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Assessing the Diffusion of International Norms:  
Evidence from State Incorporation of the Rome Statute  
of the International Criminal Court

Adam Bower



European University Institute  
**Max Weber Programme**

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## **Abstract**

The International Criminal Court (ICC) represents a compelling example of international governance via formal organizations, since it imposes new and potentially costly obligations on states. International Relations has long been concerned with how institutions affect actor behaviour, yet despite this pedigree, the impact of the ICC has only begun to be systematically explored. This Working Paper contributes to the growing literature on the Court's efficacy by examining the diffusion of ICC norms in the international system. To do so it presents a new dataset measuring the incorporation of core ICC standards in domestic law. Overall, the evidence suggests only limited adoption of the relevant standards, and consequently important gaps exist in the contemporary grave crimes regime. Moreover, the patterns of state incorporation support tentative hypotheses concerning the adoption of international norms, suggesting that we should be able to anticipate key challenges and opportunities in future efforts to internalize international legal standards.

## **Keywords**

The International Criminal Court, international norms, the international system, domestic law, state incorporation.

## **Author's Note**

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## Introduction

How do international organizations (IOs) influence state practice? This subject occupies a central place in the International Relations literature, with a variety of theoretical and methodological perspectives examining the roles that IOs may play as delegates enacting state demands, or as autonomous policymaking actors in their own right. Often this influence is manifest through the dissemination of new roles, standards and norms that in turn inform how actors (including states, armed groups, civil society and corporations) frame their policy choices. A central concern, therefore, has been whether, how and under what conditions organizations—including multilateral legal institutions—can shape the conduct of global politics by changing what actors want, and how they pursue their interests.

The International Criminal Court (ICC) represents a particularly compelling example of international governance via formal organizations. The Rome Statute of the International Criminal Court establishes a new institution that consolidates international practices concerning the appropriate means of punishing grave violations of international humanitarian and criminal law. In this regard it acts both as an independent legal enforcement mechanism and as a standard-setting body, by articulating the content of the contemporary anti-atrocity regime. In so doing, the Court also holds substantial implications for state sovereignty. By joining the Court, states accept a supranational body with the authority to conduct its own investigations and trials, and to evaluate (and potentially intervene in) domestic legal proceedings. Yet the remit of the ICC extends even further, as the Court possesses the ability to exercise legal authority over even the nationals of non-party states under some conditions. As Nicole Deitelhoff has observed,

[a]lthough the Rome statute formally establishes an institution, the ICC being designed to enforce the compliance with already existing norms, it also established a new norm: the duty of international prosecution of serious violations of humanitarian law.... This establishment of a duty to international prosecution, however, represents a sharp contrast to the earlier normative solution... which demanded that international crimes should be nationally prosecuted.<sup>1</sup>

Thus the ICC is both a judicial institution—who's development can be judged largely in relation to the volume of investigations and trials and their outcomes—and a political body, aimed at transforming the policies and behaviours of international actors.

How then should we assess the influence of the International Criminal Court, given its internal complexities and multifaceted roles? Some observers are optimistic about the Court's potential impact. For example, Antonio Franseschet has argued that "[t]he apparently strong endorsement of the ICC by a wide variety of states suggests that a reasonably wide consensus is now available on the 'rule of law' globally."<sup>2</sup> The progress associated with the ICC, and parallel ad-hoc tribunals, has led Lee and Price (among others) to conclude that "while incomplete and with significant shortcomings," we are witnessing "the increasing criminalization of international and even domestic violent conflict and repression."<sup>3</sup> This view is reinforced by Sikkink's recent study, among others.<sup>4</sup> On the other hand, many sceptics remain unconvinced that the ICC will dramatically alter the calculations of states, or indeed that it has become sufficiently entrenched in the international system to withstand even modest challenges to its authority.<sup>5</sup>

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<sup>1</sup> Deitelhoff, "Isolated Hegemon," 151.

<sup>2</sup> Franseschet, "Global(izing) Justice," 244.

<sup>3</sup> Lee and Price, "International Tribunals and the Criminalization of International Violence," 123.

<sup>4</sup> Sikkink, *The Justice Cascade*.

<sup>5</sup> For example: Teitelbaum, "Statute of the International Criminal Court;" Smidt, "The International Criminal Court;" and O'Callaghan, "Is the International Criminal Court the Way Ahead?"

What view best captures the current status of the institution, and on what grounds should we render a judgement concerning its efficacy? A diverse literature has addressed the Court's development in legal terms,<sup>6</sup> yet the *political* dimensions of ICC influence have not been as systematically explored. To address this gap, the present paper aims to provide new evidence concerning the dissemination of international criminal law norms and their incorporation by states. This approach is valuable for a number of reasons. First, the process of internalizing international legal commitments into national law—what other scholars have termed “internalization”<sup>7</sup> or “enmeshment”<sup>8</sup>—is necessary to allow states to participate fully in the legal regime established by the Rome Statute. “The ICC’s mandate is to promote domestic prosecutions of international crimes,”<sup>9</sup> and national legislative change is the primary means by which this goal is realized. The incorporation of ICC crimes and procedures is the only way to ensure that states are able to undertake investigations and trials on their own territory and meet any requests for assistance from the Court or other actors, thereby relieving the ICC of the burden of attempting to adjudicate all potential cases.<sup>10</sup> This national legal capacity is vital to the effective operation of the institution, and has been identified by the International Bar Association as “the missing link between the obligations within the Rome Statute and the implementation by States Parties.”<sup>11</sup>

Domestic incorporation thus responds to the Statute’s foundational expectation that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>12</sup> Indeed, it was recognized early on that “if the ICC is to become a successful global court that prosecutes persons for international crimes notwithstanding the international political context, the adoption of the statute must usher in a sea change in national attitudes.”<sup>13</sup> Legislative change is also a valuable indicator of national political will and the concomitant commitment to international norms, since it requires that state actors do something proactive in order to bring themselves in line with their legal obligations.<sup>14</sup> National adoption of Rome Statute standards is thus key to the process of norm dispersion, and provides a window into the internalization of international norms that is not captured by reference to formal institutional membership or other forms of compliance. Incorporation is both practically beneficial, as it closes gaps in the international capacity to try serious crimes, and normatively important as it builds momentum behind a particular vision of the appropriate response to

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<sup>6</sup> See for example Mundis, “The Assembly of States Parties;” Kress, “‘Self-Referrals’ and ‘Waivers of Complementarity;’” McKay, “Characterising the System of the ICC;” Burke-White, “Implementing a System of Positive Complementarity;” Schabas, “‘Complementarity in Practice;’” and Sheppard, “The International Criminal Court Rome Statute.” See also the contributions to *New Criminal Law Review* 12(3) and (4) (2009).

<sup>7</sup> Koh, “Bringing International Law Home.”

<sup>8</sup> Kelly, “Enmeshment as a Theory of Compliance.”

<sup>9</sup> Cryer, *Prosecuting International Crimes*, 164.

<sup>10</sup> Amnesty International, *International Criminal Court*, 18; Robinson, “The Rome Statute and Its Impact,” 1861; Cryer, *Prosecuting International Crimes*, 164; Terracino, “National Implementation of ICC Crimes,” 422; ICCLR, *International Criminal Court*, 61; Bekou, “A Case for Review of Article 88,” 474-475 and 489; Ellis, “International Justice and the Rule of Law;” and Sikkink, *Justice Cascade*, 18-19.

<sup>11</sup> International Bar Association. *IBA News Release*, 1.

<sup>12</sup> Rome Statute, sixth preambular paragraph. To that end, the fourth preambular paragraph states that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.

<sup>13</sup> Charney, “Progress in International Criminal Law?” 460. The central importance of implementing legislation is evidenced by its regular reference in high-level documents. See for example the *Kampala Declaration*. RC/Decl.1. June 1, 2010, operative paragraph 7.

<sup>14</sup> ICCLR, *International Criminal Court*, 12. The central importance of implementing legislation is evidenced by its regular reference in high-level documents. See for example the States Parties of the Rome Statute of the International Criminal Court, *Kampala Declaration* RC/Decl.1, operative paragraph 7.

certain forms of international criminality. For these reasons, assessments of the ICC's early impact should give more attention to the role of the Rome Statute in stimulating improvements in domestic laws and procedures, rather than focusing narrowly on the institutional development and judicial practice of the Court as an independent legal body.

This paper proceeds in the following fashion. I first outline the key features of the ICC regime, and demonstrate the linkages to the particular concern with national legislative change. I then draw attention to some basic expectations concerning when domestic incorporation may be more or less likely. The balance of the paper shifts to empirical analysis. I briefly describe the development of a new dataset measuring national incorporation of core ICC norms, before proceeding to a detailed examination of the findings. In brief, I conclude that states have a poor track record of implementation, and consequently important gaps exist in the contemporary grave crimes regime. More specifically, the patterns of state incorporation appear to conform to my tentative hypotheses, suggesting that we should be able to anticipate key challenges and opportunities in future efforts to internalize international legal standards.

### **The Meaning of the International Criminal Court**

The International Criminal Court is, at heart, an institution created by the international community with the responsibility "to try persons alleged to be responsible for the most serious crimes affecting the entire community as well as the peace, security, and well-being of the world."<sup>15</sup> As the constitutional document of the new Court, the Rome Statute codifies an extensive set of international humanitarian, criminal, and jurisprudential rules drawn from an array of treaty and customary sources, and creates a new mechanism for enforcing this resulting legal order. The ICC is the first permanent international court charged with trying individual human beings for acts of atrocity, and thus reinforces a recent expansion of international law to include individuals as subjects of criminal responsibility and punishment.<sup>16</sup> In so doing, the Statute embeds a social expectation that judicial process and penal sanction constitute an appropriate response to grave international crimes.<sup>17</sup>

Yet this general mandate can imply very different configurations of rights and responsibilities, and the particular structure of the Rome Statute, and resulting Court, represents one of a variety of potential responses to the challenge of how to enforce compliance with the grave crimes regime.<sup>18</sup> The Statute creates a new norm of internationalized procedural justice: while national authorities retain the primary responsibility for investigating and prosecuting atrocity crimes, they must do so via internationally-agreed standards of criminal law and with the oversight of a supra-national legal body. That body is itself able to investigate and prosecute when national authorities are unwilling or unable to do so. The principal innovation of the Rome Statute thus concerns the willingness of states to cede their exclusive right to prosecute their nationals to a permanent international body over which they cannot exercise complete control.

[The] goal [of many delegates at the Rome negotiations] was to limit the future discretion of individual states by obligating them to support prosecutions under specified circumstances, and by

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<sup>15</sup> Bourgon, "Jurisdiction *Ratione Loci*," 559.

<sup>16</sup> Rome Statute, Article 1. Dupuy, "International Criminal Responsibility;" Eser, "Individual Criminal Responsibility;" and Frulli, "Jurisdiction *Ratione Personae*."

<sup>17</sup> Rome Statute, preamble paragraph 4. Drumbl, *Atrocity, Punishment, and International Law*, 5. A duty to criminal prosecution is now well established in customary and statutory international law, and is reflected in a number of widely adopted treaties. Tolbert and Wierda, *ICTJ Briefing: Stocktaking*, 2 and 7, n. 5.

<sup>18</sup> Ralph, *Defending the Society of States*, 21 and 101; Benedetti and Washburn, "Drafting the ICC Treaty," 20 and 25. Indeed, as Struett points out, "[d]uring the negotiations [of the Rome Statute], a much wider range of approaches to constructing a permanent ICC was considered, with vastly different approaches to the powers, jurisdiction, and role of the new court." Struett, *The Politics of Constructing the International Criminal Court*, 24-25.

shifting decision-making authority from national government officials to judges and prosecutors independent of any state or particular group of states. More broadly, their goal was to shape what governments will in the future consider acceptable behaviour. This effort (which is continuing) is political but also legal; it is an attempt to achieve political goals through law.<sup>19</sup>

This represents a fundamental break with previous expectations in which the responsibility for enforcing international criminal law rested solely with the domestic legal processes of states. As such, this particular institutional solution embodies both the foundational normative commitment of the Rome Statute—as the *appropriate* means of ending impunity for grave crimes—and the principal point of contestation in the international community.

A primary consideration in the construction of the Rome regime was the scope of its mandate – what acts and actors should properly fall under the aegis of the Court. The ICC has jurisdiction over genocide, crimes against humanity, war crimes and—at some point after 2017—the crime of aggression.<sup>20</sup> These *core crimes* are understood as the most serious forms of organized violence in the international system, to be distinguished from other types of international criminal activity like piracy, drug trafficking, and so on.<sup>21</sup> The distinct intentionality, scale, and context of the constituent acts—like murder, rape, and kidnapping—means that they should be regarded as a particularly egregious class of behaviours and not treated as simply more expansive instances of “common” crimes under existing domestic laws.<sup>22</sup> The inclusion of certain crimes (with the necessary exclusion of others) thus elevates these acts and invests them with particular opprobrium. Yet these decisions were not especially innovative or controversial on the aggregate, since the Statute for the most part reflects established international customary and treaty-based law, as well as the practice of recent ad-hoc criminal tribunals.<sup>23</sup> The acts constituting genocide, crimes against humanity, and war crimes (though notably not aggression), and the related modes of responsibility were therefore largely settled by the time of the 1998 Rome Conference.<sup>24</sup> One of the significant contributions of the Statute is thus to bring together disparate strands of international law under a single legal architecture. In so doing, the Rome Statute helps to consolidate international legal practice both by reaffirming the special status of these crimes and by adding greater precision to their substantive definitions.

The Court is further predicated on the assertion that all perpetrators—no matter their official role—must be held accountable for the serious crimes under the Court’s purview. To that end, the Rome Statute deviates from previous practice by rejecting legal *immunity* for Heads of State and other political figures, thereby reversing prior diplomatic norms concerning the special legal status of certain

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<sup>19</sup> Wippman, “The International Criminal Court,” 160.

<sup>20</sup> Rome Statute, Articles 5-8. An amendment to the Rome Statute operationalizing the crime of aggression was adopted at the Review Conference in Kampala, Uganda. Review Conference, Resolution RC/Res.6: “The Crime of Aggression.”

<sup>21</sup> van den Wyngaert and Dugard, “Non-Applicability of Statute of Limitations,” 886; Drumbl, *Atrocity, Punishment, and International Law*, 4.

<sup>22</sup> Lee, “States’ Responses,” 25. However, Terracino does note that as a point of procedural law, the reliance on existing “ordinary” crimes under domestic law would not be sufficient to trigger a complementarity challenge by the Court. Terracino, “National Implementation of ICC Crimes,” 437-438.

<sup>23</sup> Especially the Geneva Conventions of 1949 and Additional Protocols of 1977, and the Genocide Convention, in the case of the former, and the International Criminal Tribunals for Rwanda and the Former Yugoslavia in the case of the latter. The Rome Statute represents compromise solution and is thus less progressive on some matters than existing statutory and customary international law. For a good discussion of differences between the Rome Statute and other international criminal law sources, particularly concerning the definition of crimes, jurisdiction, and modes of liability, see Amnesty International, *International Criminal Court*, 7-16.

<sup>24</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), *International*

*Criminal Court*, 2, 6-7, and 72-3. The Statute does advance the law in some important respects, as with gender and sexual violence crimes and the rights of victims in legal proceedings. For a fuller discussion, see footnote 78, below.

high officials.<sup>25</sup> This innovation is complicated by the fact that the Statute also accommodates, and thus implicitly acknowledges the legitimacy of, established international obligations between states concerning these same forms of immunity.<sup>26</sup> Hence this principle remains contentious, as I show below. Finally, the Rome Statute adopts two forms of *jurisdiction* that apply to acts committed by the nationals of a State Party (on any territory), or by any individuals on the territory of a State Party (regardless of nationality).<sup>27</sup> This latter form is regarded as highly controversial by some states, as it exposes the nationals of non-parties to the authority of the Court.

The more particular institutional architecture of the ICC comes in three principal parts, concerning the “fundamental implementing obligations”<sup>28</sup> of *cooperation* and *complementarity*, as well as the *modalities* by which the Court can assert its authority over crimes in the international system. First, states—primarily parties to the Rome Statute but also all UN members in instances of a Security Council referral—have a legal obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>29</sup> This requires that the status and legal personality of the Court’s constituent entities, as well as the privileges and immunities of its staff, be duly recognized in national law.<sup>30</sup> Compliance with the obligation to cooperate also involves a host of more specific expectations, including on matters of arresting and surrendering suspects, providing evidence and documentation, enforcing sentences, and other means of support.<sup>31</sup>

National implementation is instrumental to the proper functioning of the ICC as an international legal institution. Since the Court does not possess its own police force, the enforcement of criminal law necessarily relies on the active cooperation of states. Yet this cooperation involves complex legal and bureaucratic arrangements implicating constitutional, judicial, and diplomatic practices and as such, is not easily addressed in an ad-hoc fashion. As Lee points out, “many of the Statute provisions are not self-executing or may be in conflict with the existing law.”<sup>32</sup> Without a clear articulation of the relevant legal procedures, states are likely to find that some requests from the Court or other states cannot be undertaken due to complications with (for example) the transfer of sensitive documents, extradition of nationals to third parties and mandated immunities for senior political figures.<sup>33</sup>

Second, the ICC only possesses a limited capacity to investigate and prosecute cases, and so relies in large measure on the effective pursuit of justice at the national level. To organize this division of labour, the Rome Statute creates a new principle of complementarity whereby the Court shall defer

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<sup>25</sup> Rome Statute, Article 27. Also Gaeta, “Official Capacity and Immunities.”

<sup>26</sup> Rome Statute, Article 98. A good overview is provided in Akande, “International Law Immunities.”

<sup>27</sup> Rome Statute, Article 12.2. See also Bourgon, “Jurisdiction *Ratione Loci*.” The Statute does not include a more expansive assertion of authority via “universal jurisdiction,” a decision that negotiators believed would increase the acceptability of the resulting Statute by retaining a more modest reach for the new institution.

<sup>28</sup> Amnesty International, *International Criminal Court*, 5.

<sup>29</sup> Rome Statute, Article 86.

<sup>30</sup> Rome Statute, Articles 3.3, 4, and 48. This includes the Office of the Prosecutor, Registry, Presidency and the Pre-Trial, Trial and Appeals Divisions. See Amnesty International, *International Criminal Court*, 19.

<sup>31</sup> Rome Statute, Articles 86-102 and 103-111. Ciampi, “Other Forms of Cooperation.” While the Statute (especially Article 88) does not determine how the obligation to cooperate will be operationalized in national law, it does require that domestic jurisdictions accommodate all necessary procedures to facilitate Court requests. However, “[a]ccording to a well-established principle of international law, a State may not invoke provisions (or absence of provisions) of its internal law in order to avoid compliance with international obligations.” Ciampi, “The Obligation to Cooperate,” 1621-1622; also Gaeta, “Official Capacity and Immunities,” 999.

<sup>32</sup> Lee, “States’ Responses,” 42-43. “Those States Parties that have seriously examined the question of implementation have come to the unanimous conclusion that, regardless of their legal tradition or normal practice, the Statute requires some form of domestic implementing legislation.” ICCLR, *International Criminal Court*, 13.

<sup>33</sup> See for example Meerschaert Duchens, “Monaco, A Haven;” Farer, “Restraining the Barbarians,” 109-110.

to states “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>34</sup> The expectation is that justice can best be realized by transforming national criminal systems, and not by centralizing legal activity within the Court itself.<sup>35</sup> States must therefore ensure that their national laws address all relevant aspects of the criminal law regime set out in the Rome Statute, particularly by adopting ICC crimes as well as the Court’s jurisdictional regime, eliminating all immunities, and implementing appropriate criminal law procedures, including forms of criminal liability<sup>36</sup>, fair trial standards<sup>37</sup>, and specific modalities of criminal investigation and prosecution.<sup>38</sup>

The broader purpose of the ICC regime is thus to facilitate the application of international criminal law to domestic jurisdictions and thereby create a homogenous legal regime. As Kleffner has pointed out, the principle of complementarity “provides for a supervision of national criminal courts, supported by the threat that they relinquish the primary right to exercise jurisdiction if they fail to meet the relevant [Rome Statute] requirements.”<sup>39</sup> This produces a strong incentive towards legal standardization in order to meet the criteria of complementarity:

the more a national legal process approximates that of the ICC... the greater the likelihood that this process will be palatable and pass muster. This, in turn, suggests that... national institutions will model themselves along the lines of the ICC in order to maximize their jurisdiction. Complementarity, therefore, may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out.<sup>40</sup>

Domestic incorporation of the Rome Statute is thus a principal metric of national judicial capacity. It is for these reasons that scholars and practitioners have identified improvements in domestic legal practice, rather than the Court’s own judicial operations, as a crucial indicator of the ICC’s influence over international efforts to end impunity for grave crimes.<sup>41</sup>

When taken together, the configuration of actors and responsibilities enshrined in the Rome Statute constitutes a particular institutional solution to the problem of how to effectively punish, and potentially deter, the most heinous international crimes. At the same time, the Statute also articulates a vision of appropriate behaviour wherein states are obliged to investigate and prosecute grave violations of international humanitarian and human rights law via agreed international procedures. This structure of state obligations overseen by a supranational authority is the basis for what I have

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<sup>34</sup> Rome Statute, Article 17.1(a). See also Terracino, “National Implementation of ICC Crimes,” 431-437.

<sup>35</sup> This intention is articulated in the Preamble (especially paragraphs 4, 6 and 10) as well as Articles 1 and 17 of the Rome Statute.

<sup>36</sup> Rome Statute, Articles 22-33.

<sup>37</sup> Rome Statute, Articles 62-67.

<sup>38</sup> Rome Statute, Articles 86-102. See also Amnesty International, *International Criminal Court*, 7-18.

<sup>39</sup> Kleffner, “The Impact of Complementarity,” 113.

<sup>40</sup> Drumbl, *Atrocity, Punishment, and International Law*, 143; similarly, see Cryer, *Prosecuting International Crimes*, 148-9 and 164; and Ambos and Stegmiller, “German Research on International Criminal Law,” 184. As such, implementing legislation for the ICC can be thought of as an expression of sovereignty, as “[states] have criminalized the Statute crimes into their national laws in order to ensure that investigation and prosecution can take place under their jurisdiction.” Lee, “States’ Responses,” 23; Olugbuo, “Positive Complementarity,” 262. This point was explicitly recognized by the British government in its own implementation process. See Bowers, *The International Criminal Court Bill*, 61.

<sup>41</sup> Schiff, *Building the International Criminal Court*, 167; and Rastan, “The responsibility to enforce,” 179. “As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” Luis Moreno-Ocampo, Speech, 2.



termed the new internationalized procedural justice norm, and serves as the reference point against which state change is measured.

### **Patterns of Domestic Legal Change**

A key question for the proceeding analysis, therefore, is whether any regularity can be discerned in the ways in which the Rome Statute has been incorporated by states. Making such judgements first requires some theoretically informed expectations about what patterns are likely to obtain – what types of norms should be most susceptible to domestic uptake, and to what types of actors (in this case states) does this apply? The starting point for this effort is to conceptualize the international system as an expansive network of interconnected and overlapping principles, norms and rules that collectively govern relations between actors. Formal multilateral treaties like the Rome Statute are one part of this matrix. In particular, treaties act as focal points in the development of international norms<sup>42</sup> that are formalized as legal rules “constitut[ing] specific applications of norms to particular situations.”<sup>43</sup> The treaty-making process thus helps to clarify the content and scope of these constituent standards of appropriate behaviour. Hence while only part of the larger process of norm-building, multilateral treaties are a prominent way in which intersubjective social standards may be generated within the international system. Yet treaties do not exist in isolation, but are themselves informed by existing principles, norms and rules. As such, new agreements are created in the shadow of a much larger network of social expectations that structure international practice. The development of international norms thus often occurs by analogy, as new standards are associated with (and measured against) prior norms and rules that hold broader sway.<sup>44</sup> This quality of social embeddedness—the ability to draw on an established legal and political legacy—provides multilateral treaties with a source of legitimacy and authority, while at the same time leaving room for substantial contestation.

A series of general hypotheses flows from this theoretical framework. First, since treaties serve as focal points for clarifying new standards of appropriate behaviour for members of the formal treaty community, these states should on balance be much more amenable to these new norms. Therefore, we should expect that ICC State Parties will incorporate a greater number of Rome Statute norms into their domestic legislation. Yet there may well be variance within this broad group as well. More specifically, states with the strongest affinity with existing international humanitarian and criminal law norms are best placed to draw connections with historical antecedents to bolster the contemporary legitimacy and obligatory status of the Court. Hence early-adopters of the Rome Statute—as with the Like Minded Group of states that led the negotiations for the Court—should also exhibit particularly high rates of ICC incorporation. Conversely, conflict-prone states should on balance be less compliant for two reasons. On the one hand, the presence of armed conflict increases the burden of new legal constraints, since there is an increased likelihood of atrocities being committed and consequently a higher risk of exposure to ICC jurisdiction among senior political and military leaders. This, in turn, will raise the costs of potential compliance. On the other hand, the deterioration of bureaucratic capacity often associated with intra-state (civil) conflicts makes the transformation of domestic institutions more difficult.

At the same time, because treaties are part of a wider legal and social web, they may generate informal compliance and adaptation, even among non-party states. On the one hand, states may modify their laws in anticipation of a future ratification or accession, or to meet the standards of complementarity, and thus forestall the potential reach of the Court via a UN Security Council

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<sup>42</sup> I follow the conventional definition of norms as “collective expectations about proper behaviour for a given identity.” Jepperson, Wendt, and Katzenstein, “Norms, Identity and Culture,” 54.

<sup>43</sup> Cortell and Davis, Jr., “How Do International Institutions Matter,” 452. Thus, international law constitutes “the most codified, formal subset of norms.” Sandholtz and Stiles, *International Norms*, 1.

<sup>44</sup> Lowe, “The Politics of Law-Making,” 208.

referral.<sup>45</sup> In such cases, national laws reflect an increasing parity with international standards embodied in the Rome Statute even as these same states remain outside of the formal legal community. For example, Rwanda's *Law No. 33 bis (2003)* incorporates the definitions of genocide, crimes against humanity and war crimes almost in their entirety, and additionally adopts the modalities for commander responsibility and the elimination of personal immunities as articulated in the Rome Statute.<sup>46</sup> On the other hand, core features of the ICC legal regime—most especially core crimes and modes of jurisdiction—largely pre-date the Rome Statute and thus may already be found in the national laws of some non-parties. The connection to prior (and more broadly accepted) norms and rules can provide the basis for drawing ambivalent states toward new legal innovations. Determining the extent of existing concordance between the Rome Statute and the domestic laws of non-party states is thus an important empirical contribution to an account of legal impact.

The broader implication of this theoretical account is that legacy effects have an important conditioning effect on the acceptance of new international norms. Price has previously argued that “the development and implementation of new norms... are more likely to be successful to the extent they can be grafted on to previously accepted norms.”<sup>47</sup> As such, we should expect that features of the Rome Statute that most closely follow established legal practice should enjoy the widest acceptance and consequently most frequent incorporation in domestic law. Conversely, newer international norms—those that lack an established legacy or most obviously diverge from previous precedent—are likely to be incorporated more slowly and contested more heavily.

### A New ICC Legislation Database

In order to capture the current extent of national legislative concordance with the Rome Statute, I developed an original dataset that tracks the presence or absence of ICC features in the domestic law of 196 states. A few studies have previously sought to measure and assess national incorporation of the Rome Statute, but these have tended to focus on a limited number of states,<sup>48</sup> or have sought to quantify the existence (rather than detailed content) of legal developments.<sup>49</sup> To my knowledge, this paper presents the first systematic evaluation of implementing legislation in a global context.

Rather than attempting to assess the status of every element of the Rome Statute, I identify a more modest set of indicators classified under the rubrics of “cooperation” and “complementarity” that address primary aspects of the broader legal agreement. In doing so, I have selected those features that are most central to the Statute's purpose and operation, and that represent particularly consequential or challenging commitments for states to observe. In this way, I seek to assess the implementation of ICC norms under the most difficult conditions. This process yielded 12 main indicators: six concerning complementarity (jurisdiction, immunity, commander responsibility, and the core crimes of genocide, crimes against humanity and war crimes) and six addressing cooperation (obligation to cooperate, special legal status of the Court, obstruction of justice, arrest and surrender, provision of documents, and enforcement of Court sentences). These were further informed by an extensive set of sub-indicators.

This analysis is based on a comparison of the text of the Rome Statute with the language of domestic laws, both specific ICC implementing legislation and, where applicable, prior criminal

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<sup>45</sup> Kleffner, “Impact of Complementarity,” 109-112.

<sup>46</sup> Republic of Rwanda, *Law No. 33 bis/2003*.

<sup>47</sup> Price, “Transnational Civil Society,” 584.

<sup>48</sup> Terracino, “National Implementation of ICC Crimes.” Representative studies of include Relva, “The Implementation of the Rome Statute in Latin American States;” Neuner, ed. *National Legislation Incorporating International Crimes*; various contributions to the *Journal of International Criminal Justice* 2, no. 1 (2004); Ambos and Stegmiller, “German Research;” and du Plessis and Ford, eds. *Unable or Unwilling?* Generally, see Kleffner, “Impact of Complementarity.”

<sup>49</sup> Amnesty International, *Rome Statute Implementation Report Card*.

codes. In some instances, legislation incorporating other international agreements, especially the Genocide Convention, Geneva Conventions and Convention Against Torture, is included. This attention to formal legal texts is a useful since the documents reflect official state policy, and can be compared against the laws of other states and external standards. The relevant documents were derived from a series of external databases; coding was undertaken in October and November 2011. The Appendix provides greater detail concerning data sources, the operationalization of individual indicators and their aggregation.

A couple of further points are necessary before turning to the findings. This dataset is principally concerned with determining the extent to which core ICC norms have found their way into national legal environments. Their presence in national laws would suggest a widening web of state adherence, but this does not itself indicate causation. In many cases the decision to join the Rome Statute stimulated a process of legislative change, as states sought to close gaps in their ability to investigate and prosecute ICC crimes. However, the majority of states have thus far not completed this process, so a simple measure of the existence (or not) of an ICC implementation law is insufficient. It is also possible that such changes actually precede, and are unconnected to, the Statute itself—as with many states incorporating the crime of genocide well before 1998—and under such circumstances would not demonstrate endorsement of the Rome Statute *per se*. At the same time, the precise manner in which implementation occurs—whether through stand-alone legislation specifically incorporating the Rome Statute, or via various forms of ad-hoc modification of existing laws—will vary with the circumstances in each state.<sup>50</sup>

It is also important to acknowledge that this dataset is not exhaustive. My focus on national legislation explicitly excludes other potentially relevant legal sources, including military manuals and codes of conduct. Such sources are often not available as public documents, and so for reasons of consistency are not included here. Every effort was made to locate relevant legislation for each state, but in some instances no such documents could be uncovered within reasonable search parameters.<sup>51</sup> In the absence of available information, states are coded as non-compliant (i.e., the particular indicator is not present) with the hope that this dataset can be expanded during subsequent research.

Despite these drawbacks, establishing the status of particular ICC features in national law is valuable for assessing the contemporary scope of the Court as an institutional structure and its associated status as an international norm – that is, as the socially-accepted means of addressing grave criminality. Though the Rome Statute relies heavily on prior legal developments, the treaty itself can be said to have independent effects on state behaviour to the extent that its emergence can be correlated with subsequent changes in national law in response to the commitments enshrined in the treaty text. Conversely, the absence of other legal features leaves gaps in the web of legal authority that will impact the ability of states to investigate and prosecute ICC subject crimes, and limits the scope of a parallel norm concerning the punishment of grave crimes via this particular model of procedural justice.

## **National Legislation and the Incorporation of ICC Norms**

### ***Overview: Global Patterns of Legislative Change***

In this section I briefly summarize the general trends concerning global incorporation of ICC norms. For each state—both State Parties and non-parties—an aggregate compliance score was generated by combining the results from the 12 main indicators. These were weighted equally, and this composite

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<sup>50</sup> ICCLR, *International Criminal Court*, 13; Robinson, “Rome Statute and Its Impact on National Law,” 1850-1851; Lee, “States’ Responses,” 29-33.

<sup>51</sup> The present dataset contains 60 states (of 196 coded) for which substantive information is unavailable for more than 50% of the included indicators. These can be distinguished from instances where the author was able to confirm that relevant national legal provisions do not exist.

measure gives a snapshot of relative adherence on a state-by-state basis across the international system. This first cut reveals that thus far, there has been only modest incorporation of ICC norms in national legislation. 58 of the 121 State Parties have enacted new laws, or amended existing ones, in order to specifically address some or all of the relevant Rome Statute provisions.<sup>52</sup> State Parties have an average score of 4.75 out of a possible 12; this equates to a nearly 40% implementation rate. Hence the transmission of international legal standards is occurring slowly, even for those states that have formally endorsed the treaty. Table 1 summarizes these trends; “*n*” represents the number of states in the given category, while “#” reflects the absolute point total, and “%” translates this into percentage form (out of 12 possible points).

**Table 1: Overview of ICC Compliance**

	<i>n</i>	#	%
States Parties	121	4.75	39.58
Signatories	31	0.80	6.67
Non- Parties	44	0.91	7.58

Some relevant patterns are visible within this aggregate data. Of the 39 states with implementation scores of 7 or above, 33 were members of the Like-Minded Group of states that—along with civil society actors—stewarded the negotiations for an independent Court.<sup>53</sup> This fact speaks to the view that extensive incorporation of legal obligations is most likely in states that are already deeply committed to the objectives of the treaty. However, unlike those (predominantly rationalist) scholars that regard endogeneity as a mark against the independent power of legal processes and norms,<sup>54</sup> I argue in my other work that the negotiation of the Statute was itself a constitutive moment in which state identities and interests were reconfigured in favour of an independent Court, and that this intersubjective process has facilitated subsequent compliance.<sup>55</sup> Indeed, there is ample evidence that national implementation has contributed to broader societal transformations. For example, “[t]he passing of the ICC Act was momentous: prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa.”<sup>56</sup> This is similarly the case for a number of

<sup>52</sup> Amnesty International 2010, *Rome Statute Implementation Report Card*. Since the release of this report, Uganda has passed an ICC implementation law. Also Coalition for the International Criminal Court, *Ratification and Implementation Overview*.

<sup>53</sup> Andorra, Argentina, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Ireland, Korean Republic, Latvia, Liechtenstein, Lithuania, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Samoa, Senegal, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago and the United Kingdom. In total, 68 states are commonly considered part of the Like-Minded Group. The full list is found in Parliament of the Commonwealth of Australia, *Statute of the ICC*, 110.

<sup>54</sup> Prominent expressions are found in Downs, Rocke and Barsboom, “Good News About Compliance;” and Hathaway, “Do Human Rights Treaties Make a Difference?”

<sup>55</sup> See Bower, *Norm Development Without the Great Powers*, especially 180-188 and 243-249.

<sup>56</sup> du Plessis, *The International Criminal Court That Africa Wants*, 8. Also Stone, “Implementation of the Rome Statute,” 307.

states in Latin America, including Argentina.<sup>57</sup> In such cases, the Rome Statute—defined by its legalistic criteria of rules and procedures and association with prior international humanitarian and human rights law—is now taken as the embodiment of a new standard of appropriate behaviour, as anticipated by earlier works on the genesis of the ICC regime.<sup>58</sup>

Interestingly, the presence of ongoing violence does not impede the incorporation of ICC features as much as might be expected. Overall, the 64 State Parties involved in some form of armed conflict since 1998 have considerably higher rates of adherence than treaty members in general, averaging 52% (6.25 points). This compares with an average incorporation rate of 32% (4.37) when accounting for the full 103 conflict-prone states during the same period. A good deal of this observed difference can be attributed to early supporters of the ICC—including Canada, the Netherlands and the United Kingdom—who participated in coalition military operations in Afghanistan and Iraq. However, in some cases the experience of internal armed conflict has led to greater engagement with the Court and an increased sensitivity to the legal standards contained in the Rome Statute. For example, Uganda's incorporation score is a near-perfect 11.5, which is owing to the fact that the 2010 *International Criminal Court Bill* is explicitly modelled on the Statute and integrates many provisions directly from the treaty text.<sup>59</sup> Anecdotal evidence suggests that Ugandan officials modified the *ICC Bill* in specific ways to conform to the Statute.<sup>60</sup> Hence challenging circumstances do not necessarily undermine state compliance, and may in fact provide the impetus for legal change.<sup>61</sup> More broadly, this brief account confirms a view that State Parties will often invoke the legal criteria of the treaty as the benchmark against which they measure their own conformity with community expectations.

Unsurprisingly, the extent of implementation among non-parties is extremely low, with these states averaging an approximately 8% rate of incorporation (0.9 points). This is principally owing to the fact that national legislative change is typically stimulated by a decision to join the Court. For this reason it is somewhat surprising that compliance among signatories is slightly lower than for non-parties, at a little under 7% (0.8 points out of 12). We would expect to see greater internalization of Rome Statute norms among those states that, by their signature, have indicated their intention to join the institution. This finding suggests that, in the case of the ICC, legislative change and the incorporation of international norms rarely occurs in advance of formal membership.

The global overview demonstrates only limited progress in applying Rome Statute norms at the national level. This serves to highlight the difficulties, noted by various authors, in translating behavioural injunctions found in international treaties into domestic legal contexts.<sup>62</sup> These general findings therefore suggest important limits on the extent to which current national laws will permit states to undertake investigations and trials and cooperate with ICC proceedings. A more fine-grained analysis reveals particular patterns within this general compliance picture, as detailed below.

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<sup>57</sup> Garcia Falconi, "Codification of Crimes Against Humanity," 454.

<sup>58</sup> Fehl, "Explaining the International Criminal Court;" Schiff, *Building the ICC*; Struett, *The Politics of Constructing the ICC*; Deitelhoff, "Isolated Hegemon."

<sup>59</sup> Parliament of Uganda, *International Criminal Court Bill*. See also New Vision, "MPs pass ICC Bill."

<sup>60</sup> New Vision, "MPs pass ICC Bill." Mufumba, "ICC Bill."

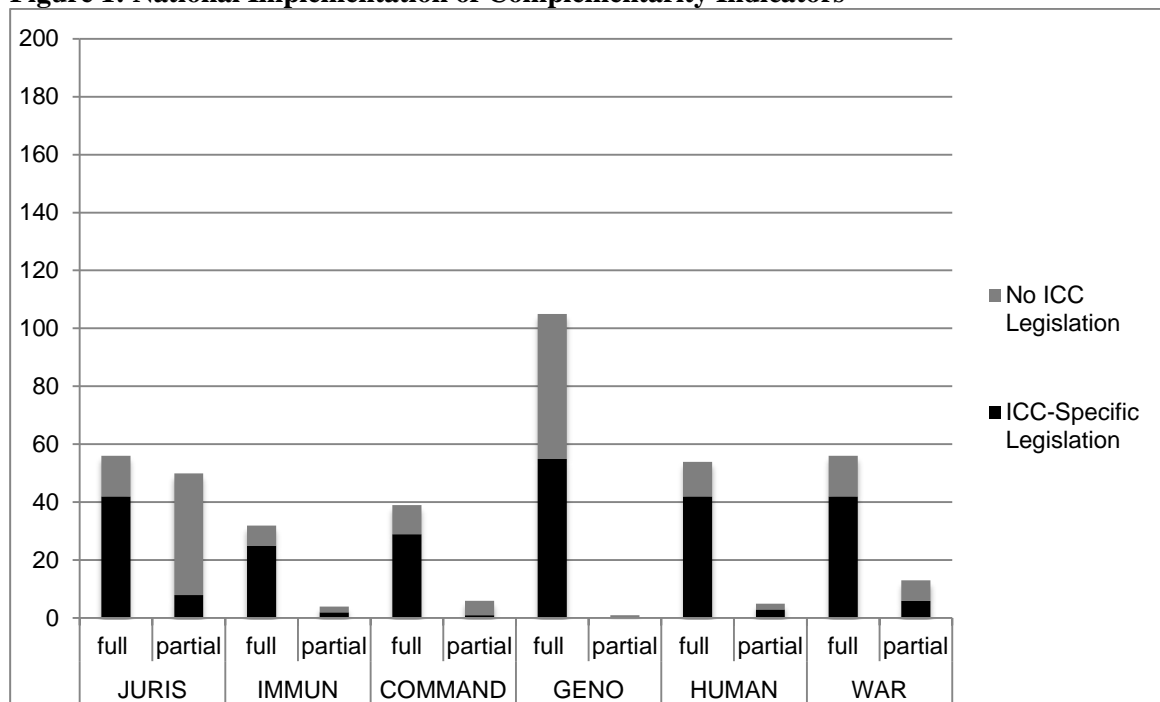
<sup>61</sup> Lyons and Reed-Hurtado, "Colombia," 2.

<sup>62</sup> For example, "the implementation of the Rome Statute in Latin America continues to face structural gaps caused by a lack of comprehensive implementation of all the elements of the treaty." Carrasco, "Implementation of War Crimes in Latin America," 462. Similarly, "[w]hile African states have been at the forefront in ratifying the Rome Statute, the progress on domestic implementation of the Statute has been rather slow.... [D]raft implementing legislation exists in several African countries but only a few countries have passed domesticating statutes to date." Nkhata, "Implementation of the Rome Statute," 283-284.

### Complementarity

As noted already, the ICC regime is predicated on a burden-sharing arrangement in which states take on the majority of responsibility for legal enforcement, but under conditions set by the Rome Statute. It is therefore incumbent upon State Parties to incorporate ICC subject crimes, as well as jurisdiction and modalities of individual criminal responsibility (elimination of immunity and incorporation of principle of command responsibility), into their domestic laws so as to enable this division of labour. As Figure 1 documents, however, a great deal of work remains to be done in this regard. To this point, State Parties have a compliance rate of close to 44%, an average of 2.65 of the 6 complementarity indicators. The extension of Rome Statute norms outside of the formal treaty community remains extremely low: current signatories average a 12% rate of incorporation (0.73 out of 6), while non-parties again score slightly higher at 15% (0.90 out of 6). These patterns mirror the aggregate view presented above, and reaffirm the observation that early supporters are much more likely to incorporate ICC obligations, albeit incompletely.

**Figure 1: National Implementation of Complementarity Indicators**



There are thus important limits in the extent to which the constituent ICC norms and rules are gaining traction in domestic law, and how much of the observed incorporation can be attributed to new laws specifically implementing the Rome Statute. At the time of writing, 56 states have fully incorporated the dual (territorial and national) modes of jurisdiction envisioned in the Rome Statute, of which 42 have done so via specific ICC implementing legislation. A further 50 states have partially recognized the jurisdictional basis of the Court, by including either the territorial or the national modality, or by incorporating both in an incomplete fashion.<sup>63</sup> In total, 106 states have met at least part of the

<sup>63</sup> As explained in the Appendix, I code the “jurisdiction” indicator in relation to those for “genocide,” “crimes against humanity,” and “war crimes”: the former was only coded as “present” in my dataset if the state in question also had incorporated a significant number of ICC crimes. While every domestic criminal code has a provision for crimes committed on state territory (territorial jurisdiction), this is only relevant if jurisdiction can be asserted over the types of crimes outlined in the Rome Statute.

jurisdictional precondition for addressing Rome Statute crimes in their domestic legal systems; this figure includes 26 states that are not presently members of the Court.<sup>64</sup> This reflects the fact that the modes of jurisdiction were already recognized norms of international law before the advent of the Rome Statute, and were thus among the most likely to be present in the national laws of non-parties.

The assertion of the complete “irrelevance of official capacity” is at the heart of the Rome Statute’s commitment to universal justice. The extent of state endorsement of this new standard is an especially important indication of norm diffusion, since the elimination of immunities for senior political leaders reverses previous international practice and implicates the very people making these international commitments, and thus represents an especially significant form of state change. Yet the Rome Statute also maintains the long-established principle that states will respect the legal immunities of certain political and diplomatic actors in their international relations, and therefore enshrines two apparently contradictory standards for how to govern sensitive questions of legal culpability. Here the dataset reveals among the most limited degrees of progress: thus far, only 32 states have fully incorporated the immunity standard articulated in Article 27 of the Rome Statute, while a further four have modified their laws in partial adherence to this new rule.<sup>65</sup> Significantly, the vast majority (27 instances) of these changes have come via specific implementing legislation by State Parties. This reflects the fact that, unlike some other metrics included in this dataset, the Rome Statute is a principal source for this emergent standard and would be a key driver of any future consolidation of an anti-immunity norm.<sup>66</sup> The evidence presented here thus also suggests that newer international norms are also likely to be incorporated more slowly and contested more heavily, a finding that corresponds with previous hypotheses in the IR literature.

Closely related is the principle of command responsibility, which was already well established as a rule of customary international law.<sup>67</sup> Here again we find only limited evidence of incorporation in national law, with 39 states having fully domesticated the Rome Statute standard, and six having done so in an incomplete manner. And, as with the principle of immunity, the vast majority of this legal change is undertaken by State Parties (38 of 46 cases) via ICC-specific national legislation (30 of 46 cases). This is yet another example of the limited domestic incorporation of international norms, in this case despite a substantial prior legacy.

Equally important to efficacy of the ICC regime is the widespread adoption of the crimes under the Rome Statute, since in their absence states are unable to meet their responsibility to address “the most serious crimes of concern to the international community as a whole.”<sup>68</sup> As above, the record is decidedly mixed. Genocide<sup>69</sup> is the most consistently incorporated crime, and features in the available laws of 105 states, including 26 states that are presently not members of the Court. However, this owes less to the Rome Statute itself than it does the widespread acceptance of the prior Genocide Convention, from which the Rome Statute derives its definition in Article 6.<sup>70</sup> Hence, while 79 ICC State Parties have incorporated the crime of genocide, only 55 of those have some form of

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<sup>64</sup> 16 non-parties and 10 signatories.

<sup>65</sup> Prominent ICC proponents including France have yet to incorporate the provisions of Article 27 into their domestic laws, while others like Colombia have retained the ability to provide amnesties and pardons. On the debate surrounding Uganda’s removal of immunities in line with Article 27, see Mufumba, “ICC Bill.”

<sup>66</sup> Interestingly, three states—Armenia, Egypt, and Rwanda—have domestic laws that parallel the spirit of Article 27 even as all three remain non-parties to the Rome Statute.

<sup>67</sup> Ambos, “Superior Responsibility,” 846-847.

<sup>68</sup> Rome Statute, Article 5(1).

<sup>69</sup> See Cassese, “Genocide.”

<sup>70</sup> In virtually every case, states have incorporated the operative language of the definition of genocide in its totality directly from either the Convention or Rome Statute. The only apparent exceptions are Guinea-Bissau, Saint Lucia and Uzbekistan.

implementing legislation relating to the Statute, which in a number of cases does not address subject crimes at all. And, while genocide is the most widely domesticated crime, it is still only present in 54% states with national laws accessible for this study.<sup>71</sup> This finding is especially relevant for two reasons. On the one hand, the modest incorporation of the Genocide Convention—a treaty that has been in existence for over 60 years and is widely ratified<sup>72</sup>—gives some perspective to the comparative experience of ICC implementation. On the other hand, the fact that a foundational norm of contemporary international society—what international lawyers term a *jus cogens* norm—has not received greater incorporation in national law provides an important qualification for the expectation that more established international standards will diffuse more widely.

The Rome Statute formulations of crimes against humanity and war crimes are even less prominent in domestic legislation.<sup>73</sup> Fifty-four states have fully incorporated the definition of crimes against humanity found in Article 7 of the Rome Statute, while five have internalized some aspects while leaving others out. Unlike genocide, crimes against humanity are most often incorporated via new national implementing legislation (45 out of 59 cases)<sup>74</sup>; this makes sense since there is no stand-alone convention defining and regulating this category of international crimes and so the Rome Statute is the most obvious legal source on this subject.<sup>75</sup> Many states already criminalize some or all of the constituent crimes encompassed in Article 7 (such as murder, torture, or rape) domestically, but not necessarily as part of a “widespread or systematic attack” “directed against a civilian population,” with the further caveats that it be composed of “multiple commissions” of the acts and be executed “pursuant to or in furtherance of a State or organizational policy.” These distinctions are important, as they collectively represent the principal difference between “ordinary” crimes and those of the normatively distinct “grave crimes” regime encapsulated by the ICC. The Like-Minded Group accounts for 65% (35 of the 54 cases) of the full incorporation of this standard, as would be expected given the earlier discussion. Most interesting are those states—including the Central African Republic, Congo, Democratic Republic of the Congo, Indonesia, the Philippines and Uganda—that have incorporated crimes against humanity in the midst of internal armed conflicts that have featured allegations of precisely these kinds of acts by rebel groups and/or state security forces. Other conflict-prone states like Azerbaijan, Burundi, Georgia and Rwanda have similarly implemented the crimes of Article 7 in their national law. These cases provide among the best examples of instances where states have endorsed legal rules under circumstances where legal exposure is most plausible, thus raising the prospective costs (and benefits) of compliance.

There are clear patterns to instances of partial compliance as well. Most notably, certain categories of less established crimes are much less likely to feature in domestic legislation. This

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<sup>71</sup> As McKay notes, “[d]espite a requirement under the Genocide Convention that States Parties ‘enact . . . the necessary legislation to give effect to the provisions of the present Convention...’ many States parties... had not done so, claiming that their domestic laws were adequate to address the crime. Many of these same states have now been prompted to finally do so when faced with ratifying the Rome Statute, therefore ensuring that they will be able to fulfill their undertakings under the Genocide Convention to prevent and punish acts of genocide.” McKay, “Characterising the System of the International Criminal Court,” 270-271.

<sup>72</sup> As of June 2012 there are 142 State Parties to the Convention on the Prevention and Punishment of the Crime of Genocide. [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en).

<sup>73</sup> Bothe, “War Crimes;” Byron, *War Crimes and Crimes Against Humanity*; Cassese, “Crimes Against Humanity.”

<sup>74</sup> The other 14 states—including six non-member states—that have adopted crimes against humanity in some form have done so presumably by referencing the widely-accepted definition under customary international law, which the Rome Statute essentially mimics. Regarding the customary development of crimes against humanity, see Cassese, “Crimes Against Humanity.”

<sup>75</sup> Lee, “States’ Responses,” 26; Sadat, ed., *Forging a Convention for Crimes Against Humanity*; Robinson, “Defining ‘Crimes Against Humanity,’” 53-54 and 56. Crimes against humanity were first articulated at the Nuremberg Tribunal. Aspects of the Rome Statute definition were drawn from this experience as well as developments at the International Criminal Tribunals for Rwanda and Yugoslavia, though these prior legal initiatives were not previously codified.



finding can be connected back to the negotiation of the Rome Statute, since a prominent view held that only those acts already recognized under customary international law at the time of the Statute's creation—i.e., “crimes that constitute a common concern of the international community and are universally considered to be the most serious”—should be included in the final document.<sup>76</sup> Of the five states that have incorporated only some aspects of Article 7, all have failed to include the sub-clauses relating to sexual crimes and the crime of apartheid, which are among these more recent and controversial innovations.<sup>77</sup> Three of these—Albania, Estonia, and Niger—are State Parties with implementing legislation specifically addressing ICC crimes, which suggests that the exclusions are the result of deliberate policy.

Finally, the Rome Statute draws together a wide body of prior international humanitarian law in formulating a single omnibus definition of war crimes. Despite its legacy, the full scope of this article has not yet widely permeated national legal settings. To this point, 56 states have fully internalized Article 8 in their domestic laws, with 13 states reflecting a partial incorporation. Here again national implementing legislation is one important vector for legal change: 43 states have incorporated some or all of Article 8 through ICC legislation, while others have evidently done so via other legal processes (for example, by ratifying and implementing the 1949 Geneva Conventions, 1977 Additional Protocols, and other legal instruments such as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict).<sup>78</sup> Most ICC non-members thus have at least some Article 8 crimes in their domestic laws.

This general pattern is most pronounced in the context of crimes that are especially controversial or have been less clearly codified in previous international humanitarian law, and thus are in a greater state of flux. It is in these instances that the Rome Statute would most clearly be a force for the progressive consolidation of social expectations within the grave crimes regime. For example, 54 states have incorporated the language of Article 8(2)(b)(xxii) rendering sexual offences as war crimes in international armed conflict.<sup>79</sup> Similarly, 60 have implemented the rule prohibiting the recruitment of child soldiers in times of international war.<sup>80</sup> There is remarkable parity in the adoption of these two crimes, with only one of the 54 states incorporating sexual crimes not also doing so for child soldiers.<sup>81</sup> In both instances, 33 of these states were members of the Like-Minded Group. The consistency here suggests first that newer norms are particularly susceptible to slow domestication, and second that their incorporation is strongly associated with the emergence, and subsequent acceptance, of the Rome Statute as a new articulation of appropriate behaviour.

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<sup>76</sup> People's Republic of China, Statement Before the 6<sup>th</sup> Committee of the United Nations General Assembly. Similarly, see Scheffer, “Deterrence of War Crimes in the 21st Century.”

<sup>77</sup> Rome Statute, Articles 7(g) and (j), respectively. During the Rome negotiations “a vocal minority of anti-abortion groups, supported by the Vatican and Arab states” sought “to prevent any language that might be interpreted as facilitating abortion from entering the Statute.” Glasius, *International Criminal Court*, 32. “The main aim of the proposal was to replace the crime of forced pregnancy with ‘forcible impregnation.’ Despite the similarities between these terms, the two crimes contained different elements or rules defining the parameters and penalties for the crime. For instance, whereas forcible impregnation referred to the single act forcing women into pregnancy, forced pregnancy was a ‘broader concept involving keeping women pregnant,’ even in the case of rape or incest.” Roach, *Politicizing The International Criminal Court*, 144. For full list of states, see Bedont and Hall Martinez, “Ending Impunity for Gender Crimes,” 75, n. 44; and Glasius, *International Criminal Court*, 88-89.

<sup>78</sup> In particular: Bulgaria, Denmark, France, Japan and Sweden.

<sup>79</sup> A further 13 states have domestic legislation that partially incorporates the Rome Statute standard, but these provisions are typically drawn from Article 27(2) of the Fourth Geneva Convention of 1949 which includes only some of the sexual offences listed in Rome Statute Article 8(2)(b)(xxii).

<sup>80</sup> Rome Statute, Article 8(2)(b)(xxvi). Interestingly, six of these states are not currently parties to the Rome Statute.

<sup>81</sup> Bosnia and Herzegovina. 32 of these states were also members of the Liked-Minded Group.

This pattern is reflected in other aspects of the war crimes definition as well. Article 8 brings violations of the laws and customs of war in both international and non-international conflicts under one operative legal article. Here again we should anticipate relatively low incorporation, since a number of states have previously resisted legal innovations relating to non-international armed conflict.<sup>82</sup> The dataset confirms this expectation. While 99 states—including 14 non-parties and six signatories—have fully incorporated the provisions of Article 8(2)(a) concerning grave breaches of the 1949 Geneva Conventions, only 56 have similarly done so for Article 8(2)(e), which addresses “serious violations of the laws and customs applicable in armed conflicts not of an international character.” Many of these crimes were previously codified (in whole or in part) in the more controversial Additional Protocol II to the Geneva Conventions.<sup>83</sup> It is particularly notable that of this group of states, fully 52 are current State Parties to the Rome Statute, and 39 were part of the Like-Minded Group. 50 have also incorporated the provisions concerning sexual crimes and child soldiers in international armed conflicts, suggesting that the incorporation of these contested international standards is closely connected.<sup>84</sup> Finally, eight states—Burundi, Central African Republic, Colombia, Congo, Democratic Republic of the Congo, Ethiopia, Philippines and Uganda—incorporated the standards of Article 8(2)(e) during internal armed conflicts in which these crimes may have featured, again highlighting the significant costs associated with this kind of legal change.

These findings draw attention to two important theoretical points. First, many states are compliant with Article 8(2)(a) as a result of their prior internalization of the 1949 Geneva Conventions and antecedent laws of war stretching back into the nineteenth century; this is especially true of non-party states. This provides further evidence of the legacy effects discussed above, and suggests one way in which the Rome Statute may gain legitimacy among non-members by virtue of its association with a long legal tradition that includes states like China, India, Russia and the United States. At the same time, however, the fact that so few non-parties have incorporated other features of the ICC war crimes regime limits the extent of this commonality. Second, incorporation of the more innovative or contested aspects of the Rome Statute is strongly correlated with ICC membership. In these cases, states have employed the legal criteria of the Statute in modifying their own domestic practice. The Statute has thus become a prominent instrument for consolidating international expectations concerning the scope of grave international crimes. As noted already, however, this process remains substantially incomplete.

### **Cooperation**

The challenges of domestic legal incapacity are further illustrated with reference to expectations concerning national cooperation with Court activities. State Parties have regularly acknowledged the vital importance of meeting their commitments to cooperate with and facilitate ICC operations.<sup>85</sup>

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<sup>82</sup> Regarding this controversy during the Rome negotiations, see Kirsch and Holmes, “The Rome Conference,” 7.

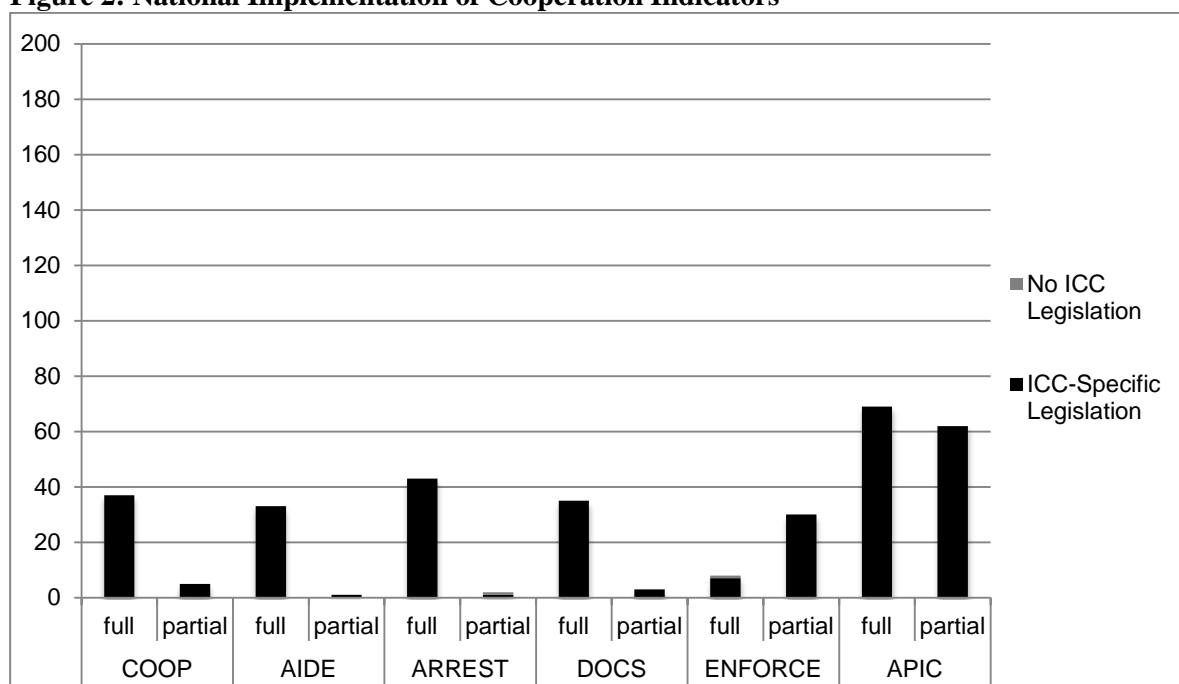
<sup>83</sup> The latter agreement is less widely ratified than the original 1949 Conventions. As of June 2012, there were 194 State Parties to the 1949 Geneva Conventions, and 166 to Additional Protocol II. However, prominent states including Israel, Iran, Turkey and the United States have not joined APII. International Committee of the Red Cross, *Annual Report 2010*, 572-578. See also La Haye, *War Crimes*, 173-174.

<sup>84</sup> By way of comparison, 72 states—including six non-parties and three signatory states—have incorporated the language of Article 8(2)(c), which concerns “serious violations of article 3 common to the four Geneva Conventions” in instances of non-international armed conflict. However, the protections enumerated in sub-article (c) are derived from the widely accepted 1949 Geneva Conventions, and not the more deeply contested standards of Additional Protocol II. Hence the finding that considerably more states (and especially non-members of the ICC) have endorsed sub-article (c) without also incorporating those found in sub-clause (e) only serves to reinforce the point that the 1949 Conventions remain a more acceptable international standard and that the Rome Statute is an important vector for increasing state incorporation of war crimes law in non-international armed conflicts.

<sup>85</sup> Assembly of States Parties, *Kampala Declaration*, operative paragraph 7; Assembly of States Parties, *Report of the Bureau on Cooperation*; Rastan, “Responsibility to Enforce.”

Moreover, these responsibilities, articulated in Part IX of the Rome Statute, are generally understood to impose specific legal obligations on treaty members.<sup>86</sup> Yet thus far, the calls for greater cooperation have not been met. State Parties have an average compliance rate of only 35%, implementing 2.09 of the 6 cooperation indicators. Interestingly, the 68 members of the Like-Minded Group fare only slightly better, with an average score of 2.76, though 30 of these states have scores of 4 or higher. The extension of these norms to non-members is virtually non-existent: current signatories average a 1% rate of incorporation (0.06 out of 6), while non-parties are even lower (0.01 out of 6). This makes sense, since cooperation in most instances applies only to ICC member states, and these particular commitments are not found in prior legal agreements. The formal codification of obligations via legislative change is thus a process normally only contemplated by treaty members. Moreover, 40 states—all of whom are ICC members—have scores of 4 or above, further suggesting that the incorporation of cooperation provisions typically comes as a bundled legislative response to the legal demands of ratification.

**Figure 2: National Implementation of Cooperation Indicators<sup>87</sup>**



A disaggregated view (Figure 2) reinforces the general pattern of limited legislative change among State Parties, and especially non-members. Thus far, only 37 ICC parties have included a provision specifically acknowledging the obligation to cooperate with Court requests for assistance, as per Article 86 of the Rome Statute.<sup>88</sup> Recognition of the special legal status of Court officials has received greater endorsement thus far, with 71 State Parties ratifying or acceding to the Agreement on the

<sup>86</sup> Bekou, “Case for Review of Article 88;” and Swart, “General Problems.” A United Nations Security Council resolution referring a situation to the Court—as with Sudan and Libya—is the one exception in which non-parties incur a legal obligation to cooperate with ICC processes. See Ciampi, “The Obligation to Cooperate,” 1609-1617.

<sup>87</sup> “Partial” incorporation of the “APIC” indicator refers to signature (but not ratification) of the Agreement on the Privileges and Immunities of the Court. Coalition for the International Criminal Court, *Ratification/Accession and Signature of the Agreement on the Privileges and Immunities of the Court*.

<sup>88</sup> A further five State Parties have made general reference to this commitment without reflecting the Rome Statute language.

Privileges and Immunities of the Court (APIC), and a further 62 having signed the document.<sup>89</sup> This greater degree of state compliance is likely owing to two principal factors. First, the APIC merely reflects established principles concerning the special status of diplomats and representatives of international organizations, and is thus largely uncontroversial. Second, the APIC can be domesticated via ratification or accession and without the long process of developing detailed national legislation to implement other Rome Statute obligations.

On issues of particular concern to the proper functioning of the ICC as a legal and judicial institution, the data presented here is unimpressive. State progress in criminalizing the obstruction of Court activities—denoted as “AIDE” in Figure 2—has received limited uptake, with 33 State Parties including comprehensive language in their implementing legislation.<sup>90</sup> The numbers are very similar with respect to the provision of documents for ICC investigations<sup>91</sup>: only 35 states have included this obligation in their implementing laws, with three others providing an incomplete rendering of the Rome Statute formulation. Hence little more than a quarter of all State Parties currently have the domestic legal authority to contribute to vital Court needs.

Arguably the most pressing state contribution to ICC operations—the arrest of indicted individuals and their subsequent surrender to the Court—has also received only limited support in the national laws of State Parties. Forty-three states have included a specific reference to this obligation and provided procedures to facilitate the detention and transfer of suspects, while two others have partially addressed this issue in their national legislation. Various authors have noted that arrest and surrender remains a key gap in state commitment to the Court. For example,

the failure to date of States Parties to ensure the execution of the majority of the arrest warrants issued by the Court has put the issue of international cooperation at the centre of deliberations. The judges are increasingly inquiring as to the fulfilment by States of their cooperation obligations, particularly in respect of the warrants of arrests issued by the Court. The President of the Court and the Prosecutor, moreover, have made repeated calls on States to shoulder their responsibilities under the Statute.<sup>92</sup>

The dataset findings presented here suggest that the absence of domestic legal capacity is an important reason why states have yet to meet these commitments. Finally, ICC members have been slow in implementing provisions for the enforcement of Court convictions. Since the Court does not have a permanent detention facility of its own, its sentences will have to be undertaken in a national penal system.<sup>93</sup> In this light, the fact that only eight State Parties have explicitly included procedures to facilitate the acceptance of ICC criminals in their national laws—with a further 30 making a generalized commitment without outlining specific mechanisms—may complicate future efforts to place convicts.

With only two exceptions, the cooperation provisions discussed here have been incorporated via ICC-specific national implementing legislation. This observation reinforces the call from many quarters to make national implementing legislation a priority.<sup>94</sup> In important respects, therefore, the Rome system currently features only a limited capacity among members to address vital aspects of the institution’s operations. The low rate of state incorporation on matters of cooperation is problematic both for the efficacy of the institution—by limiting the scope of actors that can positively contribute to

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<sup>89</sup> Assembly of States Parties of the International Criminal Court, *Agreement on the Privileges and Immunities of the International Criminal Court*. These statistics are current as of January 2012. CICC, *Ratification/Accession*.

<sup>90</sup> Rome Statute, Article 70. One state has also partially incorporated this commitment in their legislation.

<sup>91</sup> Rome Statute, Article 93(d) and (i).

<sup>92</sup> Rastan, “Responsibility to Enforce,” 164; more generally, see Swart, “Arrest and Surrender.”

<sup>93</sup> Kress and Sluiter, “Imprisonment.”

<sup>94</sup> Assembly of States Parties, *Cooperation*. Coalition for the International Criminal Court, *Background Paper*.

its judicial mandate—and the prospective consolidation of Rome Statute norms – since only widespread adaptation and engagement would reinforce an expectation that the supranational judicial model embodied in the Statute is the appropriate response to the demands of international criminal justice.

## **Conclusion**

A central contention of this paper is that national legislation provides a window into the internalization of international norms that is not captured by reference to formal institutional membership or other forms of behavioural change and adherence. The development of a new dataset measuring national implementing legislation is thus an important empirical contribution to the growing literature on ICC effectiveness.

Despite widespread membership, the Rome Statute has thus far been largely ineffective at changing state behaviour in this vital context, and domestic incorporation of the Rome Statute remains substantially incomplete. The evidence presented above reveals generally low levels of national legislative implementation, both in terms of the incorporation of core crimes and modes of liability, and cooperation with Court activities. This means that states across the international system currently have only a limited ability—as provided in their national laws—to enforce ICC crimes within their domestic jurisdictions. There is a strong linkage here to the broader concern with behavioural change, since the absence of sufficient national legislation contributes to this non-compliance, by denying the legal and judicial conditions necessary to facilitate state engagement. This in turn impedes the effective operation of the ICC regime, as gaps in domestic legal systems weaken the network of international justice and place further burdens on the Court to enforce for itself grave violations of international criminal law. These gaps can be deployed by ambivalent states in an attempt to excuse and avoid obligations under the Statute; in this respect, incapacity can suggest a lack of political will at the heart of state inaction.

The present analysis also broadly confirms the general hypotheses of this study, though with significant caveats. First, the experience with State Parties is broadly in keeping with the expectation that treaties serve as focal points for clarifying new standards of appropriate behaviour—defined in terms of their legal criteria—for members of the formal treaty community. In some cases, as with the category of crimes against humanity and certain war crimes, the Statute provides the most comprehensive legal articulation of the rule, and thus sets the standard for new social expectations concerning the scope of the grave crimes regime. The treaty has therefore served as the reference point for the transmission of international rules and norms to domestic institutions. Since the advent of the ICC, therefore states that have developed new legislation to address relevant international crimes have overwhelmingly been parties to the Rome Statute. Moreover, members of the Like Minded Group are far and away the most likely to substantially incorporate the relevant indicators, which confirms the expectation that early endorsement of the Court is highly correlated with subsequent pro-norm change. There are important limits to this impact, however, as the extent of incorporation is relatively modest even among the most amenable states. The expansion of ICC membership has therefore led to only a limited diffusion of Rome Statute features into the national laws of treaty parties, and has had little influence on the domestic legal contexts of non-party states.

Second, the empirical evidence also suggests some key limitations of legacy effects in providing the conditions for the spread of legal norms. The Rome Statute clearly benefitted from its association with existing international legal structures, as the constitutive process of reaffirming and refining these norms generated widespread support for the creation of the Court. Yet these connections have not led to a similarly broad incorporation of constituent criminal features in domestic legislation, as already noted. It would appear that many antecedent norms and rules of international humanitarian and human rights law were not widely incorporated in domestic law prior to the emergence of the Rome Statute. This fact can help explain the limited overlap with existing national laws in non-party states as well as some otherwise supportive ICC members. It has been suggested, for example, that the

lag in incorporation may be owing to the relative unfamiliarity of international rules and norms in many national legal systems.<sup>95</sup> This provides an important qualification to the brief theoretical account presented above, while at the same time further reinforcing the significance of the Rome Statute—and its domestication—as a means of consolidating prior international law.

Despite these significant caveats, the incorporation of some Rome Statute crimes—principally genocide, and to a lesser extent the grave breaches articulated in Article 8(2)(a)—even among non-parties, does provide a modest window of opportunity for expanding the reach of the ICC legal regime over time. The existence of these crimes in national law means that these states are capable of investigating and prosecuting cases on these grounds on their own territory, thereby alleviating the responsibility of the Court itself. At the same time, the promotion of international norms often occurs by analogy, as new social and legal standards are associated with prior principles and rules that hold wider sway. The fact that many non-parties already recognize some Rome Statute crimes in their national laws narrows, but by no means resolves, the divergent visions for how best to organize and pursue international justice. Hence, it is at least conceivable that the endorsement of the crime of genocide and some war crimes can be leveraged to bring such states into closer alignment with the commitments of the Rome Statute.

Whether the Rome Statute will ultimately prove successful at reshaping international responses to atrocity crimes will go a long way to inform the legacy of the Court. While no definitive answers are possible at this early stage in the Court's development, this paper has offered some initial assessment, and theoretical and empirical grounds for studying the further adoption (or stasis) of ICC norms.

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<sup>95</sup> Regarding the Japanese experience, see Meierhenrich and Ko, "How Do States Join the ICC," 254.

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## **Appendix: Coding Rules and Sources**

This dataset addresses national implementation of the Rome Statute of the International Criminal Court. The goal is to determine whether, and to what extent, State Parties as well as non-party states are adopting the principal features of the ICC, and what patterns may be developing within this process. Since the Statute anticipates legal parity at the national level, tracking the existence of ICC crimes and procedures in domestic legislation provides a good proxy for the spread of ICC norms, and hence a partial account of institutional effectiveness.

### ***Temporal Representation***

The analysis of the ICC is not divided into specific temporal periods but rather captures the entire timeframe from the conclusion of the Rome Statute in 1998 through to December 2011. This decision was necessitated by two considerations. On the one hand, the ICC regime lacks an permanent, institutionalized monitoring mechanism of the kind that has proven so useful in other treaty regimes (the Antipersonnel Mine Ban Treaty, for example). As such, it is extremely difficult to track changes in state compliance on an annual or semi-annual basis in the necessary detail and with sufficient coding reliability and consistency. On the other hand, the type of behavioural change captured by this dataset is less suited to fine-grained temporal distinctions. National legislation—the primary subject of study in this analysis—tends to change infrequently and in “bursts” that encompass a number of relevant features at one time. It is therefore sufficient to focus on the nature of national policy change. The lack of differentiation in terms of yearly state progress is thus offset by the extensive detail included in the constituent indicators.

### ***Data Sources and Scope***

This analysis is based on a comparison of the text of the Rome Statute with language of domestic laws – both specific implementing legislation and, where applicable, prior criminal codes. This study utilizes a series of external databases of national legislation. The National Implementing Legislation Database (NILD)—developed jointly by the University of Nottingham’s Human Rights Law Centre and the International Criminal Court Legal Tools Project<sup>96</sup>—was initially employed as the primary source. The database contains the most extensive repository of national legislation concerning the Rome Statute that can be searched either by individual state or by a collection of 800 keywords.

To compile the data, I first undertook a series of keyword searches for each of the chosen indicators and for every available state within the NILD. I then conducted a further qualitative analysis of the available documents for each state identified by the searches, in order to verify parity between the Rome Statute and the relevant legislation. Since the NILD only covers approximately 60 states at present, I subsequently consulted three additional databases—maintained by the International Committee of the Red Cross, the Geneva Academy of International Humanitarian Law and Human Rights, and the UN Office on Drugs and Crime—in order to assess the available national legislation for the 196 states in my dataset. An English version of the relevant legislation was sometimes not available; in these circumstances I utilized Google Translate in order to render the relevant passages for comparison. Since I am comparing only the existence of legal concepts—rather than verbatim incorporation of the Rome Statute text—this was an acceptable, though imperfect, approach. Finally, the above research was occasionally supplemented with reference to academic sources where external databases were inconclusive. When taken together, these sources provide the empirical data for coding state adoption of ICC norms. Coding for the ICC dataset was conducted during October and November 2011.

Focusing on the incorporation of core procedural and substantive norms enshrined in the Rome Statute is potentially controversial, as the Statute wording and extant state practice make clear

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<sup>96</sup> [www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php](http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php) and <http://www.legal-tools.org/en/>.

that implementing legislation is not legally obligatory. This assessment is further complicated by the fact that there is no agreed international standard delimiting the proper approach to the domestication of international crimes. There is thus great variety in the particular form domestic implementation will take, and this study does not privilege one approach—stand-alone legislation, amendment of existing laws, etc.—in assessing state adaptation. Nevertheless, there is widespread agreement that as a political matter, some form of legislative change is necessary so as to ensure that all relevant features of the Statute are addressed in national law as a prerequisite to facilitating state compliance. Moreover, domestic legal reform offers an important demonstration of state commitment to the ICC and its norms. Considered in these terms, therefore, domestic legal change is a vital, but by no means sufficient, demonstration of state compliance and adaptation.

Limiting my attention to legislation specifically implementing the Rome Statute would obviously exclude those states that have not ratified or acceded to the treaty, as well as those who have yet to complete the national legislative process; in this respect, the dataset would capture only a relatively modest sub-set of state cases. In order to address the broader international status of constituent rules and norms, I replicate the coding protocols to include all states regardless of their status vis-à-vis the treaty. This is useful as it allows the researcher to suggest ways in which aspects of the Rome Statute are anticipated in states that officially oppose the Court or have yet to make significant progress in transposing the Statute domestically.

### ***Compliance Indicators***

The dataset seeks to operationalize the core ICC norms through a set of discrete indicators. Naturally these do not account for all features of the Rome Statute. Those selected do however closely accord with core treaty purposes, and have been identified for their legal and political significance – i.e., because they are vital to the proper functioning of the Court, or are regarded as particularly controversial or challenging to implement.<sup>97</sup> In this way, I seek to assess the implementation of ICC norms under the most difficult conditions.

The dataset identifies 12 main indicators: six concerning the principle of complementarity (territorial and national jurisdiction,<sup>98</sup> the removal of immunity,<sup>99</sup> command responsibility,<sup>100</sup> and the core crimes of genocide, crimes against humanity and war crimes<sup>101</sup>) and six reflecting cooperation concerns (general obligation to cooperate with Court operations,<sup>102</sup> the special legal status of the Court,<sup>103</sup> and more specific obligations concerning the punishment of the obstruction of justice,<sup>104</sup> arrest and surrender of ICC suspects,<sup>105</sup> provision of documents and other evidence,<sup>106</sup> and the enforcement of Court sentences<sup>107</sup>). These were further informed by an extensive set of more specific sub-indicators.

Unless otherwise noted, coding reflects the degree of parity between domestic legislation and the legal (textual) content of the Rome Statute. Under this coding scheme, 1 represents the inclusion of

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<sup>97</sup> For one example, see ICCLR, *International Criminal Court*, 19-25.

<sup>98</sup> Rome Statute, Article 12.2.

<sup>99</sup> Rome Statute, Article 27.

<sup>100</sup> Rome Statute, Article 28(a).

<sup>101</sup> Rome Statute, Articles 6-8.

<sup>102</sup> Rome Statute, Article 86.

<sup>103</sup> Rome Statute, Article 48.

<sup>104</sup> Rome Statute, Article 70.

<sup>105</sup> Rome Statute, Articles 59 and 89.

<sup>106</sup> Rome Statute, Article 93(d) and (i).

<sup>107</sup> Rome Statute, Articles 103 and 109.



specific language incorporating the particular treaty feature (i.e., language that matches, or is substantively equal to, the provision found in the Rome Statute); by contrast, 0 indicates that no such provision exists in the national legislation. Less frequently, a cell may be coded with 0.5 to indicate a partial incorporation of Rome Statute language, for example by excluding certain elements of the ICC rule. Language that expands the scope of crimes beyond all recognizable definitions—for example, by eliminating the “widespread and systematic” criteria of crimes against humanity—is similarly coded as 0.5 to reflect the substantial disjuncture entailed. For some indicators—especially the three core ICC crimes—the relevant article in the Rome Statute contains multiple subsidiary clauses. In these instances, the main dataset reflects the aggregate implementation of the omnibus crime: 0 denotes incorporation of less than 50% of the distinct sub-clauses, while 0.5 is given for 50-75%, and 1 for greater than 75% incorporation. This measure is utilized in the main ICC compliance dataset, though a version of the more fine-grained dataset measuring each individual sub-clause is also available upon request.

### *Jurisdiction (JURIS)*

This indicator measures whether the state in question has adopted the jurisdictional modality set out in the Rome Statute that applies to acts either committed on the territory of a State Party (even if committed by nationals from a non-party) or by the national of a State Party (in any territory).<sup>108</sup> Recognition in national law of the forms of ICC jurisdiction is necessary to ensure that the state in question can deal with any crimes under its purview. The main dataset indicator is composed of two sub-indicators that account respectively for the territorial and national modes of jurisdiction. This principal indicator is scored as 1 when both features are present in national law, and 0.5 when either one is present or (more rarely) when both are partially incorporated in domestic legislation. As elsewhere, a score of 0 indicates the absence of these features. Since the jurisdictional modalities of Article 12 apply to the core crimes enumerated in the Rome Statute, the features are only coded as present in national legislation if the state also recognizes the majority of ICC crimes in national law. This reflects the fact that to be of practical use, the modes of jurisdiction must apply to actual or potential acts.

### *Elimination of Personal Immunities (IMMUN)*

This indicator captures the principle—central to the ICC regime and articulated in Article 27 of the Rome Statute—that all persons are subject to international criminal law. Building on prior developments including at the Nuremberg and Tokyo Tribunals and more recent ad-hoc criminal tribunals, the Rome Statute explicitly aims to overturn the prior customary international legal norm whereby (in most cases) senior political leaders are exempt from these kinds of criminal culpability, particularly when the proposed prosecutions are to take place via a foreign entity.<sup>109</sup> In order to ensure full compliance and complementarity with the Rome Statute, State Parties must adopt the same

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<sup>108</sup> Rome Statute, Article 12.2. See also Bourgon, “Jurisdiction *Ratione Loci*.” This does not include more expansive assertions of authority over accused persons including “passive personality jurisdiction”, “jurisdiction of custodial State or State where present”, and “universal jurisdiction”. Due to the unsettled nature of the norm—and the fact that the Rome Statute does not impose a specific obligation for national jurisdictions—an age of criminal responsibility is not coded in this dataset. See Robinson, “Rome Statute and Its Impact on National Law,” 1863-1864 and Frulli, “Jurisdiction *Ratione Personae*,” 534.

<sup>109</sup> Article 27 of the Rome Statute states that the treaty “shall apply equally to all persons without any distinction based on official capacity.... 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.” As du Plessis notes, “[A]rticle 27(2) makes clear that the traditional doctrine of personal immunity for sitting state officials also does not apply. This latter provision is not found in the statutes of any of the earlier international criminal tribunals, and thus is unique to the ICC.” du Plessis, *International Criminal Court*, 77. On the complex interplay of Article 27 and prior norms of international law, see Akande, “International Law Immunities,” esp. at 407.

provision in their national law(s), in particular by eliminating existing immunities for Heads of State or Government, or other elected or appointed officials. As with jurisdiction above, the immunity provision was only coded as present in national legislation if the state also recognizes the majority of ICC crimes in national law.

### *Command Responsibility (COMMAND)*

Article 28 reaffirms the principle of command responsibility in international criminal and humanitarian law: “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control”.<sup>110</sup> This dataset does not include the various grounds for excluding criminal responsibility, as to do so would introduce too much complexity into an already expansive dataset.<sup>111</sup> Most notably, the rule (and associated conditions) concerning “superior orders”<sup>112</sup> is not addressed here. This decision is justified by the reasonable assumption that the most politically controversial instances of criminal punishment are likely to involve senior military officers and civilian officials, and it is here that non-compliance is most likely to occur. The formal incorporation of command responsibility is therefore the most consequential for the perspective of assessing ICC influence.

Beyond matters of the jurisdictional scope and subjects of legal authority, states should also fully incorporate the content of ICC crimes in their national law. While this is not an explicit legal obligation, the adoption of subject crimes is important for two reasons. First, failure to ensure national processes exist for investigating and prosecuting ICC crimes would leave states unable to fully meet the standards of complementarity set out in Article 17 and would result in gaps between national and international levels of criminal justice.<sup>113</sup> Second, as discussed elsewhere, the crimes encapsulated in the Rome Statute are considered to be the most egregious in the international system.<sup>114</sup> Therefore, it is important for the development of ICC norms that core crimes are treated as “special” crimes under domestic law, and distinguished from “regular” civil acts like murder, rape, kidnapping, and so forth.

A separate dataset details each sub-indicator for the three core crimes individually. There are five such indicators for the crime of genocide, 11 for crimes against humanity, and fully 50 for war crimes. This approach is useful, as early experience has demonstrated that states may incorporate crimes in different ways (with broader or narrower definitions), or not at all.<sup>115</sup> The coding for the sub-crimes follows the standard protocol for this project and measures the similarity between domestic legislation and the language of the relevant Rome Statute crime: 0 reflects an absence of the particular provision, 0.5 denotes partial incorporation, and 1 indicates its full inclusion in domestic law. In cases where the domestic law is broader than the Rome Statute wording—for example, including additional war crimes not contained in the Statute<sup>116</sup>—the domestic provision is coded as 1, provided that it encompasses all features of the ICC standard. These are then composed into a single score reflecting overall national implementation of each genus of crimes: 0 denotes incorporation of less than 50% of the individual indicators, while 0.5 is given for 50-75%, and 1 for greater than 75% incorporation. It is this latter aggregate measure that is included in the main ICC compliance dataset. Because the Court will not gain jurisdiction until at least 2017, the crime of aggression is excluded from this analysis.

<sup>110</sup> Rome Statute, Article 28(a). See also ICCLR, *International Criminal Court*, 72-73 and 86-89.

<sup>111</sup> Regarding the grounds for excluding criminal responsibility, see Rome Statute, Articles 31 and 33; and ICCLR, *International Criminal Court*, 89-91.

<sup>112</sup> Rome Statute, Article 33. See also Ambos, “Superior Responsibility.”

<sup>113</sup> Lee, “States’ Responses,” 4 and 44; Terracino, “National Implementation of ICC Crimes,” 422.

<sup>114</sup> Van den Wyngaert and Dugard, “Non-Applicability of Statute of Limitations,” 886; La Haye, *War Crimes*, 165-166.

<sup>115</sup> Terracino, “National Implementation of ICC Crimes,” 423 and 428-438.

<sup>116</sup> As with Argentina, Germany, and the Netherlands. Terracino, “National Implementation of ICC Crimes,” 424-5.

### *Genocide (GENO)*

This aggregate measure is composed of six sub-indicators—the chapeau clause laying out the operative features of “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” and the five constituent crimes—encompassing the crime of genocide as contained in Article 6 of the Rome Statute. Some states and commentators have argued that national jurisdictions may address the genocide crimes via existing “normal” statutory categories like murder, rape, and so on. However, this approach is problematic because it fails to capture the particular normative opprobrium attached to acts that by their nature are targeted against specific identifiable groups. It is this mental element of *intent* that is the key to the specific nature of genocide as a core crime, and what distinguishes acts as especially heinous. In order to be fully compliant states must incorporate the specific conception of genocide as defined in the Rome Statute; reliance on existing domestic crimes is insufficient.<sup>117</sup>

### *Crimes Against Humanity (HUMAN)*

“HUMAN” is an aggregate indicator composed of 12 sub-indicators constituting the various elements of crimes against humanity, as well as the conditioning criteria that the acts were “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” as contained in Article 7 of the Rome Statute.<sup>118</sup> These latter features are what transform “ordinary” crimes into more particular crimes against humanity. As above, a separate dataset details each sub-indicator, and the main indicator is a composite of these. While the Rome Statute reflects existing statutory and customary international law it also includes new categories, particularly with respect to sexual crimes.<sup>119</sup> Indeed, as Lee notes, the absence of a prior treaty codifying crimes against humanity means that “Article 7 may... be regarded as creating an autonomous regime.”<sup>120</sup> In this respect, state compliance—via domestic incorporation—is a good indicator of the normative status of these crimes and, by extension, the influence the Rome Statute is having on the progressive extension of international humanitarian and criminal law.

### *War Crimes (WAR)*

“WAR” is an aggregate measure composed of 50 sub-indicators encompassing all elements as contained in Article 8 of the Rome Statute. In particular, war crimes are defined as those acts (a) occurring during a recognised armed conflict and that (b) constituted significant violations of the established laws governing warfare.<sup>121</sup> The Statute by and large does not create new crimes but instead brings existing laws of war into a single, more comprehensive and precise, document. The incorporation of war crimes as detailed in the Rome Statute thus provides a useful means of assessing the influence of the ICC in consolidating these expectations.

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<sup>117</sup> Lee, “States’ Responses,” 25. Cassese notes that the Rome Statute incorporates word-for-word the language in Article II of the Genocide Convention, but is less expansive than Article II of the Convention (for example, by not including conspiracy to commit genocide as a crime). Cassese, “Crimes Against Humanity,” 347.

<sup>118</sup> Rome Statute Article 7.1. Lee, “States’ Responses,” 26-27; Cryer, *Prosecuting International Crimes*, 253-260.

<sup>119</sup> See Byron, *War Crimes and Crimes Against Humanity*, 224-225 and 258-260; Cassese, “Crimes Against Humanity,” 373-377; Glasius, *International Criminal Court*, 77-90; and Bedont and Hall Martinez, “Ending Impunity for Gender Crimes.”

<sup>120</sup> Lee, “States’ Responses,” 26.

<sup>121</sup> Rome Statute Articles 8.2(a-c) and (e). Regarding the nexus with an armed conflict, see Byron, *War Crimes and Crimes Against Humanity*, 14-16. Concerning gravity, see Bothe, “War Crimes,” 380. For a detailed assessment of each constituent crime and its relationship to existing statutory and customary international law, see Byron, *War Crimes and Crimes Against Humanity*, 21-187. Note, however, that unlike for genocide and crimes against humanity, this dataset does not include the four chapeau paragraphs for Articles 8(a)-(c) and (e).

### *Obligation to Cooperate (COOP)*

This is a generic measure of whether a state has incorporated a legal recognition of the obligation to cooperate with Court requests, though this does not require that the state adopt legislation or follow a standardized procedure.<sup>122</sup> This is a useful indicator nonetheless, since it indicates political support for the cooperation norm, and removes potential barriers that may be present in the absence of clear legal mechanisms.<sup>123</sup> Unlike core crimes or modes of liability that frequently pre-date the Rome Statute, provisions relating to cooperation are specifically directed towards treaty members, and so almost entirely exclude non-party states.

### *Status of Court Officials (APIC)*

Article 48 of the Rome Statute requires that all states provide adequate recognition, in their domestic law, of the special status of the Court and its officials on their national territory.<sup>124</sup> While this can often be accomplished via amendments to existing laws, a more complete protocol has been developed in the form of a stand-alone Agreement on the Privileges and Immunities of the International Criminal Court (APIC).<sup>125</sup> State recognition of the special rights and duties of ICC officials is operationalized in this dataset via formal acceptance of the APIC: 1 denotes ratification, 0.5 for signature, and 0 for no action taken. Data is derived from the most recent CICC tally (current as of May 5, 2011).<sup>126</sup> States that have not ratified the APIC but *have* included parallel language in their national implementing legislation are coded as compliant in the same manner as other indicators derived from the NILD. These instances are noted in the dataset.

### *Facilitating Court Operations (AIDE)*

This indicator measures state progress in criminalizing the obstruction of Court activities by individuals or groups with respect to investigations, collection of evidence (including access to witnesses), and the like.<sup>127</sup> Failing to adopt and apply fully compliant procedural rules represents a likely way that State Parties may seek to avoid the full range of their obligations under the Rome Statute.

### *Arrest and Surrender (ARREST)*

Articles 59 and 89 require that States Parties (and third party states subject to ICC jurisdiction) comply with requests from the Court for the arrest and surrender of suspects.<sup>128</sup> To be fully compliant, states must include explicit provisions for facilitating such requests in their implementing legislation; the precise manner of these procedures is left to the discretion of the state.<sup>129</sup> The obligation to turn over nationals to an international body is a particularly hard case for normative change since this provision

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<sup>122</sup> Rome Statute, Article 88. See Ciampi, “Other Forms of Cooperation” and “The Obligation to Cooperate.”

<sup>123</sup> Indeed, as Bekou has pointed out, “a state cannot use the absence of national procedures as an excuse for non-cooperation.... As it is unlikely that a state would have legislation in place that would be completely in line with the Statute requirements, Article 88 serves as a gateway to all those provisions that need to be incorporated.” Bekou, “Case for Review of Article 88,” 470.

<sup>124</sup> Herve Ascensio, “Privileges and Immunities,” 289-295.

<sup>125</sup> Assembly of States Parties, *Agreement on the Privileges and Immunities*.

<sup>126</sup> Coalition for the International Criminal Court, *Ratification/Accession and Signature of the Agreement on the Privileges and Immunities*.

<sup>127</sup> Rome Statute, Article 70.

<sup>128</sup> This duty has been described as “one of the cornerstones on which the Rome Statute rests.” Swart, “Arrest and Surrender,” 1640.

<sup>129</sup> ICCLR, *International Criminal Court*, 33-4 and 37-8.

is antithetical to the prior law in many states. At the same time, in most states existing procedures for inter-state extradition are too cumbersome to deal adequately with the ICC surrender process, and streamlined procedures need to be enacted to specifically address ICC requests.<sup>130</sup> Importantly, therefore, the Statute explicitly regards surrender as distinct from the established practice of extradition (which governs the transfer of individuals between states), and provides no grounds for refusing an ICC surrender request.<sup>131</sup> In the interest of maintaining a more efficient dataset, the obligation relating to provisional arrest found in Article 92 is not included in this indicator.

#### *Provision of Documents (DOCS)*

Articles 93(d) and (i) enumerate state responsibilities with respect to the provision of records and documents related to prospective and on-going Court investigations. For reasons of efficiency and parsimony, a variety of other important aspects of state cooperation—including the protection of victims and witnesses and the identification, tracing, freezing of assets from crimes<sup>132</sup>—are not included here.

#### *Enforcement of Sentences (ENFORCE)*

This indicator assesses the legal capacity of a state, via formal procedures, to accept individuals convicted at an ICC trial and incarcerate these persons in their own national prison system. These processes are outlined in Articles 103 and 109 of the Rome Statute. As the Court does not possess its own permanent detention facility, the responsibility for enforcing sentences falls on states. Yet as Article 103 makes clear, this is a voluntary commitment,<sup>133</sup> albeit one that speaks to the willingness to expend material resources in support of the Court. States may indicate their intention to receive prisoners through their domestic implementing legislation and/or the conclusion of an Enforcement of Sentences Agreement with the Court.<sup>134</sup>

#### Composite Score (COMPScore)

This aggregate measure reflects the combined score of the preceding 12 indicators. This provides a “snapshot” of state compliance with core treaty features across the entire state system, judged on a standardized set of measures.

A table summarizing the indicators and coding sources is available from the author upon request.

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<sup>130</sup> Lee, “States’ Responses,” 2.

<sup>131</sup> Rome Statute, Article 102(a) and (b). On the latter point, see ICCLR, *International Criminal Court*, 37-38; and Robinson, “Rome Statute and Its Impact on National Law,” 1852-1855.

<sup>132</sup> Rome Statute, Article 93.1(j) and (k), respectively.

<sup>133</sup> Kress and Sluiter, “Imprisonment,” 1787.

<sup>134</sup> In order to maintain consistency in the application of justice, State Parties should adopt implementing legislation which broadly follows the Rome Statute sentencing guidelines (Article 77). However, the Statute does not impose a specific set of legally binding punishments for particular crimes, and so this dataset does not attempt to measure individual state policies concerning appropriate penal sanction.



