Domesticating the ICC Statute: A global perspective

'Domesticating the ICC Statute: A Global Perspective'

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1. Introduction

In early 2022, Italy announced the constitution of an expert committee in charge of drawing a national 'code of international crimes', with the aim of enacting domestic legislation which would ensure the criminal repression of conducts criminalized in international law, like those listed and defined in the Rome Statute of the International Criminal Court (ICC).[1] Italy's move is not a novelty, since several states have engaged in similar initiatives in the past, in different forms.[2] The phenomenon of adopting national criminal legislation which mirrors or implements international legal provisions can be labelled as 'domestication'.[3] In this short contribution, I aim to clarify whether states are in fact obliged under international law to put in place such domestication initiatives with respect to the ICC Statute specifically, and whether they face any constraints in this effort. In so doing, I will offer examples of ICC Statute 'domestication' practices, reflecting on their compatibility with international law, on their strengths and on their weaknesses. It is hoped that such analysis may be of assistance for states and individuals engaged in comparable initiatives currently or in the future.

At the heart of the domestication issue lie the rules on the relationship between international law and domestic law. In this context, one must remember that the ICC Statute does not exist in isolation: States Parties to the ICC are bound not only by the Statute, but also by other

[1] Italy, Ministry of Justice, Decree 22 March 2022, *Commissione per l'elaborazione di un progetto di Codice dei Crimini internazionali* ('Commission on the elaboration of a draft Code of International Crimes'), at https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC372746&previsiousPage=mg_1_36_0 (visited 2 May 2022).

[2] For instance, see Germany, *Völkerstrafgesetzbuch* 'Code of Crimes against International Law'), 26 June 2002 (Federal Law Gazette I, p. 2254), as last amended by Article 1 of the Act of 22 December 2016 (Federal Law Gazette I, p. 3150); or the relevant provisions in the implementing legislation of, inter alia, the United Kingdom, *International Criminal Court Act 2001*, c. 17 ('UK ICC Act 2001'); South Africa, *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (Gazette 23761 of 16 August 2002); Uganda, *The International Criminal Court Act 2010*, Acts Supplement n. 6 to the Uganda Gazette n. 39, Col. CIII, 25 June 2010.

[3] As it is done, for instance, by Lisa J Laplante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 John Marshall Law Review 635.

applicable rules of treaty and customary international law, which may steer state practice in the implementation of the ICC Statute and international criminal law more in general. The ICC Statute itself, moreover, is an international treaty: thus, rules and principles of international law of treaties may also impact on practices of domestication.

2. The lack of a general obligation to 'domesticate' the ICC Statute

There is no general obligation for States Parties to enact domestic legislation which implements or conforms to provisions of the ICC Statute — including those concerning the crimes under ICC jurisdiction.[4] Should States Parties decide to embark in such initiatives, they would still enjoy a good measure of discretion in deciding how to formulate the relevant legislation.

This is not to say that specific ICC Statute provisions do not demand domestic implementation. If States Parties are to comply with their duty to cooperate fully with the Court (Article 86), pursuant Article 88 ICC Statute, they must ensure that national law makes appropriate procedures available under their national law.[5] The ICC Statute also provides that each State Party must make offences against the administration of justice referred to in Article 70 punishable under national law, when committed on that state's territory, or by one of its nationals.[6]

Moreover, all states (not necessarily just States Parties) may want to align certain provisions of national legislation to the standards provided in the ICC Statute, for reasons of convenience. For instance, to ensure that evidence collected by national authorities can be transferred to and used before the ICC, states must ensure that national provisions on rights of suspects during investigations ensure the same level of protection as those contained in the Statute. This is the avenue followed, inter alia, by the United Kingdom (UK).[7]

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[4] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (Oxford University Press 2020) 181, § 464.

[5] See also Olympia Bekou and Katerina Katsimardou Miariti, 'Implementing the Rome Statute of the International Criminal Court' (Case Matrix Network 2017) 81, 84 <https://www.legal-tools.org/doc/e05157/>.

[6] Article 70(4), ICCSt.

[7] UK ICC Act 2001, ss. 28, 29 and 30 on questioning and taking or production of evidence. Robert Cryer, 'Implementation of the Criminal Court Statute in England and Wales' (2002) 51 International & Comparative Law Quarterly 733, 735.

And, of course, it is in states' interest to make sure that national criminal law allows for the investigation and prosecution of cases involving conduct which is also under the jurisdiction of the ICC, if they want to be the authority actually exercising jurisdiction over such cases: if not — in the event that the ICC is seeking to exercise its own jurisdiction over the same case — the case may be found to be admissible due to the inability of the state in question to carry out the investigation or prosecution in accordance with Article 17 ICC Statute.[8] One may wonder whether it could be possible to rely on customary international law for national prosecutions in the absence of relevant domestic legislation, without the need to embark into a legislative 'domestication' process. However, reliance on customary international law alone may at times be contrary to relevant constitutional and human rights protections, including the principle of legality.[9]

The lack of a general obligation to 'domesticate', of course, does not imply that the extent of States Parties' discretion is unfettered. In fact, considering that the ICC Statute is a treaty, rules of international law of treaties must guide States Parties' when adopting national legislation in

[8] In this sense, among others, Jann K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 Journal of International Criminal Justice 86, 88–89; Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 Journal of International Criminal Justice 421, 435–437; Olympia Bekou, 'Crimes at Crossroads: Incorporating International Crimes at the National Level' (2012) 10 Journal of International Criminal Justice 677, 678–679.

[9] For instance, resort to customary international law alone was implicitly excluded by the UK House of Lords in *R. v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte* [No.3] [1999] 2 WLR 827. Lord Millet, at 912, refers to this as the opinion of his fellow lord justices. The position is critiqued in Roger O'Keefe, 'Customary International Crimes in English Courts' (2002) 72 British Yearbook of International Law 293. However, in *R v Jones* [2006] UKHL 16, Lord Bingham, whilst rejecting that a crime recognised in customary international law may be automatically assimilated into domestic criminal law (§ 23), considered that such assimilation has already occurred, in the United Kingdom, for war crimes (§ 22). See also the opinion of Lord Hoffmann, § 59. Of relevance, s. 65A of the UK ICC Act 2001 provides that war crimes, crimes against humanity and genocide are, retroactively, offences in the law of England and Wales, and of Northern Ireland, from 1 January 1991. The date was chosen because, signposting the beginning of the temporal jurisdiction of the International Criminal Tribunal for the former Yugoslavia, it gives a strong hint that such offences had already been criminalized in international law. Robert Cryer and Paul David Mora, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?' (2010) 59 International & Comparative Law Quarterly 803, 805. However, s. 65B also provides that crimes against humanity and war crimes committed in non-international armed conflict before the entry into force of the UK ICC Act 2001 will be considered to be offences in the relevant domestic law only if 'at the time the act constituting that crime was committed, the act amounted in the circumstances to a criminal offence under international law.' Similarly, a reference to customary law has been incorporated in the *Canadian Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24., ss. 4(3), 6(3) and 7(5).

matters of relevance to the Statute. At least three rules come to mind in this respect. First — pursuant to the rule enshrined in Article 18 of the Vienna Convention on the Law of Treaties (VCLT), which according to some has achieved customary status and would thus apply to the ICC Statute[10] — until the Statute enters into force for a particular state who has signed it or otherwise expressed its consent to be bound, such state is obliged not to defeat the treaty's object and purpose with its own conduct. Secondly, States Parties to the ICC Statute must behave in good faith in the performance of the treaty, in accordance with a rule of customary nature reflected in Article 26 VLCT.[11] Thirdly, even at the stage of domestic implementation, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, in line with customary rules on treaty interpretation contained in Article 31 VCLT.[12] Considering these three rules together, it appears that any domestication initiative must be carried out in good faith and be compatible with the object and purpose of the ICC Statute. Whilst being conscious that it would be an extreme case, of which luckily I could find no example in practice, it could be a violation of these rules if a State Party adopted a crime definition that manifestly abuses the labels used in the Statute to the point that it may actually favour the commission of 'unimaginable atrocities'.[13] For instance, this could happen if the definition of crimes against humanity is maliciously extended to include forms of non-violent political dissent and abused

[10] Hinting that the provision possesses customary status, Dino Kritsiotis, 'The Object and Purpose of a Treaty's Object and Purpose' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 271–272. See also Laurence Boisson de Chazournes, Anne-Marie La Rosa and Makane Moise Mbengue, 'Article 18 – Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry into Force' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol I (Oxford University Press 2011) 372–383. At 382-383, the authors conclude that 'Article 18 reflects a principle of international law to which States consider themselves bound either by an obligation following from the signature of a treaty or by an existing obligation in general international law independently of any signature or ratification of a legal instrument. It is, however, true that the outlines of the principle are not yet well-defined.'

[11] As convincingly concluded by Jean Salmon, 'Article 26 – Pacta Sunt Servanda' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol I (Oxford University Press 2011) 661–682.

[12] On the customary nature of such provision see, inter alia, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 6, at pp. 21-22, § 41; and Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31 – General Rule of Interpretation' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol I (Oxford University Press 2011) 817–823.

[13] Preamble, § 2, ICCSt.

to effectively deprive certain groups of their rights in a discriminatory way — what could effectively amount to the crime against humanity of persecution.

Moreover, any domestication effort must be consistent with at least two other sets of rules of international law. First, the grounds upon which the relevant state establishes and will exercise its own national criminal jurisdiction need to be consistent with applicable rules of treaty and customary law, for instance those allowing for the exercise of jurisdiction over persons who are neither nationals of the proceeding state, nor did commit a crime on the territory of such state.[14] Second, national criminal provisions must abide by the principle of legality as recognized under international human rights law[15] and must, thus and *inter alia*, be non-retroactive, accessible and foreseeable.[16]

3. Duties to adopt domestic legislation to ensure the repression of international crimes, beyond the ICC Statute

Even though the ICC Statute itself does not provide for an obligation to enact implementing domestic legislation, obligations to enact such legislation for crimes under the jurisdiction of the ICC may derive from other international treaties.

With respect to the crime of genocide, listed and defined in Article 6 of the ICC Statute, such obligation descends from the 1948 Genocide Convention, Article V, establishing that 'The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts

[14] For instance, a provision of this kind seems is s. 68, UK ICC Act 2001. For an overview of the rules concerning the exercise of jurisdiction based on grounds other than territoriality, see Menno Kamminga, 'Extraterritoriality', *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2020) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040> accessed 3 May 2022.

[15] E.g. International Covenant on Civil and Political Rights, Art 15; European Convention on Human Rights, Art 7; African Charter of Human and Peoples' Rights, Art 7(2); American Convention on Human Rights, Art 9.

[16] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 359; Talita de Souza Dias, 'Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?' (2019) 19 Human Rights Law Review 649. The European Court of Human Rights has stressed this point, inter alia, in *Sunday Times v United Kingdom*, App no 6538/74, 26 April 1979 [49]; *Korbely v Hungary*, App no 9174/02, 19 September 2008 [70]; *Kononov v Latvia*, App no 36376/04, 17 May 2010 [185].

enumerated in article III' — namely: conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide. Considering the formulation of Article V ('persons guilty of genocide') it appears that domestic legislation is required to maintain the label of genocide for the relevant offence: proscribing the relevant conduct under a different criminal label would not be enough.

States Parties to the ICC also have an obligation to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches'[17] of the 1949 Geneva Conventions, a category of war crimes which is the object of Article 8(2)(a) ICC Statute. In this case, unlike for genocide, there seems to be no explicit requirement that the relevant domestic legislation resorts to the crime label of 'war crimes' or 'grave breaches': what matters is that 'effective penal sanctions' are stipulated in domestic legislation.[18] Of note, Article 8 ICC Statute provides a list of war crimes which is much longer than those amounting to grave breaches of the 1949 Geneva Conventions, for which technically there is thus no treaty obligation to adopt domestic legislation. Nonetheless, domestic legislation covering *all* war crimes may be necessary as a matter of customary international law. According to the study of customary international humanitarian law authored by the International Committee of the Red Cross (ICRC), Rule 158, states must indeed 'investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'[19] The only way for states to

[17] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Art 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Art 50; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art 146.

[18] Often, what matters is not the exact charge under which an internationally criminalized conduct is prosecuted domestically, but the adequacy of domestic law provisions to reflect the nature and gravity of the conduct and to avoid impunity for it. This is the direction chosen by the ICC itself, for instance, when making its complementarity assessment. See, e.g., Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Gaddafi* (ICC-01/11-01/11-344-Red), Pre-Trial Chamber I, 31 May 2013, §§ 85-88, explaining that the legal characterization is not important if the criminal proceedings cover the same conduct. See also Werle and Jessberger (n 5) 181, § 464, fn 1125. Expressing scepticism on this point, Knut Dörmann and Robin Geiβ, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 703, 710.

[19] International Committee of the Red Cross (ICRC), *IHL Database – Customary IHL*, Rule 158, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 (visited 2 May 2022).

comply with such customary obligations is to equip themselves with adequate national law. Furthermore, it must be noted that the obligation to enact *effective* penal sanctions arguably entails the need to ensure that applicable domestic legislation excludes statutes of limitations, the defence of superior orders and amnesties for grave breaches of the Geneva Conventions.[20]

Crimes against humanity, as it is well-known, are not the subject of any comprehensive treaty regime at the time of writing. Should such a treaty be adopted and entered into force, an obligation to enact relevant domestic legislation could be inserted there. For instance, the United Nations International Law Commission's draft articles on crimes against humanity, which could be the starting point for a comprehensive treaty on the subject, provide that each state 'shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law'.[21] Moreover, despite the lack of a comprehensive treaty, conduct which could amount to specific crimes against humanity — or to other crimes under the ICC jurisdiction — has been the object of specific treaties which establish an obligation to enact relevant domestic criminal legislation. Such is the case, for instance, of the international conventions against apartheid, torture and enforced disappearance.[22]

With respect to the crime of aggression, finally, no discrete obligation to enact domestic legislation appears to exist, even though several states have implemented such legislation.[23]

Of note, the ICC Statute Preamble recalls that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes,'[24] implying the need to adopt relevant national legislation covering conduct which would amount to international

[20] ICRC, *Updated Commentary on the Third Geneva Convention* (2020), Art 129, § 5111.

[21] Draft articles on Prevention and Punishment of Crimes Against Humanity, Yearbook of the International Law Commission, 2019, vol. II, Part Two, Art 6.

[22] International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, Art 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, Art 4; International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, Art 4.

[23] Some examples, including inter alia Luxembourg, are discussed in Bekou and Katsimardou Miariti (n 6) 45–46; Meagan Wong, 'Germany and Botswana Ratify the Kampala Amendments on the Crime of Aggression: 7 Ratifications, 23 More Ratifications to Go!' (*EJIL: Talk!*, 10 June 2013) <https://www.ejiltalk.org/germany-and-botswana-ratify-the-kampala-amendments-on-the-crime-of-aggression-7-ratifications-23-more-ratifications-to-go/> accessed 3 May 2022.

[24] Preamble, § 6, ICCSt.

crimes,[25] including crimes against humanity and the crime of aggression, even if not necessarily under those criminal labels.

4. Routes towards 'domestication' of the ICC Statute

States, in light of the above, face a tension when it comes to domestication of the ICC Statute: on one side, they have obligations to enact national legislation implementing certain parts of the Statute, and incentives to pass legislation covering an ampler amount of issues than they are legally obliged to; on the other, they enjoy a measure of discretion as to how to proceed to domestication, even if with the constraints posed inter alia by the law of treaties, the rules on jurisdiction, and international human rights law. Such tension may result in different routes leading to 'domestication', of which it is possible to identify at least four — often pursued not alternatively to each other but 'mixing and matching' between them.

First, an ICC State Party may decide not to adopt specific legislation to incorporate ICC Statute provisions, believing that the existing domestic criminal law is already sufficient to deal with the relevant issues. This is the avenue chosen, for instance, by the United Kingdom with respect to offences against the administration of justice[26] and to the rules on the general part of criminal law, including modes of liability and defences.[27] The advantage of this approach is that no additional legislation is needed, and the system is simply assessed to be already sufficiently equipped to deal with the issues in question as they may arise in relation to the crimes in question. However, as a disadvantage, some elements of the applicable domestic law may not fully reflect the distinct nature and gravity of the crimes under the ICC jurisdiction. Moreover, certain defences recognized in the ICC Statute (for instance duress as a defence to murder or superior orders) may not be available to defendants in the relevant domestic law, resulting in a disparity of treatment between the ICC and the domestic system in question.[28]

[25] Kleffner (n 9) 92.

[26] UK ICC Act, s. 54, which however clarifies what domestic provisions are applicable.

[27] UK ICC Act, s. 56, providing that, in determining whether an offence has been committed, the court shall apply the relevant principles of the law of England and Wales. However, new rules are adopted to accommodate the definition of intent for offences provided in the ICC Act (s. 66, corresponding to Art 30 ICC Statute) and for superior responsibility (s. 65, corresponding to Art 28 ICC Statute).

[28] As noted in Robert Cryer and Olympia Bekou, 'International Crimes and ICC Cooperation in England and Wales' (2007) 5 Journal of International Criminal Justice 441, 448–449.

Secondly, an ICC State Party may decide to enact domestic legislation that makes a simple reference, a *renvoi*, to the relevant ICC Statute provisions, as done by the UK with respect to the definition of crimes listed in Article 5 of the ICC Statute.[29] Such form of incorporation has the advantage of being relatively straightforward, and of keeping national legislation automatically up to date with any amendments to the original ICC Statute wording. Nonetheless, it may make it difficult to provide for differentiated penalties for the long list of crimes — often very different from each other in character and gravity — to which reference is made. Moreover, it may engender issues of compatibility with already existing domestic law.[30] Considering how the law of war crimes is intrinsically related to international humanitarian law, furthermore, national courts of states choosing this form of domestication will need to consider the existence of any reservations or declarations made by the state in question to the relevant treaties.[31]

Thirdly, a State Party to the ICC Statute may decide to replicate *verbatim* the relevant provisions of the ICC Statute into its own national legislation, as for instance Switzerland did with respect to crimes against humanity in Art 264a of its own Criminal Code. Such an approach may be seen as maximizing accessibility and foreseeability for individuals, addressing concerns or the respect of the principle of legality: individuals would be able to consult the relevant legal provisions in *both* national law and the ICC Statute, doubling the chances for them to acquire knowledge. Nevertheless, it may lead to the introduction in national law of language and offence structures which are not commonly used and may, thus, make it more difficult to fully comprehend their meaning.

Fourthly and finally, a State Party to the ICC Statute may domesticate its provisions by adopting legislation which partly reflects the ICC Statute language, but also presents modifications aimed to adapt that language to the specificities of the national legal system, or that are aimed at addressing specific national policies and strategies.[32] Modifications, in this respect, may take many different shapes. For example, the definition of protected groups for the purposes of the crime of genocide may be expanded, inter alia by adding social and political

[29] UK ICC Act, ss. 50-51.

[30] For instance, in the United Kingdom, certain war crimes had already been introduced in domestic legislation by effect of the Geneva Conventions Act, s. 1(A)(b): how they relate to the war crimes listed and defined in the ICC law is to be seen.

[31] For instance, see the UK ICC Act, s. 50(4).

[32] Werle and Jessberger (n 5) 184, § 474.

groups[33] or 'groups defined by any other arbitrary criterion'.[34] Or, as another example, war crimes originally conceived for international armed conflict may be made equally criminal if carried out in a non-international armed conflict.[35] Moreover, new offences related to core international crimes may be created, for instance by extending the offence of incitement not only to genocide but also to crimes against humanity and war crimes,[36] or by punishing the imposition of distinctive signs upon members of a group protected against genocide, especially if such signs are imposed with a view to prepare the partial or total destruction of the group.[37] Of course, it may happen that a modification effectively makes the definition of the crimes in question more demanding: for instance, the United States — even though not a party to the ICC Statute — adopted a definition of genocide which requires mental harm to amount to permanent impairment of mental faculties, arguably more than what would be required by the case law of the ICC and other international criminal tribunals.[38]

The pros of this 'tailored implementation' approach include a better chance to coordinate the ICC Statute rules with the peculiarities of the national legal system in which they are transplanted, and an enticing possibility to drive changes in customary international criminal law — which, after all, may well diverge from the ICC Statute. A disadvantage of this approach, on the other side, would be that if crime definitions are made broader, this could result in a dilution of the stigma usually associated with the crime in question (for instance, for genocide). As another weakness of such approach, issues of judicial cooperation may arise if different definitions of the same crime exist across different national jurisdiction. Modifying crime definitions in domestic law, moreover, may come with certain knock-on effects, as they relate inter alia to the granting of refugee status,[39] or to the eligibility for certain offices, since some vetting processes may exclude personnel who have engaged in international crimes.

[33] Art 264 Swiss Criminal Code.

[34] '*groupe déterminé à partir de tout autre critère arbitraire*': Art 211-1 French Criminal Code (own translation).

[35] As done by Switzerland, Art 264b of the Criminal Code and Art 110 of the Military Criminal Code, if the nature of the offence does not exclude it ('*si la nature de l'infraction ne l'exclut pas*').

[36] UK ICC Act, s. 55(1)(b). Cryer and Bekou (n 29) 446.

[37] As done by Italy not when implementing the ICC Statute, but when adopting national legislation enacting the crime of genocide: law n. 962, 9 October 1967, Art 6.

[38] 18 US Code, § 1091(a)(3). See Bekou (n 9) 682.

[39] For instance, in application of the 1951 Refugee Convention, Art 2(F), establishing that the provisions of the convention do not apply to persons for whom there are serious reasons for considering that 'they

Regarding forms by which a domestication initiative is carried out, this can be done by either a single comprehensive legislative act, or by amending existing national legislation gradually. The latter could be done in different moments, ensuring quicker action on more urgent matters.[40] The former, on the other side, has the advantage of avoiding fragmentation and ensuring consistency.[41]

5. Conclusion

This short contribution has sought to highlight that, whilst the ICC Statute itself does not provide for a general obligation to enact national implementing legislation, such legislation is often demanded by other rules of conventional and customary international law, including rules on war crimes, genocide, and certain forms of conduct which may amount to crimes against humanity. And, whilst states who decide to adopt national legislation to implement the ICC Statute enjoy discretion on the specific avenue to follow, such discretion is limited by the operation of rules of the international law of treaties, of those on the establishment and exercise of jurisdiction, and of international human rights law. The legal framework they create is the basis for assessing the lawfulness of any past initiative of 'domestication' of the ICC Statute, and for guiding any present or future such initiatives.

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have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.'

[40] For instance, Switzerland first passed legislation on cooperation with ICC (*Loi fédérale sur la coopération avec la Cour pénale internationale*, RO 2002 1493, 22 June 2001), then modified the substantive criminal law about a decade later (*Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale*, RO 2010 4963, 18 June 2010).

[41] A good example being the UK ICC Act 2001.

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