law' for all the specified forms of cooperation.

Going back to the arguments that could be made on the irrelevance of implementing legislation in monist legal traditions, similar arguments could be made in dualist systems, as the Rome Statute does not impose express obligations in this regard. However, as already highlighted in the previous section, States' enactment of adequate domestic legislation in both substantive and procedural terms is a prerequisite for fulfilling their primary responsibilities under the Rome Statute system of justice. In so doing, States have discretion on when, and how they should enact implementing legislation of the Rome Statute, given the silence of the Statute in this regard and the absence of guidelines elsewhere. Hence, States can embark on enacting legislation before or after ratifying the Rome Statute and adopt any appropriate methods in such endeavours.

As such, the temporal dimensions of national implementation of the Rome Statute unveil the contexts in which the ICC's normative framework diffuses, including the level of political consensus on the provisions of the Statute, local capacity to implement them, and the general sentiments about atrocity crimes. Conversely, the approaches or methods that States adopt in enacting domestic legislation have implications on the scope of their implementation of the relevant provisions of the Statute.

2.1 Temporal Dimensions in States' Implementation of the Rome Statute

African States were relatively fast in signing the Rome Statute, beginning with Senegal on 17 July 1998. Of the States under study, Côte d'Ivoire first signed the

14 Olympia Bekou and Sangeeta Shah, 'Realising the Potential of the International Criminal Court: The African Experience,' *Human Rights Law Review*, 6(3) (2006): 503.
15 Ibid.
16 Ibid, 503.
17 Ibid, 504.
18 Ibid.

Statute in November 1998, followed by Uganda in March 1999, Kenya in 1999, CAR in December 1999, and lastly Sudan in September 2000.[19] However, the opposite occurred in treaty ratification and the eventual enactment of domestic implementing legislation of the Statute, revealing inadequate political will and State capacity gaps.

To illustrate, CAR ratified the Rome Statute in October 2001, followed by Uganda in June 2002, and Kenya in March 2005, several years after signing the Rome Statute and its entering into force.[20] For its part, Côte d'Ivoire's interests in the Statute were kept alive by a 2003 note of acceptance of the Court's jurisdiction,[21] as Sudan unsigned the Statute in August 2008 after the Court indicted President Omar-al-Bashir. Additionally, Côte d'Ivoire's President reconfirmed the acceptance of the Court's jurisdiction in December 2010 and May 2011, but only after the 2010-2011 post-election violence (PEV) in which atrocity crimes were committed. Côte d'Ivoire eventually ratified the Rome Statute in May 2013.[22]

The States' delays in treaty ratification and the extremes of abandoning it altogether can be attributed to several factors, including 1) inadequate political will; 2) local capacity gaps; and 3) the rare occurrence of international crimes.

2.1.1 Inadequate political will

The question of political will can be discerned at the level of States' status within the Rome Statute system of justice. First, for State Parties to the ICC such as Kenya, Uganda and Côte d'Ivoire, their commitments in accepting the Court's style of justice implied that they ought to have domestic laws that are adequate in both substantive and procedural terms. Yet still, the domestic authorities in these States are culpable of committing atrocities in their quests for, and maintaining political power.[23] Hence, a critical look at the States' eventual decisions to enact national implementing legislation of the Rome Statute indicates that pursuing justice was not necessarily their primary motivation.

For example, in Kenya, the authorities placed the International Crimes Bill on the Parliament's agenda in February 2008 after the 2007/2008 post-election (PEV).[24] As at the time, the political elite were eager to demonstrate their capacities in the investigation and prosecution of alleged masterminds of the 2007/2008 PEV, and potentially escape a possible ICC intervention. With the ICC's active prosecution of the alleged masterminds of the PEV, some of the suspects (Uhuru Kenyatta and William Ruto), who were subsequently elected as President and

19 United Nations, 'Rome Statute of the International Criminal Court,' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed 15 August 2022).

20 Assembly of State Parties to the Rome Statute, 'State Parties,' https://asp.icc-cpi.int/States-parties/States-parties-chronological-list (accessed 15 August 2022).

21 International Criminal Court, 'Situations Under Investigation: Côte d'Ivoire,' https://www.icc-cpi.int/cdi (accessed 10 August 2022).

22 Ibid.

23 William Gumede, 'The International Criminal Court and Accountability in Africa,' LSE Blog, 31 January 2018, https://blogs.lse.ac.uk/africaatlse/2018/01/31/the-international-criminal-court-and-accountability-in-africa/ (accessed 7 January 2023).

24 Benson Kinyua, 'The Rome Statute: Its Implementation in Kenya,' June 2011, https://ssrn.com/abstract=2353383 (accessed 27 July 2022).

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Deputy respectively, campaigned for Kenya's and African States' collective withdrawal from the ICC.[25]

Equally, Uganda passed the International Crimes Act of 2010 to meet the expectations of holding an ICC conference in Kampala that year.[26] Uganda's President, Yoweri Museveni, has also publicly condemned the ICC as an unnecessary disruption in African affairs, either in defence of his Kenyan counterparts or as a cover for his alleged culpability in the northern conflict in which the ICC intervened in 2004 following State referral.[27]

For Côte d'Ivoire, the political elite had been suspicious of the ICC, as seen in their intermittent commitment to the Court over time. In this regard, the 2015 partial amendments to the Ivorian Penal Code and further amendments could be seen as measured outcomes of State actors' balance between safeguarding their interests and their international responsibilities. Conversely, CAR's political instability negatively impacted the State's capacity to comply with both its domestic and international obligations.[28] The State was only able to embark on legal reforms in 2010 through partial amendments to the Criminal Code and the Code of Criminal Procedure.[29]

For non-State Parties, such as Sudan, there are no obligations to enact domestic implementing legislation. Sudan's motion towards compliance with the Rome Statute system of justice followed the 2005 UNSC's referral to ostensibly 'perform complementarity' and potentially limit the ICC's involvement.[30] This began with the December 2007 amendment to the Armed Forces Act 1986 that expanded the list of war crimes in the Armed Forces Act 1983, and further amendments to the Criminal Act 1991 in 2009 to provide further provisions for the criminalisation of core international crimes. Sudan's chequered implementation of the Rome Statute could be understood in the context of a State under siege, as the UNSC had adopted a UN Chapter 7 decision that imposed the ICC's jurisdiction on a non-member state.

Together, African States form the African Union (AU), which occasionally adopts ICC non-cooperation resolutions. For example, following common perceptions of the Court's bias towards Africa, the AU adopted a strategy of

25 Geoffrey Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neo-colonial: Lessons from Kenya,' International Journal of Transitional Justice 11(1) (2017): 9–29; Gabrielle Lynch, Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya (Cambridge: Cambridge University Press, 2018).

26 Sarah Nouwen, Complementarity in the Line of fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (Cambridge: Cambridge University Press, 2013).

27 Geoffrey Lugano, 'Distance in the International Criminal Court's Relations with the Local,' International Journal of Transitional Justice 16 (3) (2022): 346-362.

28 Godfrey Musila, 'The Special Criminal Court and other Options of Accountability in the Central African Republic: Legal and Policy Recommendations,' International Nuremberg Principles Academy, 2016, https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf (accessed 20 July 2022).

29 Parliamentarians for Global Action, 'Central African Republic and the Rome Statute,' https://www.pgaction.org/ilhr/rome-statute/central-african-republic.html (accessed 10 July 2022).

30 Nouwen, supra n 26 at 289.

withdrawing en masse from the ICC in early 2016.[31] While South Africa, The Gambia, Kenya, and Burundi initiated steps towards withdrawing from the Court,[32] all the States but Burundi have rescinded such decisions. This indicates the State's acceptance of the ICC's utility in regulating international crimes, amidst the misgivings that the political elite might have on the Court.

2.1.2 Local capacity gaps

As a novel concept, most drafters of domestic legislation in the African States were unfamiliar with the Rome Statute and its 'delicate balances.'[33] Being a difficult task, implementation requires expert knowledge of international criminal law and procedure, which most drafters of domestic legislation are not conversant in.

The capacity gaps in most ICC member States, including in Africa, contributed to the development of 'positive complementarity,'[34] under which collective action was triggered towards enabling States to draft implementing legislation. Several actors, such as the Parliamentarians for Global Action (PGA), the Coalition for the International Criminal Court (CICC), and the Commonwealth Secretariat, stepped in to assist African States in enacting national implementing legislations, some of which will be highlighted in the subsequent section.

2.1.3 Rare occurrence of atrocity crimes

As stipulated in the Preamble of the Rome Statute, atrocity crimes are those which are 'the most serious … and of concern to the international community.' They are so grave that 'they threaten the peace, security and well-being of the world.' These categories of crimes, including genocide, crimes against humanity, war crimes and the crime of aggression, are rare occurrences that are primarily committed during hostilities. Thus, the rarity of international crimes negated the urgency of enacting domestic implementing legislation in the African States under study and many others.

2.2 Approaches in States' Implementation of the Rome Statute

The approach that States adopt in their implementation of the Rome Statute significantly depends on their legal systems (common law, civil law or *Sharia* law), as will be seen in the divergent pathways that the various African States under study adopted. Broadly speaking, States can opt for either an individual approach under which they tailor-make their legislation, or the model approach that entails

31 African Union, 'Decisions and Declarations,',' October 2013, https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf (accessed 7 January 2023).

32 Franck Kuwonu, 'ICC: Beyond the Threats of Withdrawal,' Africa Renewal, May-July 2017, https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal (accessed 7 January 2023); MPs Vote to Quit the ICC, The Star, 6 September 2013.

33 Bekou and Shah, supra n 14.

34 Positive complementarity is broadly conceived as 'activities and actions of cooperation aimed at promoting national proceedings, with specific reference to the prosecutorial policy of the ICC.' See Hitomi Takemura, 'Positive Complementarity,' Max Plank Encyclopedia of International Law, October 2018, https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2507.013.2507/law-mpeipro-e2507?prd=MPIL (accessed 12 July 2022).

adopting a 'model kit of implementation.' Whether States opt for either the individual or model approach, they still have to choose an appropriate method of enacting the relevant provisions of the Rome Statute.

In so doing, States have the liberty of using either the minimalist approach, or the express criminalisation method.[35] In the minimalist approach, States apply 'military or ordinary law,' and domestic crime labels that are already in place (such as murder, rape, and theft) to 'the conduct in question.'[36] In this approach, States do not incorporate international crimes, but merely apply domestic laws to the applicable conduct.[37] This approach has been adopted in Denmark and Peru in criminalising serious offences.[38] Libya also relied on this approach during its admissibility challenge to the ICC's prosecution of Saif Ai-Islam Gaddafi.[39]

The downside of the minimalist approach is that the crimes, their requirements, and penalties only partially conform to international standards. As such, it might 'not serve the best interests of States as it does not provide the opportunity to import international crimes into their domestic criminal law.'[40] Hence, the majority of States, including in Africa, have opted for the express criminalisation approach that is more useful in importing the substantive provisions of the Rome Statute.

Express criminalisation entails 'specific incorporation through a general and open-ended reference to the Rome Statute.'[41] This can be done in three ways: 1) the static or literal transcription approach, 2) the dynamic criminalisation approach, and 3) the hybrid approach.'[42]

First, the static approach involves a 'transcription of the international crimes into domestic law in such a way that it repeats the definitions'[43] of crimes as they appear in Article 5 of the Rome Statute. The legislation acquires the same wording and penalties as spelt out in the Statute. This approach has the advantages of clearly and predictably setting out which conduct is considered an international crime, and the applicable penalties.[44] On the flip side, this approach 'may not take into account new developments in international criminal law.'[45]

The static or literal transcription has variations, such as instances where States only make references to Article 5 crimes and do not reproduce their texts.[46] Kenya and Uganda embraced this method in their respective implementation of the Rome Statute.[47] Another variation is where States reproduce Article 5 crimes from the Statute, together with the full details of the ICC's Elements of Crime document.[48]

35 Imoedemhe, supra n 5 at 72.
36 Ibid, 72.
37 Ibid, 73.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid, 73.
42 Ibid.
43 Ibid, 74.
44 Ibid.
45 Ibid.
46 Ibid.
47 See Kenya's International Crimes Act 2008 and Uganda's International Crimes Act 2010.
48 Imoedehme supra n 5 at 74.

Côte d'Ivoire used this method in its national implementation of the Rome Statute.[49]

Second, the dynamic approach entails the redrafting, rephrasing, or reformulating the Rome Statute's Article 5 crimes.[50] This is to ostensibly 'provide a better connection to existing criminal provisions in the domestic legislation or to clarify some of the Rome Statute concepts.'[51] This method is compatible with the individual State approach, allowing them to tailor the Rome Statute to their national situations. Notably, CAR and Sudan adopted these approaches in their national implementing legislations.[52]

Third, a hybrid approach combines the static and dynamic methods. This is to 'facilitate the transcription of certain international crimes, with a generic or residual clause covering other grave violations of international humanitarian law or treaties to which the state is party.'[53] Changes in Finnish criminal law are considered to conform to this model.[54]

2.2.1 Static or literal transcription in Kenya, Uganda, and Côte d'Ivoire

By adopting the static or literal transcription approach in their implementation of the relevant provisions of the Rome Statute, Kenya, Uganda, and Côte d'Ivoire defined core international crimes in domestic law in ways that are compatible with the Statute. However, Kenya and Uganda adopted the Commonwealth Model Law,[55] as Côte d'Ivoire opted for the individual approach in partially amending its penal code.

Using the Commonwealth Model Law as a template, Kenya and Uganda incorporated nearly all the substantive provisions of the Rome Statute in 'one-all-encompassing pieces of legislation.'[56] Guidance from the commonwealth, whose goals include promoting good governance, peace, human rights, and the rule of law,[57] provided the possibility of enacting nearly 'all provisions to do with the ICC'[58] in a single legislation.

Specifically, Kenya's International Crimes Act 2008 provides for 'the punishment of certain international crimes and enabling co-operation with the ICC.'[59] The Act explicitly states that the Rome Statute has the force of law in Kenya, particularly with regards to the relevant provisions of the Statute such as

49 See chapter I (offences against the jus cogens) of book II of Côte d'Ivoire's penal code.
50 Ibid.
51 Ibid.
52 This can be gleaned in the States' pieces of legislation that are discussed in the subsequent sections of this report.
53 Imoedemhe, supra n 5 at75.
54 Ibid
55 Christian De Vos, 'All Roads Lead to Rome: Implementation and Domestic Politics in Kenya and Uganda,' in *Contested Justice: The Practice and Politics of International Criminal Interventions*, eds. Christian De Vos, Sara Kendall and Carsten Stahn (Cambridge: Cambridge University Press, 2015).
56 Bekou and Shah, supra n 14 at 507.
57 The Commonwealth, 'Democracy, Governance and Law,' https://climate.thecommonwealth.org (accessed 12 July 2022).
58 Bekou and Shah, supra n 14 at 507.
59 Kenya, International Crimes Act 2008.

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jurisdiction, admissibility and applicable law, general principles of criminal law, rules of procedure and evidence, investigation and prosecution of crimes, the conduct of trials, penalties, appeals, international cooperation and judicial assistance, and enforcement of sentences.[60] Uganda's International Crimes Act 2010 takes a similar approach, beginning with the objective of 'giving effect to the Rome Statute of the International Criminal Court.'[61] The Act also gives 'the force of law in Uganda,' and commits Uganda to the relevant provisions of the Statute similarly to Kenya.[62]

Similarly, Côte d'Ivoire passed several separate laws that provided for the implementation of the Rome Statute. These include Bill n°2015.134 of 9 March 2015 which fully implemented specific substantial provisions of the Rome Statute, and Bill n°2015.133 of 9 March 2015, which voided the statutes of limitations.[63] Moreover, Chapter I (offences against the jus cogens) of Book II of the penal code reproduces the Rome Statute's Article 5 crimes together with the elements of crimes and penalties, albeit selectively. Even though the penal code focuses on describing the crimes, their characteristics, and penalties, it omits several provisions of the Rome Statute, notably cooperation and irrelevance of official capacity.

2.2.2 Dynamic Criminalization in CAR and Sudan

The dynamic criminalisation approach adopted by CAR and Sudan is evident in the legislation with which the two States implemented the relevant provisions of the Rome Statute. Based on their respective legal cultures and governance contexts, the two States reformulated various provisions of the Statute into their domestic legal systems.

First, as an authoritarian and Islamic regime for most of its contact with the ICC, Sudan amended its domestic law with the flavour of militarism and *Sharia* law. Sudan's first point of call in criminalising core international crimes was amending the Armed Forces Act 1986 in 2007. The Armed Forces Act as amended in 2007, contains a few provisions of the Rome Statute (particularly Article 5 crimes), but does not explicitly mention the terms genocide, war crimes and crimes against humanity, or refer to their international legal sources such as the Geneva and the Genocide conventions.[64]

Furthermore, the Armed Forces Act was confined to military conduct and did not provide for civilian acts. Thus, in order to 'complete the picture',[65] Sudan amended the Criminal Act of 1991 in 2009 with the introduction of a new chapter

60 Article 4(2) of Kenya International Crimes Act 2008.
61 Uganda, International Crimes Act 2010.
62 Ibid.
63 Parliamentarians for Global Action, 'Côte d'Ivoire and the Rome Statute,' https://www.pgaction.org/ilhr/rome-statute/cote-divoire.html (accessed 12 July 2022).
64 Nouwen, supra n 26 at 284.
65 Ibid, 286.

(chapter 18) on core international crimes.[66] Whereas the new chapter is more comprehensive than the Armed Forces Act, it is aligned to customary international law rather than the Rome Statute.[67] Nonetheless, Sudan is at liberty to align its national law with customary international law, as it is not a party to the Rome Statute. At the same time, the definitions of Article 5 crimes in Sudan's legislation have been reformulated in ways that depart from those in the Rome Statute. This is problematic, as Sudan is a party to the Genocide and Geneva Conventions, from which the Statute derives the definitions of the crimes of genocide and war crimes.

The high levels of impunity in CAR necessitated adjustments to the penal code and legal system, as effected in bill n°10.001 of 6 January 2010, that partially gave effect to substantial provisions of the Rome Statute.[68] Moreover, the 2015 Organic Law (*loi organique* n° 15-003) was enacted to establish the Special Criminal Court (SCC).[69] It is important to note that the Organic Law does not generate new norms. Instead, it cross-references domestic legislations, particularly the Central African penal code and the code of criminal procedure.[70] Regarding temporal jurisdiction, the Organic Law provided that the SCC's investigations would begin from 1 January 2003 and proceed for an initial five-year period with the possibility of extension.[71] The SCC became fully operational in June 2021,[72] and conducted its first trial in May 2022.

The SCC was established amidst the ICC's forays into the CAR, starting with the investigations into conflicts in Bangui in 2003 that led to the Jean-Pierre Bemba case.[73] Further, at the end of 2018, the ICC arrested three suspects (Mahamat Saïd Abdel Kani, Alfred Yekatom and Patrice-Edouard Ngaïssona) in the context of its CAR investigations.[74] Whereas the SCC's legal framework envisages cooperation with the ICC,[75] this has not been the case. As an SCC magistrate

66 Mohamed Babiker, 'The prosecution of International Crimes Under Sudan's Criminal and Military Laws: Developments, Gaps and Limitations,' in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* ed. Lutz Oette (Brulington: Routledge, 2011).

67 Nouwen, supra n 26.

68 Parliamentarians for Global Action, supra n 31.

69 Loi organique n° 15-003.

70 Patryk Labuda, 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?', *Journal of International Criminal Justice*, 15(1): 175-206.

71 Following this provision, on 28 December 2022, the CAR parliament renewed the SCC's mandate for another five-year term. See Franck Petit, 'Toussant Muntazini: If they Extend the Special Court Mandate, they Expect Added Value,' JUSTICEINFO.NET, 5 January 2023, https://www.justiceinfo.net/en/110828-toussaint-muntazini-extend-special-court-mandate-expect-added-value.html (accessed 7 January 2023).

72 United Nations, 'CAR Special Criminal Court (SCC) Now Fully Operational,' June 2021, https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational (accessed 14 July 2022).

73 International Criminal Court, 'Situation in the Central African Republic: The Prosecutor v Jean Pierre Bemba Gombo,' March 2019, https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf (accessed 7 January 2023).

74 International Criminal Court, 'Central African Republic II,' January 2022, https://www.icc-cpi.int/carII (accessed 7 January 2023).

75 This is via law n°18-010 establishing the SCC's rules of procedure and evidence. Article 14 of the SCC also provides that the SCC's prosecutor should consult the ICC's prosecutor regarding their investigation and prosecutorial strategy.

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acknowledged, 'two rogatory commissions sent to the International Criminal Court in October 2021 have remained unanswered, and that there is almost no collaboration from the ICC.'[76]

Given that the ICC does not have a permanent field presence in the CAR, it struggles with having an impact, making the SCC a 'valuable potential partner for the ICC.'[77] Case-related cooperation between the SCC and the ICC is beneficial to both institutions as they could benefit from the division of labour based on institutional strengths and capacities. For example, the SCC could be instrumental for the ICC in securing witnesses in the CAR cases it is prosecuting and conducting outreach missions to victims and affected communities. In turn, the ICC could transfer to the SCC the evidence it has collected for future investigations and prosecutions.

The prosecutorial capacities of the SCC are particularly envisaged in Article 3 of the Organic Law that established the court. As the legislation states, the SCC is competent to investigate and judge:

> The serious violations of human rights and serious violations of international humanitarian law committed on the territory of the Central African Republic since January 1, 2003, as defined by the Penal Code… and by virtue of the international obligations … in matters of international law, in particular the genocide, crimes against humanity and war crimes.[78]

Regarding subject matter jurisdiction, the language of Article 3 is significant as a reference to 'serious violations of international humanitarian law' covers a much broader category of offences than just the crimes of genocide, war crimes and crimes against humanity.[79] As 'a generic term with no fixed content', the frame of 'serious violations of international humanitarian law' 'leaves the door open to potentially creative jurisprudential innovations grounded in customary international (humanitarian) law.'[80]

Another notable innovation in Article 3 of the Organic Law is the provision that the SCC might refer to 'the substantive norms and the rules of procedure established at the international level' in three circumstances.[81] These include when the legislation in force does not deal with a particular matter, when there is uncertainty concerning the interpretation or application of a rule of domestic law, and when there are questions of the compatibility of this law with international law. Nevertheless, 'reliance on international law could in some instances elicit concerns about legality and fair trial.'[82]

76 Julian Elderfield, 'The Rise and Rise of the Special Criminal Court (Part II),' OpinioJuris, 7 April 2021, https://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-ii/ (accessed 7 January 2023).
77 Ibid, 1.
78 Article 3 of the CAR's Organic Law.
79 Labuda, supra n 70 at 187.
80 Ibid, 187.
81 Musila, supra n 28 at 18.
82 Ibid, 18.

Seemingly, States have taken up a broad discretion in implementing the ICC Statute, as seen in the different approaches they have adopted. A close examination of their implementation of specific provisions of the Rome Statute, as well as the alignment of their legal orders with the Statute provides a more comprehensive outlook of their level of compliance with the Rome Statute system of justice.

3 National implementation of the provisions of the Rome Statute

The provisions of the Rome Statute that primarily enable criminal accountability for alleged perpetrators of atrocity crimes that States should pay attention to include: 1) the criminalisation of core international crimes, 2) elimination of obstacles to prosecutions, 3) cooperation with the ICC, 4) witness protection, 5) victim-centeredness, and 6) penalties for the criminalised offences.

3.1 Incorporation and definition of Article 5 crimes

Although it is not obligatory to include Article 5 crimes of genocide, crimes against humanity, war crimes, and crimes of aggression into domestic law, their incorporation and definition demonstrate States' willingness to facilitate their prosecution at the national level.[83] Generally, Article 5 crimes are duly incorporated in the implementing legislations of all States under study, except for the crime of aggression (Article *8bis*) that was activated in December 2017 following the 2010 Kampala amendments to the Rome Statute. Additionally, the States are yet to ratify amendments to the Rome Statute on biological weapons, blinding laser weapons, and non-detectable fragments as war crimes.

States that adopted the static or literal transcription approach in their national implementation legislation (Kenya, Uganda, and Côte d'Ivoire) are compliant with the definitions of Article 5 crimes in the Rome Statute. Conversely, the definitions of the core international crimes in the States that opted for the dynamic criminalisation approach (CAR and Sudan) are not in conformity with the Statute and are, at times, inadequate in the description of the crimes.

3.1.1 Article 5 crimes in Kenya, UGANDA, and Côte d'Ivoire

Kenya's and Uganda's respective International Crimes Acts do not reproduce the definition of Article 5 crimes but only make references to them.[84] In this regard, Kenya's International Crimes Act 2008 lists part 2 (which relates to jurisdiction, admissibility, and applicable law) of the Rome Statute among the relevant provisions that have the force of the law in Kenya. Further, part II (on international crimes and offences against the administration of justice) of the legislation specifies that in this section, genocide, crimes against humanity, and war crimes have 'meanings ascribed to them' in the Rome Statute.

Similarly, Uganda's International Crimes Act 2010 begins with the enumeration of part 2 of the Rome Statute (that relates to jurisdiction, admissibility, and

83 Bekou and Shah, supra n 14.

84 Kenya, International Criminal Act 2008; Uganda, International Criminal Act 2010.

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applicable law) as part of the relevant provisions of the Statute that have the force of law in Uganda.[85] In the same breadth, part II of the Act provides that genocide, crimes against humanity and war crimes are 'acts as referred to' in Articles 6, 7 and 8 of the Rome Statute, respectively.

Likewise, Côte d'Ivoire reproduces the definitions of all Article 5 crimes together with the elements of crime in its penal code, except for Article 8(2)(e) of the Rome Statute that completes the criminalisation of war crimes.[86] Article 8(2) of the Rome Statute lists and defines four categories of war crimes that include crimes committed in both international armed conflict, and non-international armed conflict.[87] By omitting Article 8(2)(e), the criminal code excludes the commission of atrocity crimes in the context of civil war, which is more prevalent in present-day Côte d'Ivoire.

3.1.2 Article 5 Crimes in CAR and Sudan

Regarding the dynamic criminalisation approach, CAR and Sudan's departures from the Rome Statute's definitions correspondingly denote different meanings of the respective crimes. For example, Article 6 of the Rome Statute defines the crime of genocide as a commission of any of the listed acts 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.' However, Article 152 of CAR's penal code slightly deviates from the Rome Statute's definition by extending protection to 'any other group defined by specific criteria.'[88] 'Arguably, this definition could extend protection to any group, including political, cultural and social groups.'[89] Scholars and States alike have been resistant to, and advise against expanding the groups protected, given that 'such an approach can result in the trivialisation of genocide, universally regarded as the most serious international crime.'[90] Moreover, CAR's reformulation of the crime of genocide could be confused with the crime against humanity of persecution, that refers to crimes 'against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender…or other grounds.'[91]

For crimes against humanity, Article 153 of CAR's Penal Code duplicates Article 7(1) of the Rome Statute's definition as the commission of any of the listed acts 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.' Nonetheless, the penal code excludes the state or organisational policy element in Article 7(2) of the Rome Statute relevant to what constitutes an attack. Without this critical element, 'any attack on

85 International Criminal Act 2010.

86 Côte d'Ivoire: Code pénal, 1981-640; 1995-522.

87 The four categories of war crimes as defined in the Rome Statute are: 1) grave breaches of the Geneva Conventions of 12 August 1949 (Art. 8(2)(a), (2)) other serious violations of the laws and customs applicable in international armed conflict (Art. 8(2), (3)), serious violations of article 3 common to the four Geneva Conventions (Art.8(2)(c), and (4)) 'other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law' (Art. 8(2)).

88 Article 152 of CAR penal code.

89 Musila, supra n 28 at 16.

90 Ibid, 16.

91 Article 7(h) of the Rome Statute.

civilians by any entity' could denote a crime against humanity, and this strips 'the crime of its essence.'[92] Article 153 of CAR's Penal Code also fails to 'define any of the key terms relating to crimes against humanity, similar to those found in the rest of Article 7(2) of the Rome Statute, and the Elements of Crime.'[93]

Article 153 further provides several innovations in the description of crimes against humanity. These include the criminalisation of massive and systematic executions as separate offences, and the expansion of the Rome Statute's prohibition of torture to include the 'practice of torture and other inhumane acts.' However, gender has not been recognised as a ground of persecution.

Whereas Articles 154 to 156 of CAR's Penal Code broadly cover the war crimes enumerated in Article 8 of the Rome Statute,[94] the crimes listed in Article 8(2)(e) are largely omitted. Although such omissions and the others before are potentially remedied by the SCC's reference to international law as the Organic Law provides, such an approach could, in some situations, 'elicit concerns about the legality and fair trial.'[95]

The problems with reformulating the definition of Article 5 crimes are similarly observable in Sudan's national implementing legislations of the Rome Statute. As a starting point, Sudan's Criminal Act of 2007 (as amended in 2009) reformulates the crime of genocide as:

> '… the commitment of the offence or the offences of homicide against an individual or individuals of a national, ethnic, racial, or religious group upon that entity with the intention of exterminating it or destroying it partially or totally in the context of a systematic and widespread conduct directed against that group and commits in the same context any of the following acts:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.'[96]

The definition of genocide in Sudan's Criminal Act 2007 significantly departs from the Rome Statute, and that of the Geneva Convention of 1948 that the Statute draws upon. Unlike the 1948 definition that affirms that 'any of the listed' acts constitute genocide, the Criminal Act stipulates homicide as the 'essential act that

92 Musila, supra n 28 at 17.
93 Ibid, 17.
94 Ibid.
95 Ibid, 18.
96 Sudan, Criminal Act 2007.

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constitutes genocide if the other elements of the crime are present.'[97] Hence, the Acts' reference to homicide 'appears to narrow the definition and is bound to create confusion.'[98]

Also, the relationship between homicide and the other five acts enumerated at the end of Article 188 of the Criminal Act 2007 is unclear. Seemingly, the definition implies that they are cumulative, that there needs to be the act of homicide as well as any of the five listed acts.[99] The Geneva Convention's definition clearly distinguishes the five acts from homicide, 'as genocide is characterised by the intent to destroy a protected group by the enumerated means.'[100] While only the first of the five acts relate to homicide, the others do not have to lead to the death of members of a protected group. With the 1948 definition, there is a recognition that there are several ways of destroying groups. As such, centring homicide as 'an essential element of the crime of genocide does not fully capture the nature of the crime.'[101]

Moreover, the Criminal Act 2007 introduces new elements to the definition of genocide that mirror crimes against humanity. In so doing, Article 187 of the Act stipulates that acts of genocide can be committed 'in the context of a systematic and widespread conduct.'[102] This definition likely creates confusion by mixing genocide with crimes against humanity. It introduces a new threshold for the former that is non-existent in both the Genocide Convention of 1948 and the Rome Statute of the ICC.

By insinuating that genocide can be committed against an 'individual', the definition in Criminal Act 2007 also defies the 'collective or quantitative' dimension of the core crime. In the ICC Statute, 'the number contemplated must be significant',[103] as encapsulated in the phrase 'in whole or in part.' Hence, the objective of killing 'only a few members of a group' cannot amount to genocide.

For crimes against humanity, Article 186 of the Criminal Act 1991 reproduces the definition in Article 7 of the Rome Statute, but fails to bring the definition of rape in line with international statutes and jurisprudence.[104] Article 186 of the Criminal Act 1991 defines rape as using 'coercion in a sexual intercourse with a female or sodomy with a male', or 'committing outrages upon personal dignity of the victim if such is accompanied by penetration in any way.'[105] This definition fails to cover all acts of penetration, nor does it specify the forms of coercion.

Similar omissions can be seen in Article 149 of the Criminal Act, which 'does not include penetration other than sexual intercourse by way of penile penetration

97 Redress, 'Comments on the Proposed Amendment of the Sudanese Criminal Act,' September 2008, http://www.pclrs.com/downloads/Miscellaneous/Penal_Code_Amendment_Position%20Paper%20_2_.pdf (accessed 15 July 2022), 5.
98 Ibid.
99 Ibid.
100 The Geneva Conventions of 1948.
101 Redress, supra n 97.
102 Ibid.
103 Babiker, supra n 66 at 166.
104 Redress, supra n 97.
105 Ibid.

into the vagina or anus.'[106] Moreover, the inclusion of adultery in the definition of sexual intercourse 'has created ambiguity' about the applicable rules of evidence, such as the requirement of a confession or four male eyewitnesses to the act.[107] Women are also exposed to the risk of prosecution, as any reference to adultery is an admission of indulging in unlawful sexual intercourse.

War crimes are criminalised in Article 188 of the Criminal Act 2007 as 'Crimes against persons.'[108] Further, in Articles 189 to 192 of the Act, four groups of war crimes are addressed, namely: (a) 'war crimes against properties and other rights' (Article 189); (b) 'war crimes against humanitarian operations'; (c) 'war crimes related to the prohibited methods of warfare'; and (d) 'war crimes related to the use of prohibited weapons.' In this sense, the framework of war crimes under Article 188 differs significantly from the structure of Article 8 of the Rome Statute, which consists of both international armed conflict and non-international armed conflict. Conversely, in the Criminal Act 2007, all the crime categories 'can be committed in the context of an international armed conflict or non-international armed conflicts,'[109] thus obscuring the distinction between the two crime categories.

Moreover, the Criminal Act 2007 omits several war crimes, namely: '(i) sexual slavery; (ii) making improper use of a flag of truce, of the flag or the military insignia and uniform of the enemy or the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious physical injury; (iii) the transfer, directly or indirectly, by the Occupying Power of parts of its civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside its territory.'[110]

3.2. Elimination of obstacles to investigations and prosecutions

The Rome Statute provides for the elimination of obstacles to investigations and prosecutions in numerous ways that similarly call for States' adjustment of their domestic legislations. These include the principles of individual criminal responsibility, the irrelevance of official capacity and the non-applicability of statutes of limitation.

3.2.1 Individual criminal responsibility

The principle of individual criminal responsibility is cardinal in the criminalisation of Article 5 crimes, as international criminal law deals with individuals and not States. The principle originates in the departure from longstanding immunity of State officials from foreign criminal jurisdictions to enable them to perform their functions free from external constraints towards increasing recognition of the mantra that 'crimes against international law are committed by men, not by

106 Babiker, supra n 66 at 169.
107 Ibid.
108 Sudan, Criminal Act 2007.
109 Babiker, supra n 66 at170.
110 Redress, supra n 97 in references to Rome Statute.

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abstract legal entities.'[111] Consequently, the Rome Statute articulates the principle of individual criminal responsibility in several ways.

First, Article 25 addresses 'individual criminal responsibility', stating that: 'a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.' Article 25 goes on to stipulate that individual criminal liability is established if a person, *inter alia*:

> (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; and
>
> (c) aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Second, Article 28 provides for the responsibility of commanders and other superiors in the commission of atrocities. Accordingly, Article 28(a) stipulates that:

> A military commander or person effectively acting as a military commander shall be criminally responsible for acts committed by forces under his or her effective command and control, or effective authority and control.

With this provision, military commanders are held criminally liable for the atrocity crimes the forces under their effective control commit. However, Article 28(b) further articulates that responsibility is limited to cases where the superior had or should have had knowledge of such crimes or failed to take 'all the necessary and reasonable measures' to prevent their commission.

Third, Article 33 on 'superior orders and prescription of law' subsequently limits the concept of individual criminal responsibility. This is by stating that 'an order of a Government or of a superior, whether military or civilian, shall not relieve a person of criminal responsibility.'[112] To this effect, exceptions are made when (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful.

At the same time, Article 33 affirms that 'orders to commit genocide or crimes against humanity are manifestly unlawful.' The implication is that Article 33 'was limited to war crimes, as it was recognised that conduct that amounted to genocide

111 Ellies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), 18.

112 Article 33 of the Rome Statute.

or crimes against humanity would be manifestly illegal that the defence should be denied altogether.'[113]

The importance of Article 33 is that it strikes a balance between the interests of justice on the one hand and the obligations of soldiers on the other hand. While in itself the Article does not provide 'an escape to impunity, it might, in those rare cases when it is likely to be invoked, provide justice to a soldier who finds himself carrying the responsibility for decisions made in good faith on the basis of orders given by others who had information, denied to the accused himself, which rendered the order illegal.'[114]

Generally, the provisions made for Articles 25, 28 and 33 of the Rome Statute in Kenya, Uganda, Côte d'Ivoire, and Sudan vary due to the differences in the approaches they adopted in their national implementing legislations. On the one hand, the model approach that Kenya and Uganda adopted enabled their respective International Crimes Acts to enumerate the Rome Statute's Articles 25, 28 and 33 among the general principles of criminal law applicable in prosecuting Article 5 crimes. On the other hand, the individual approach employed by Côte d'Ivoire, CAR and Sudan, resulted into their omission of some of the provisions for individual criminal responsibility.

For CAR, Article 162 of the Penal Code generally prohibits immunities for genocide, crimes against humanity and war crimes.[115] Additionally, title four on 'criminal responsibility and the applicable penalties' of the SCC's Organic Law reproduces verbatim the Rome Statute's Article 25(3)(a) and Article 28(a) and (b).[116] However, CAR has no legislation on the responsibility of commanders and other superiors. Equally, Côte d'Ivoire's Penal Code of 1981, as amended in 2015, provides for individual criminal responsibility and responsibility of commanders, with omissions on superior orders and prescription of the law.

Likewise, Sudan recognizes the traditional modes of individual criminal responsibility but also provides cover against prosecutions in equal measure. Notably, Article 3 of the Criminal Procedures Act 1991, as amended in 2009, prohibits the criminal prosecution of 'any Sudanese national for any act or omission that constitutes a violation of international humanitarian law including crimes against humanity, genocide, and war crimes' in non-Sudanese courts. Simply put, the Act provides a comprehensive cover to Sudanese nationals, whether in official or non-official positions, from prosecutions in foreign courts on the alleged commission of international crimes. Additionally, Sudan's legal order does not refer to the responsibility of commanders and other leaders, superior orders, or prescription of law.

113 Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied,' December 1999, International Review of the Red Cross, https://www.icrc.org/en/doc/resources/documents/article/other/57jq7h.htm (accessed 17 July 2022).

114 Ibid, 1.

115 Article 162 of CAR Penal Code.

116 Loi organique n° 15-003.

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3.2.2 Irrelevance of official capacity

Article 27 of the Rome Statute articulates the principle of 'irrelevance of official capacity' that voids the traditional practice of exempting certain persons from criminal responsibility based on their higher-level positions in government. In so doing, the Article pronounces an equal application of the law 'without any distinction based on official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official.' The Article declares that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'[117]

Traditional practice has been that international law grants Heads of State absolute immunity. However, such a position has been revisited over time with a number of exceptions to the absolutist position. As part of customary international law, 'immunities including for Heads of State, are neither available as defence mechanisms nor are they available as jurisdictional bars to charges involving the allegation of international crimes.'[118] Such a 'narrow exception to the principle of sovereign immunities' emerged alongside the view that regardless of rank or position, individuals 'could be held criminally responsible for acts committed in violation of international law.'[119]

Based on this paradigm shift, Article 27 of the Rome Statute prohibits absolute immunity for Heads of State and government officials for trials before the ICC. Nevertheless, with many States still holding the traditional view, national legislations and their court systems continue to suggest the shielding of sitting Heads of State and government from prosecutions. This reluctance to uphold the Rome Statutes' position on the irrelevance of official capacity at domestic levels is further reinforced by Article 27's prohibition of immunities only at the international level, and with no 'absolute obligation for States to remove immunities for the purpose of national prosecutions.'[120]

By virtue of their model approaches, Kenya's and Uganda's respective International Crimes Acts provide for the irrelevance of official capacity. The two Acts make references to part 3 of the Rome Statute (on general principles of criminal law) as among the relevant provisions of the Statute that they give force of law to.

Yet still, Uganda's Constitution of 1995 (with amendments through 2017) shields the president from proceedings in 'any court'.[121] More so, exemptions to the president's prosecutions are only premised on the president 'ceasing office' and not on liability for a crime for which the president might be accused or lifting immunities under a treaty to which Uganda is a party.[122] Conversely, Article 143 of

117 Article 27 (1) of the Rome Statute.

118 Guénaël Mettraux, John Dugard and Max du Plessis, 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa,' *International Criminal Law Review* 18 (2018): 583.

119 Ibid, 583.

120 Bekou and Shah, supra n 14 at 513.

121 Article 98(4) of the Constitution of Uganda, 1995.

122 Article 98(5) of the Constitution of Uganda, 1995.

Kenya's Constitution of 2010 takes a more progressive path by making exceptions on the president's immunity regarding a "crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity".[123]

Similarly, CAR provides for irrelevance of official capacity in Article 56 of the Organic Law, but only in a partial manner. The SCC law states that "this law shall apply equally to all persons without any distinction based on official capacity".[124] This is an omission of Article 27 of the Rome Statute's specific identification of the Head of State, elected representatives or government, and member of government or parliament as official capacity. The question therefore is whether the Organic Law implicitly approves immunities for international crimes for certain categories of people. The cover for immunity, especially for the president, is further enabled by CAR's Constitution of 2015, with the declaration that the office holder has no responsibility for acts committed while executing their duties, except for treason.[125]

At the more extreme end, Sudan's legal order renders the principle irrelevant. To this end, several laws, including the Criminal Procedures Act as amended in 2009, the Police Act 2008, the Armed Forces Act 1999, and the National Security Act 2010, grant immunity to State officials for acts, including for gross human rights violations, committed in the course of performing official functions.[126] Furthermore, Côte d'Ivoire is yet to legislate on the irrelevance of official capacity. As such, Article 27 of the Rome Statute is incompatible with Article 157 of the Ivorian Constitution of 2016, that excuses the president from criminal liability, with the exception of cases of high treason.[127]

3.2.3 Statutes of limitation

Article 29 of the Rome Statute on 'non-applicability of statute of limitations' states that 'the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.' Seemingly, this provision is directed at national legislation, given that the Statute itself has no statutory limitation to the prosecution of core international crimes.[128]

States are bound to abolish any statute of limitation if they have to effectively provide for the investigation and prosecution of alleged perpetrators of atrocity crimes. By adopting the provisions of Article 29 of the Rome Statute, States potentially protect against excusing criminal liability on the grounds that "the offence is statute-barred according to national law".[129]

Both Kenya's and Uganda's implementing legislation recognise the non-applicability of statutes of limitations. Particularly, Article 4 of the former's International Crimes Act 2008 on 'general principles of criminal law' lists Article 29

123 Article 143(4) of the Constitution of Kenya, 2010.
124 Article 56 of SCC Organic Law.
125 Article 124 of the CAR Constitution, 2015.
126 Babiker, supra n 66.
127 Article 157 of the Constitution of Côte d'Ivoire, 2016.
128 William Schabas, *An Introduction to the International Criminal Court. 6th Edition* (Cambridge: Cambridge University Press, 2020).
129 Imoedemhe, supra n 5 at 179.

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of the Rome Statute among the applicable relevant provisions of the Statute.[130] The same case applies to Uganda's legislation, which follows a similar approach in Article 19 on 'general principles of criminal law.'[131] Moreover, Section 98(5) of Uganda's Constitution of 1995 stresses that '(5) civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.'

CAR's legislation also excludes statutes of limitations for core international crimes. Particularly, Article 162 of the Penal Code states that 'public and civil action, as well as the sentences imparted for genocide, crimes against humanity and war crimes are not subject to statutes of limitations.' This is reiterated in Article 7(c) of CAR's Code of Criminal Procedure, which States that 'the crime of genocide, war crimes and crimes against humanity are not subject to statutes of limitation.'[132]

Equally, Côte d'Ivoire has provisions on non-applicability of statutes of limitation as established in amendments to the Code of Criminal Procedure. Particularly, Law no. 2015-133 of 9 March 2015 inserted into Article 7 of the Code of Criminal Procedure the provision that 'in matters of genocide, crimes against humanity and war crimes, there is no statute of limitations on public action.'[133]

Sudan is an outlier among the countries under study regarding legislating against statutes of limitation. Pursuant to Article 38(a) of Sudan's Criminal Procedure Act 1991, international crimes described in the Criminal Act 1991 (as amended in 2009) are subject to a ten-year prescription period, as the offences therein are punishable by death or incarceration for ten or more years.[134] In other words, the 2009 amendments to the Criminal Act 1991 did not consider the procedural changes required to enable the prosecution of core international crimes, such as the exclusion of statutes of limitation, among several other things.

3.3 Cooperation with the ICC

By virtue of their accession to the Rome Statute, State Parties are duty-bound to cooperate with the ICC in the investigation and prosecution of core international crimes. The Statute expressly calls upon States to fully cooperate with the ICC and 'ensure that there are procedures available under their national law for all of the forms of cooperation which are specified'[135] in the Statute. For non-State Parties, however, the basis for cooperation includes ad hoc arrangements under which the ICC may request assistance[136] or grant requests for assistance from States.[137]

130 Kenya, International Crimes Act 2008.
131 Uganda, International Crimes Act 2010.
132 Article 7(c) CAR Code of criminal procedure.
133 Law no. 2015-133 of 9 March 2015.
134 Sudan, Criminal Act 1991.
135 Article 88 of the Rome Statute.
136 Article 87 (5)(b)(a) of the Rome Statute.
137 Article 93 (10)(c) of the Rome Statute.

Whether for State or non-State Parties, the multiple obligations in the Rome Statute's cooperation regime cannot be adequately covered within pre-existing cooperation frameworks, such as extradition arrangements that have been available to States over the years. Particularly, Parts 9 and 10 of the Rome Statute contain the range of cooperation issues between the ICC and States, which can be grouped into three broad categories, namely: 1) the arrest and surrender of persons at the ICC's request; (2) other practical assistance concerning the ICC's investigations and prosecutions; and (3) general enforcement.[138]

Of the three, the arrest and surrender of persons is the most significant, as the Rome Statute does not allow trials in absentia. Additionally, the ICC does not have executive power and a police force of its own, and thus entirely depends on State cooperation in the arrest and surrender of suspects. The viability of the ICC's cases also depends on the availability of documentary evidence, witnesses, and other crucial information, which are collectively enabled by further practical assistance with the Court's investigations and prosecutions.

The Rome Statute's formulation of cooperation also foresees the option of 'reverse' cooperation, under which the ICC is expected to assist and support domestic institutions in conducting their own investigations and prosecutions.[139] Hence, the availability of cooperation legislation enables proactive complementarity, as it would be easier for States to seek assistance from the Court.[140]

The third aspect of enforcement is also important in its own right, as the ICC cannot enforce sentences on its own. As in many other aspects of the Court's functions, enforcement is a shared responsibility among State Parties to the Rome Statute.

Of the four State Parties to the ICC under study, only Côte d'Ivoire has yet to enact legislation on cooperation with the ICC. The absence of cooperation legislation provides legal cover for domestic authorities to ignore the Court's requests for assistance with the arrest and surrender of suspects. A case in point is the refusal of the Ivorian authorities to act on a warrant of arrest for a former ICC suspect –Simone Gbagbo – and their resort to domestic trials in contempt of the Court's procedures.[141]

For their part, Kenya and Uganda have provisions on the three categories of state cooperation with the ICC in their respective International Crimes Acts. Specifically, they are enlisted in the legislation's sections on 1) general provisions relating to requests for assistance; 2) arrests and surrender of persons to the ICC; 3) domestic procedures for other types of cooperation; 4) enforcement of penalties; and 5) requests to the ICC for assistance.[142]

Similarly, CAR enacted a cooperation regime with the ICC through Law N°18-010, establishing the SCC's Rules of Procedure and Evidence in July 2018.

138 Imoedemhe, supra n 5.

139 Article 93(10) of the Rome Statute.

140 Imoedemhe, supra n 5.

141 Faith Karimi and Christabelle Fombu, 'Ivory Coast Refuses to Transfer Former First Lady Simone Gbagbo to ICC,' CNN News, September 2013, https://edition.cnn.com/2013/09/21/world/africa/ivory-coast-first-lady-icc/index.html (accessed 20 July 2022).

142 Kenya, International Crimes Act 2008; Uganda, International Crimes Act 2010.

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Article 14 of the law states that both the SCC and the ICC have jurisdiction to judge the crimes of genocide, crimes against humanity and war crimes. Additionally, Article 37 of the SCC's Ordinary Law obligates the domestic tribunal to recognise the ICC's precedence if it exercises jurisdiction over a specific case. Moreover, Article 14 of the SCC law provides that conflicts of jurisdiction between the SCC and the ICC are settled by the latter's decisions, in line with Article 119 of the Rome Statute.

Article 14 of the SCC also provides that the SCC's prosecutor should consult the ICC's prosecutor regarding their investigation and prosecutorial strategy. While such a provision could be construed as an avenue for exchanges between the two offices, it potentially undermines the independence of the SCC. On a positive note, however, the Article has provisions for the SCC's requests to the ICC for judicial assistance and that the former must respect the principle of cooperation and judicial aid.[143]

For Sudan, relationships with the ICC are regulated by non-cooperation legislation. Article 3 of the Criminal Procedure Act, as amended in 2009, prohibits 'assistance or support to any entity to hand over any Sudanese national in order to be prosecuted overseas for committing any crime that constitutes violation of the International Humanitarian Law including crimes against humanity, genocide and war crimes.'[144] Simply put, the Act prohibits non-Sudanese actors and institutions from prosecuting Sudanese nationals and any assistance to them.

3.4 Witness protection

Witnesses are essential actors in criminal proceedings, whether in the prosecution of ordinary or core international crimes, as they help in establishing evidence for prohibited conduct. Thus, protecting witnesses from both physical and psychological harm 'is imperative to the integrity and success of judicial processes.'[145]

Recognising the centrality of witnesses in the viability of cases, Article 43(6) of the Rome Statute establishes a Victims and Witnesses Unit (VWU) within the Registry of the ICC. The VWU's mandate is to have 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.'[146]

The functions of the VWU are further elaborated in Rule 17 of the ICC's Rules of Evidence and Procedure. Concerning all witnesses and victims who double up as witnesses, the VWU is obligated to 1) 'provide them with adequate protective and security measures and formulating long and short-term plans for their protection'; 2) 'recommend to the organs of the Court the adoption of protection measures and also advising relevant States of such measures'; 3)'assist them in obtaining medical, psychological and other appropriate measures'; 4) make available to the Court and

143 Article 14 of the SCC law.

144 Article 13 of the Criminal Procedure Act.

145 Chris Mahony, 'The Justice Sector Afterthought: Witness Protection in Africa,' Institute for Security Studies, 2010, https://www.legal-tools.org/doc/f476e7/pdf/ (accessed 18 July 2022), 1.

146 Article 43(6) of the Rome Statute.

other parties training in issues of trauma, sexual violence and confidentiality'; and 5) 'recommend, in consultation with the OTP, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court.'[147] Moreover, the VWU advises witnesses 'where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony', and assists them when they are called to testify before the Court.[148]

While State Parties are not obligated to replicate the ICC's VWU, the practice of witness protection seems to be a 'judicial afterthought.'[149] Most of the countries under study have no legislation on witness protection and instead rely on informal protection measures based on a need's basis.[150] Only Kenya and CAR have witness protection legislation, albeit with a number of operational challenges.

First, Kenya enacted a Witness Protection Act in 2006 that was subsequently amended in 2012 and 2016.[151] The objective of the Act was to 'provide for the protection of witnesses in criminal cases and other proceedings, and to establish a Witness Protection Agency (WPA) and provide for its powers, functions, management, and administration, and for connected purposes.'[152] While the WPA has since been established, and the legislation covers witnesses in national courts or international(ised) tribunals outside Kenya, witness protection is still problematic.[153] For example, many witnesses in the Kenyan cases at the ICC forcefully disappeared or were intimidated, and some others were found dead, with no investigations into these unfortunate circumstances.[154] As a result, the ICC indicted some Kenyans for offences against the administration of justice in the William Ruto and Joshua Sang case.[155] The WPA is also underfunded, and there are doubts about its independence.[156]

Second, CAR's witness protection is provided in Law n°18-010 establishing the SCC's Rules of Procedure and Evidence. Article 46 of the SCC law provides for a support and protection unit for victims and witnesses. Additionally, Article 47 of the law provides frameworks for counselling for victims and witnesses. Pursuant to the legislation, and following the ICC's model, the SCC has a Victim and Witness

147 International Criminal Court, 'Rules of Procedure and Evidence,' 2019, https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf (accessed 23 July 2022), 6.
148 Ibid.
149 Mahony, supra n 145.
150 Ibid.
151 Witness Protection Agency, 'The Legal Framework,' https://wpa.go.ke/about-us/the-legal-framework/ (accessed 14 July 2023).
152 Kenya, Witness Protection Act 2006.
153 People Daily, 'Tall Order Protecting Witnesses and Whistle-blowers in Kenya,' People Daily, 17 January 2022.
154 Ibid.
155 International Criminal Court, 'Offences Against the Administration of Justice,' 2013, https://www.icc-cpi.int/taxonomy/term/326 (accessed 14 July 2023).
156 People Daily, supra n 155.

Support and Protection Unit.[157] Thus, the SCC's witness protection regime is consistent with international legal standards. The challenge is putting such measures into practice in such a volatile environment, where armed groups continuously challenge the authority of the State.

3.5 Victims' Centredness

As a victims' Court, the ICC advances the rights of victims in several ways that are unprecedented in the case law and practice of previous *ad hoc* tribunals or national judicial institutions. The rights of victims 'can be found scattered throughout the various pieces of legislation that govern the proceedings of the ICC.'[158] These include 1) the Rome Statute itself that establishes the principal rights of victims; 2) the rules of evidence and procedure; 3) the Court's regulations; and 4) the regulations of the Court's registry.[159]

The advances in the Rome Statute follow the UN's earlier adoption of the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.'[160] The declaration called for the treatment of victims and their access to justice, providing medical, psychological, and social support, and remedies to victims of abuses of power and crime.[161] Living up to these ideals, the Rome Statute promotes victims' rights by providing for their rights to participation, protection and reparation.

The right to participation is particularly important, as it gives victims an opportunity to contribute to 'the establishment of the truth given their experience of the crimes.'[162] It is also a way of acknowledging their suffering and enables their agency and empowerment.[163] On this note, Article 68(3) of the Rome Statute guarantees victims' rights to participation, as Articles 43 and 68(1) provide for victims' protection from physical and psychological harm. Victims' rights to reparations are subsequently enshrined in Articles 75 and 79 of the Statute.[164] Towards these ends, the ICC has since established the Office of Public Counsel for Victims (OPCV), the Victims and Witnesses Unit (VWU), the Victims Participation

157 Juan-Pablo Perez-Leon-Acevedo, 'Victims at the Central African Republic's Special Criminal Court,' Nordic Journal of Human Rights, 39 (1) 2021: 1-17.

158 Paulina Gonzalez, 'The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court,' 2006, https://sur.conectas.org/wp-content/uploads/2017/11/sur5-eng-paulina-vega-gonzalez.pdf (accessed 1 August 2022), 20.

159 Ibid.

160 United Nations, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,' 1985, https://www.unodc.org/pdf/rddb/CCPCJ/1985/A-RES-40-34.pdf (accessed 24 July 2022).

161 Ibid.

162 Redress and Institute for Security Studies, 'Victims Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecution,' September 2015, https://redress.org/wp-content/uploads/2017/12/September-Victim-Participation-in-criminal-law-proceedings.pdf (accessed 25 August 2022), 11.

163 Ibid.

164 Articles 75 and 79 of the Rome Statute.

and Reparations Section (VPRS), the Trust Fund for Victims (TFV), and field outreach offices in situations.[165]

As with witness protection, victim-centeredness is emerging as a 'justice sector afterthought in Africa.'[166] Again, only Kenya and CAR have legislation on victims, with notable variations in their levels of safeguarding victims' rights.

For CAR, Article 46 of the SCC's Rules of Procedure and Evidence establishes a support and protection unit for victims and witnesses.[167] Moreover, Article 47 of the Rules provides for counselling for victims and witnesses. As in witness protection, CAR's legal regime on victims' centeredness mirrors the practice in international proceedings, such as the ICC's.

In Kenya, Article 50 (9) of the Constitution of 2010 recognises the plight of victims by mandating Parliament 'to enact legislation providing for the protection, rights and welfare of victims of offences.' Consequently, the Victims Protection Act 2014, as amended in 2019, provides for 'the protection of victims of crime and abuse of power […] and reparation and compensation.' However, the Act fails to establish victims' rights to participate in criminal proceedings. While the Act gives effect to Article 50 (9) of Kenya's Constitution of 2010, it makes no reference to Articles 43, 68(1) and 68(3) of the Rome Statute.

3.6 Penalties

Article 77 of the Rome Statute provides guidance in the determination of penalties for core international crimes. The Article gives judges the discretion of sentencing perpetrators to either imprisonment for a number of years with an upper limit of 30 years or life imprisonment, depending on 'the gravity of the crime and the individual circumstances of the convicted person.'[168] In addition to the option of imprisonment, judges have the liberty to order 'a fine under the criteria provided for in the Rules of Procedure and Evidence, or forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.'[169]

Further, Article 78 of the Statute provides guidance on the ICC's imposition of penalties. Accordingly, sentencing should be based on 'the gravity of the crime and the individual circumstances of the convicted person.' The latter could include the time spent in detention[170] and whether one has been convicted for more than one crime.[171]

It is important to note that the Rome Statute does not provide for the death penalty. Imperatively, the absence of the death penalty in the Statute 'suggests that even the most serious crimes of concern to the international community'[172] do not

165 International Criminal Court, 'About the Court,' 2023, https://www.icc-cpi.int/about/in-the-courtroom (accessed 14 July 2023).
166 Mahony, supra n 145.
167 Article 46 of the SCC.
168 Art 77(1)(a) and (b) of the Rome Statute
169 Article 77 (2)(a) and (b) of the Rome Statute.
170 Articles 78(2) and 110 (3) of the Rome Statute.
171 Article 78(3) of the Rome Statute.
172 Bekou and Shah, supra n 114 at 519.

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warrant it. However, the Statute's sentencing provisions 'are not authoritative for the sentences that may be prescribed by national law' for core international crimes as explicitly stipulated in Article 80 of the Statute:[173]

> Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

Following in the Rome Statute, together with international abolition trends, Kenya, Uganda, CAR and Côte d'Ivoire impose life imprisonment as the maximum penalty for Article 5 crimes. Yet still, Kenya[174] and Uganda[175] impose the death penalty for certain ordinary crimes. More explicitly, Article 27 of Sudan's Criminal Act, as amended in 2009, provides for the death penalty on convictions for both core international crimes and ordinary offences such as murder, armed robbery, and offences against the state.[176]

4 Beyond legal reforms: rival normative frameworks and implications for States' prosecution of atrocity crimes

Beyond the legal reforms, African States are confronted with rival normative frameworks that affect their abilities to comply with the Rome Statute justice system. Over time, the traction of restorative justice has engendered the adoption of amnesty, reconciliatory tones and traditional justice mechanisms that undermine the opportunities for putting to 'test' the legal reforms that come with the national implementing legislations of the Rome Statute. It is also important to note that 'there is no general prohibition under international law on amnesties, including for genocide, crimes against humanity and war crimes.'[177]

Transitional societies are often confronted with the 'peace versus justice' conundrum that depicts a long-standing struggle between the pursuit of criminal accountability and the immediate concerns of establishing peace or the appropriate sequencing of the two tracks. Opinions continue to differ 'about what exactly doing justice means, as well as about the strategies and mechanisms best suited to realize that objective.'[178]

173 Ibid, 519; see also Article 80 of the Rome Statute.

174 Kenya is considered an abolition de facto, for having not carried out executions for more than 30 years. See Edgar Odongo, 'The Death Penalty in Kenya: A Bleak Future?', Jurist, September 2021,https://www.jurist.org/commentary/2021/09/edgar-odongo-ochieng-death-penalty-kenya/ (accessed 15 August 2022).

175 Derrick Kiyonga, 'Uganda's death penalty under renewed focus,' *Daily Monitor*, 10 June 2023.

176 Sudan, Criminal Act 2007.

177 Labuda, supra n 70 at 197.

178 Stef Vandeginste and Chandra Lekha Sriram, 'Power Sharing and Transitional Justice: A Clash of Paradigms?' *Global Governance* 17(4) (2011): 498.

Although the advocates of criminal accountability argue that events have overcome the peace versus justice debate,[179] or believe that it is a false dichotomy, there is a general consensus that prosecutions are only possible when some semblance of peace has been achieved in the event of atrocity commission. More so, the transitional justice paradigm has moved away from its initial strong focus on the need for retribution and has 'gradually become more open toward supplementary or even alternative nonjudicial methods of rendering justice for past abuses.'[180]

As in other parts of the world, Kenya, Uganda, CAR, Côte d'Ivoire, and Sudan condone non-judicial mechanisms in their redress to past abuses against the backdrop of their motions towards compliance with the Rome Statute justice system. For example, whereas Kenya provides for *de facto* amnesties, Uganda, CAR, Côte d'Ivoire, and Sudan are more explicit in their approval of amnesty by providing for its legislation.[181] Amnesties are believed to encourage parties to conflicts to embrace peace agreements rapidly, and they can be effectively linked to truth-telling and reconciliation processes, thus achieving accountability via non-judicial methods.[182] Alongside amnesties, traditional justice mechanisms are also instrumental in the transitions from conflict in several African societies, such as in Uganda in the aftermath of the northern conflict.[183]

5 Conclusion

The selected African States that are part of the situational docket at the ICC as of the time of writing this paper have enacted national implementation legislations of the Rome Statute with varying degrees of compliance on criminalisation of core international crimes, elimination of obstacles to prosecutions, cooperation with the ICC, witness protection, victims' centeredness, and penalties. The varying degrees of compliance are contingent on the implementation methods and the political contexts under which legal reforms unfold.

For example, Kenya's and Uganda's dependence on the Commonwealth Model Law enabled their incorporation of nearly all the substantive provisions of the Rome Statute in single legislation, as well as compatibility with the Statute's definition of core international crimes. However, just as in other African States, Uganda and Kenya are yet to ratify the amendments to the Statute on the crime of

179 For example, through advances in international criminal law and the increasing recognition of the norm of criminal accountability.

180 Vandeginste and Sriram, supra n 178 at 491.

181 Louise Mallinder, 'Global Comparison of Amnesty Laws,' October 2009, https://www.researchgate.net/publication/228214698_Global_Comparison_of_Amnesty_Laws (accessed 7 January 2023).

182 Redress, 'A general Amnesty in Sudan: International Law Analysis,' January 2021, https://redress.org/wp-content/uploads/2021/01/REDRESS-Sudan-General-Amnesty-Briefing-Note.pdf#:~:text=A%20GENERAL%20AMNESTY%20IN%20SUDAN%20International%20Law%20Analysis,weapons%20or%20participated%20in%20military%20operations%20in%20Sudan (accessed 23 July 2022).

183 Cecily Rose and Francis Ssekandi, 'The Pursuit of Transitional Justice and African Traditional Values: A Clash of Civilizations- the Case of Uganda,' January 2007, https://sur.conectas.org/en/pursuit-trasitional-justice-african-traditional-values/ (accessed 7 January 2007).

aggression, and the use of biological weapons, blinding laser weapons, and non-detectable fragments as war crimes. Despite their joint adoption of the Commonwealth Model Law, Kenya and Uganda take divergent paths in legislating on other provisions of the Rome Statute, notably on witness protection and victim-centeredness. Unlike Uganda, Kenya has legislation on witness protection and victims' participation, albeit with practical challenges in operationalisation and deviations to their protection. Uganda has recently adopted regulations as it continues with the process of enacting the appropriate legislation.

For their part, States that opted for the individual method, such as Côte d'Ivoire, CAR and Sudan, had much flexibility in implementing substantive provisions of the Rome Statute. Though useful in aligning international law with domestic legal cultures, such flexibility provided room for the States' omissions and/or reformulation of specific texts of the Statute, which undermined their compliance levels. For example, while Côte d'Ivoire's statutes incorporate and reproduce the definition of the core international crimes, they do not provide for 1) Article 8(2)(e) of the Rome Statute that completes the criminalisation of war crimes non-international armed conflict, 2) irrelevance of official capacity, 3) cooperation with the ICC, 4) witness protection and 5) victim centeredness.

Similarly, CAR's advancements in implementing the Rome Statute (see the amendments to the Criminal Code and the SCC's Organic Law) are undermined by certain omissions and reformulations of the definition of some core international crimes. Specifically, CAR's penal code extends protection to 'any other group defined by specific criteria' in its definition of genocide. It excludes the state or organisational policy element in Article 7(2) of the Statute. At the same time, the penal code largely omits the crimes listed in Article 8(2)(e). However, such omissions are potentially mitigated by the SCC's reference to international law in instances of uncertainty concerning the interpretation or application of a rule of domestic law, and when there are questions about the compatibility of this law with international law.

Moreover, CAR provides for the irrelevance of official capacity but only partially by excluding such specific identifications as Head of State, elected representatives or government, and member of Government or parliament as official capacity. The cover for immunity, especially for the president, is further enabled by CAR's 2015 Constitution, which declares that the office holder has no responsibility for acts committed while executing their duties, except treason. Furthermore, CAR's legislation on cooperation with the ICC is problematic, as it elevates the ICC in dispute resolution in case of conflict between the Court and the SCC. The ordinary law also provides that the SCC's prosecutor should consult the ICC's prosecutor regarding their investigation and prosecutorial strategy. The law also obligates the SCC to recognise the ICC's precedence in case it exercises jurisdiction over a specific case. Collectively, these provisions contradict the ICC's foundational principle of complementarity. On a positive note, however, CAR has legislation on victims and witness protection, and abolition of the death penalty.

Sudan lies at the extreme end of non-compliance with the substantive provisions of the Rome Statute. These begin with incorporating Article 5 crimes in line with customary international law rather than the Rome Statute, and the

reformulation of their definitions in ways that depart from those in the Statute. To illustrate, Sudan's legislation refers to homicide as a key component of genocide, which seemingly narrows the definition of genocide and creates confusion in the law, fails to define rape in line with international statutes and jurisprudence, criminalises war crimes in ways that significantly deviate from the structure of Article 8 of the Rome Statute, and omits several war crimes. Furthermore, domestic statutes prohibit the prosecution of any Sudanese nationals from prosecution in international tribunals and do not refer to the responsibility of commanders and other superiors, and superior orders and prescription of law. Further, Sudan's legal orders render irrelevant the principle of 'irrelevance of official capacity,' and provide for a ten-year prescription period. Sudan is also an outlier among the African States by legislating on non-cooperation with the ICC, in addition to having no provisions on witness protection, victim-centeredness, and the abolition of the death penalty.

Evidently, the African States under study have made several missteps in their enactment of the relevant provisions of the Rome Statute that potentially render them unable to investigate and prosecute core international crimes. Subsequently, this paper recommends several policy options to address such glaring gaps. Additionally, attention should be paid to competing normative frameworks such as amnesty, reconciliation and traditional justice mechanisms, which are equally relevant in providing redress for past abuses.

6 Recommendations

As a starting point, concerted efforts should be made to ratify amendments to the Rome Statute by selected African states, such as the crime of aggression and the use of biological weapons, blinding laser weapons and undetectable fragments as war crimes. These amendments were incorporated into the Statute long after states had enacted national implementing legislation. This paper therefore calls for the activation of both national and regional advocacy for the ratification of the amendments by African States.

To some extent, the glaring failures in state implementation of the Rome Statute can be attributed to capacity gaps at the national level. "Positive complementarity" should therefore be activated as a framework for addressing such capacity gaps. Emphasis should be placed on training national officials to draft amendments to Rome Statute implementing legislation, focusing on missing and inadequate provisions. Training should also be extended to national legislators, with particular attention to improving their understanding of the missing links in their respective legal systems and the need for amendments.

For now, the enthusiasm for 'positive complementarity' seems to have waned, and yet there are still glaring capacity gaps in the national implementation of key provisions of the Rome Statute. The current debate on the reform of the ICC thus provides a critical entry point and momentum for the adoption of 'positive complementarity', which has been instrumental in getting most states to enact their respective implementing legislation.

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Similarly, the "judicial afterthought" of witness protection and victim-centredness should be addressed. This could be done in several ways, including placing them on the agenda of national legislators through concerted national and regional advocacy. Given that witness protection and victim-centredness are novel concepts in most jurisdictions, model legislation (based on the diverse legal traditions of African countries) could be a good starting point for such proposed national and regional advocacy.