Complementarity's Gender Justice Prospects and Limitations

Examining normative interactions between the Rome Statute and national accountability processes for sexual violence crimes in Colombia and the Democratic Republic of Congo

Dieneke de Vos

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 12 October 2017

European University Institute
Department of Law

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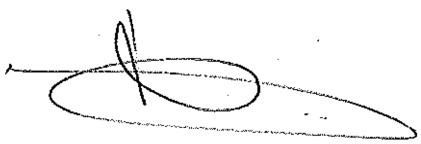

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SUMMARY OF THESIS

Despite the centrality in the Rome Statute of both the principle of complementarity and gender justice norms, little research exists connecting these two core ideas. Using Harold Koh's transnational legal process theory, this thesis seeks to fill that gap by analysing normative interactions between the Rome Statute and national accountability processes for sexual violence crimes in Colombia and the Democratic Republic of Congo (DRC). It examines how, why and in what way the Rome Statute's gender justice accountability norms and standards have been domesticated in these two countries, and what this reveals about (positive) complementarity as a tool in the fight against impunity for sexual violence. This analysis starts from a doctrinal analysis of gender justice pressure points in the ICC's admissibility framework, but also seeks to investigate the practical application of (positive) complementarity in both Colombia and the DRC. This analysis ultimately demonstrates that, while the existence of the ICC (as an institution) is important, most developments around accountability for sexual violence, while often grounded in the idea of complementarity and linked to the Rome Statute, happen through the actions of other actors. The ICC's constitutive documents and the norms and standards around accountability for sexual violence enshrined therein, on the other hand, have provided an important normative impetus for these developments, particularly where catalysed by civil society organisations and domestic political actors acting as norm entrepreneurs. This thesis thus aims to contribute to illuminating both the prospects and the limitations of (positive) complementarity as applied to the fight against impunity for sexual violence crimes.

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"De juiste keuze, is de keuze waar je energie van krijgt."
– Margreet Boesveldt, geschiedenisdocent, Baarnsch Lyceum, 2000-2006

As a fourteen-year-old high school student in the Netherlands, I never would have guessed that my history class would turn out to play such an important role in shaping my future career choices. I didn't know it then, but it was ultimately two research projects in Ms Boesveldt's class in Baarn – one on the Khmer Rouge in Cambodia, and one on Aletta Jacobs, the first woman to become a doctor and an avid women's rights advocate in the Netherlands – that have shaped me and my career choices. I owe her a great debt, for inspiring me all those years ago and when I did not even know it myself, to seek a path that combines international criminal law and women's rights. Professor Marjolein van den Brink's encouragement years later in Utrecht really cemented my interest in this field, which ultimately led me to writing this thesis. I also wish to thank Professor van den Brink for her continued encouragement all these years.

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In memory of Alina Maria Vlad, who left this world much too soon, but leaves behind a legacy of love, laughter, incredible strength, and kindness.

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LIST OF ACRONYMS

ABA ROLI	American Bar Association – Rule of Law Initiative
AFDL	*Alliance des forces démocratiques pour la liberation de Congo* (Democratic alliance forces for the liberation of Congo)
ASF	*Avocats Sans Frontières* (Lawyers without borders)
ASP	Assembly of States Parties
AUC	*Autodefensas Unidas de Colombia* (Colombian self-defence forces)
BACRIM	*Bandas Criminales* (criminal gangs)
CAR	Central African Republic
CCAJAR	*Collectivo Abogados Jose Alvear Restrepo* (Colombian Lawyers Collective)
CCVS	*Coalition contre les violences sexuelles* (DRC Coalition against sexual violence)
CEDAW	Convention to Eliminate all forms of Discrimination against Women
CICC	Coalition for the International Criminal Court
CIDA	Canadian International Development Agency
CNDP	*Congrès national pour la défense du people* (National congress for the defence of the people)
CPRDC	*Commission permanente de réforme du droit congolais* (Permanent commission for the reform of Congolese law)
DINAC	*Dirección de Analysis y Contexto* (Directorate of analysis and context)
DRC	Democratic Republic of Congo
ECCHR	European Center for Constitutional and Human Rights
ELN	*Ejército de Liberación Nacional* (National liberation army)
EoC	Elements of the Crimes
EPL	*Ejército Popular de Liberación* (Popular liberation army)
EU	European Union
FAB	*Forces armées burundaises* (Burundian armed forces)
FARC-EP	*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (Revolutionary Armed Forces of Colombia – People's Army)

FARDC	*Forces Armées de la République Démocratique du Congo* (Congolese Armed Forces)
FAZ	*Forces armées zaïroises* (Armed forces of Zaire)
FIDH	International Federation of Human Rights
FRPI	*Force de résistance patriotique en Ituri* (Patriotic resistance force of Ituri)
HRW	Human Rights Watch
HWG	The Hague Working Group
ICC	International Criminal Court
ICL	International Criminal Law
ICS	International Cooperation Section
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IRC	International Rescue Committee
JCCD	Jurisdiction, Complementarity, and Cooperation Division
JEP	*Jurisdicción Especial para la Paz* (Special Jurisdiction for Peace)
JPL	*Ley de Justicia y Paz* (Justice and Peace Law)
LFP	*Marco Jurídico para la Paz* (Legal Framework for Peace)
LRA	Lord's Resistance Army
M23	*Mouvement du 23 Mars* (Movement of 23 March)
MLC	*Mouvement pour la libération du Congo* (Movement for the liberation of Congo)
MONUC	*Mission de l'organisation des Nations Unies en RDC* (UN Organisation Mission in DRC, 1999 – 2010)
MONUSCO	*Mission de l'organisation des Nations Unies pour la Stabilisation en RDC* (UN Organisation and Stabilisation Mission in DRC, 2010 – present)
NGO	Non-Governmental Organisation
NYWG	New York Working Group
OSISA	Open Society Institute for Southern Africa
OSJI	Open Society Justice Initiative
OTP	Office of the Prosecutor

PAJ	Political, Administrative, and Judicial Committee
PGA	Parliamentarians for Global Action
RCD	*Rassemblement congolais démocratique* (Rally for Congolese democracy)
RCD-KML	*Rassemblement congolais démocratique/Kisangani, Mouvement de Libération* (Rally for Congolese democracy/Kinsangani, Movement of liberation)
RFAs	Requests for Assistance
RPE	Rules of Procedure and Evidence
SAS	Situation Analysis Section
SFVS	*Synergie des femmes contre les violences sexuelles* (Women's synergy for victims of sexual violence)
SGBC	Sexual and Gender-Based Crimes
SGBV	Sexual and Gender-Based Violence
SMC	Specialised Mixed Court
TLP	Transnational Legal Process
UN	United Nations
UNAC	*Unidad Nacional de Análisis y Contextos* (Unit of analysis and context)
UNDP	United Nations Development Programme
UNEP	*Unité d'enquête et de poursuite* (Unit of investigations and prosecutions)
UNPROVIT	*Unité de protection des victimes et témoins* (Unit for the protection of victims and witnesses)
UNSRSG	UN Special Representative of the Secretary General
UNSC	UN Security Council
UPC	*Union des patriotes congolais* (Congolese patriots union)
UPDF	Ugandan People's Defence Forces
WPS	Women, Peace and Security

1

INTRODUCTION

On 17 July 1998, 120 states voted in favour of the Rome Statute, which established the International Criminal Court (ICC) with a mandate to prosecute war crimes, crimes against humanity, and genocide (and in the future aggression); the Statute entered into force four years later in July 2002. This was a watershed moment for the field of international criminal law not just because it established the first permanent international criminal court, but because of the gender sensitive nature of its mandate. In recognition of the historical barriers facing the prosecution and investigation of sexual and gender-based violence (SGBV), and following successful lobbying by feminist activists,[1] the drafters of the Rome Statute adopted a broad range of gender sensitive provisions to ensure a sustained focus within international criminal law on these crimes and to redress a history of under-enforcement. Gender sensitivity has inserted itself in the Statute in a variety of ways: it affects the substantive jurisdiction of the Court;[2] it establishes important procedural requirements, particularly regarding evidence;[3] it requires specific institutional capacity in relation to gender;[4] and, finally, it guides the Court in its interpretation of applicable laws.[5] This acknowledgement of the importance of gender for an institution like the ICC presents a significant move forward in a field that traditionally largely ignored sexual violence and the impact of gender in times

[1] For a more detailed discussion of the importance of feminist advocacy during the negotiations of the Statute, see, *e.g.*, Barbara Bedont and Katherine Hall Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court', VI *The Brown Journal of World Affairs* (1999); Marlies Glasius, 'Who is the Real Civil Society? Women's Groups versus Pro-Family Groups at the International Criminal Court Negotiations', in Jude Howell and Diane Mulligan (eds), *Gender and Civil Society: Transcending Boundaries* (Oxford: Routledge, 2005); Pam Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power', 28 *Signs* (2003).

[2] The Rome Statute criminalises not only rape, but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender-based persecution, trafficking and other forms of sexual violence as war crimes, crimes against humanity and, in some circumstances, genocide. The Elements of the Crimes provide detailed (and progressive) legal definitions for each of these crimes of sexual violence.

[3] Articles 36(8)(a)(ii), 36(8)(b), 42(9), 43(6), 68, *Rome Statute of the International Criminal Court* (18 July 2002).

[4] Rules 63(4), 70 and 71, *Rules of Procedure and Evidence*, International Criminal Court (10 September 2002).

[5] Article 21(3) confers an obligation on the Court to apply and interpret the law in a manner that is non-discriminatory, including on grounds of gender.

of armed conflict, political repression or unrest. As Patricia Sellers aptly puts it: "gender justice formed part of its teleological objective".[6]

A second innovative element in the Rome Statute is an emphasis on the shared responsibility of delivering international criminal justice: the ICC is complementary to national criminal jurisdictions. Within this framework of complementarity, states have primary jurisdiction to investigate and prosecute Rome Statute crimes. The ICC – in essence a court of last resort – can only intervene when states fail this duty, or where they are unable or unwilling to do so genuinely. Strictly speaking, complementarity is a legal test pertaining to the admissibility of cases before the ICC (also known as 'legal complementarity'). Over time, however, it has developed into a normative principle structuring and shaping the relationship between international criminal law and the national law of those States that ratified the Rome Statute (captured by the term complementarity "as a big idea", or complementarity "in its literal sense"[7]). The idea of *positive* complementarity is often said to embody this "big idea" of complementarity and refers to the way in which the ICC, within this Rome Statute 'system of justice', encourages, facilitates, or assists national authorities (directly or indirectly) to successfully and genuinely provide accountability for Rome Statute crimes in their national courts. While initially a concept used to refer specifically to the role the ICC / the Office of the Prosecutor plays, over time, positive complementarity has morphed into a broader idea capturing a range of activities and actors aimed at increasing accountability for Rome Statute crimes at a national level.

Given the importance accorded to domestic accountability processes within the Rome Statute, an important question that arises is how we can ensure that the gender justice progress in international criminal law gained with the adoption of the Rome Statute in 1998 is not lost when the heart of international criminal justice is in fact found at the national level. Positive complementarity, with its emphasis on encouraging or facilitating domestic proceedings, seems like a useful concept to explore this question. Despite the importance of this question, however, little research exists on the link between (positive) complementarity

[6] Patricia Sellers, 'Beyond a Recitation of Sexual Violence Provisions: A Mature Social Science Evaluation of the ICC - Book Discussion', *EJIL: Talk!* (20 December 2016), available at <http://www.ejiltalk.org/beyond-a-recitation-of-sexual-violence-provisions-a-mature-social-science-evaluation-of-the-icc-book-discussion/>, accessed 22 December 2016.

[7] Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013), at 340.

and the Rome Statute's gender justice sensitivity.[8] This thesis intends to fill that gap by examining (aspects of) positive complementarity in Colombia and the Democratic Republic of Congo (DRC) specifically in relation to accountability for sexual and gender-based violence. It aims to answer the following question: how, why and in what way have the Rome Statute's gender justice accountability norms been domesticated in Colombia and DRC, and what does this reveal about (positive) complementarity as a tool in the fight against impunity for sexual and gender-based violence?

Before explaining the premises of this research, however, it is important to make a brief note on the definition of the term sexual and gender-based violence used in this thesis. Sexual violence is understood to be any act of a sexual nature committed without consent, or any act that violently targets a person's sexual function. Gender-based violence is understood to mean any form of violence that targets male or female victims differently because of their gender role in society and can include using violence to punish a person for not conforming to their social (gender) role. It is important to stress that all forms of sexual violence are also forms of gender-based violence, but not all gender-based violence is necessarily sexual. For instance, the separation of women and girls from men and boys in conflict is an inherently gendered, but not necessarily sexual, practice. Take the following example: A militia group attacks a village and proceeds to separate the civilians; all men/boys of fighting age are taken away and killed whereas all the women and girls, and any men and boys who stay behind, are sexually assaulted or raped. The killing of the men/boys is an example of gender-based violence: they are seen as potential threats because of their gender. The sexual assault and

[8] Only few authors have addressed the question in a preliminary manner. See, e.g., Louise Chappell, Rosemary Grey, and Emily Waller, 'Gender and Complementarity: Bridging the Gap', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice (2nd ed)* (Cambridge: Cambridge University Press, forthcoming 2017); Louise Chappell, Rosemary Grey, and Emily Waller, 'The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia', 7 *International Journal of Transitional Justice* (2013); Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford: Oxford University Press, 2015); Amrita Kapur, 'Complementarity at Work in Unwilling States: Raising the Threshold of Accountability for Gender-Based International Crimes', *Justice for All? The International Criminal Court - a conference: 10 year review of the ICC* (2012); Amrita Kapur, 'The Value of International-National Interactions and Norm Interpretations in Catalysing National Prosecutions of Sexual Violence', 6 *Oñati Socio-legal Studies* (2016); Susana SáCouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court', 17 *Am. UJ Gender Soc. Pol'y & L.* (2009), at 344; Brigid Inder, 'Partners for Gender Justice', in Anne-Marie de Brouwer*, et al.* (eds), *Sexual violence as an international crime: interdisciplinary approaches* (Cambridge, United Kingdom: Intersentia, 2013), at 322; Patricia Sellers, 'Gender Strategy is Not Luxury for International Courts', 17 *American University Journal of Gender, Social Policy & the Law* (2009), at 22; Dieneke de Vos, 'Complementarity and case selection: exposing the vulnerability of sexual and gender-based violence in the admissibility test', in Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes (2nd Ed)* (Beijing: Torkel Opsahl Academic EPublisher, forthcoming 2017).

rape of the women, girls, and remaining men and boys is both sexual violence and gender-based violence. In this thesis, for reasons of brevity, where the term 'sexual violence' is used, this refers to violence that is *both* sexual *and* gender-based.

This thesis agrees with those authors who have argued that, from a complementarity perspective, the broader significance of the Rome Statute's gender justice principles and provisions "is their effect on the domestic practice of ICL",[9] for instance through the "alignment of domestic standards with international norms".[10] In fact, as chapter 3 argues, there are a number of gender justice pressure points within complementarity in its legal sense of admissibility that justify increased attention for sexual and gender-based violence within positive complementarity. Although there are arguably many different aspects to positive complementarity, this thesis focuses specifically on the internalisation of the norm of accountability for sexual and gender-based violence as a way to increase such accountability and thereby achieve positive complementarity (aimed at encouraging domestic accountability). This thesis thus examines how, why, and in what way the Rome Statute's standards regarding sexual violence crimes have been domesticated in Colombia and the DRC, and to what extent this contributed to increasing accountability for conflict-related sexual violence at a national level. It questions in particular what role the ICC, if any, has had in these processes of domestication, but equally analyses actions by other actors that take place at a national level using the ICC's normativity. Ultimately, this analysis exposes a number of gender justice pressure points in the complementarity framework, and challenges the idea that positive complementarity falls solely within the purview of the ICC itself.

This thesis posits that 'positive complementarity' is best approached analytically as a process of interaction to facilitate accountability for Rome Statute crimes.[11] Relying upon Harold Koh's transnational legal process theory, this thesis argues that through a series of interactions between different actors, including but not limited to the ICC, on the interpretation of accountability norms enshrined in the Rome Statute and their application at a

[9] Kapur (2016), at 14.

[10] Lisa J. Laplante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Influence', 43 *John Marshall Law Review* (2010), at 637.

[11] Labuda has similarly argued: "Premised on the expectation that the domestic legal systems of ICC States Parties will adjust to international standards, complementarity produces a range of interactions between the ICC and domestic judicial authorities in states emerging from conflict". Patryk I. Labuda, 'The ICC in the Democratic Republic of Congo - A Decade of Partnership and Antagonism', in Kamari Maxine Clarke, Abel S. Knottnerus, and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2016), at 277.

national level, accountability for sexual and gender-based violence can be increased. For instance, repeated norm-interpretative interactions between the ICC, national authorities, civil society, and other actors on the need to prioritise sexual and gender-based violence within domestic investigations, can challenge existing norms that these crimes are not as serious and deserving of attention as other crimes. Such interactions may happen in a direct forum, for instance in discussions between the ICC and national prosecutors, through lobbying efforts from civil society organisations or through litigation before national courts, but can also take place on a more indirect, or normative, level where international standards are integrated into domestic legal frameworks.

This analysis ultimately demonstrates that, while the existence of the ICC (as an institution) is important, most developments around accountability for sexual and gender-based violence in both Colombia and the DRC, while often grounded in the idea of complementarity and linked to the Rome Statute, happen through the actions of other actors. The ICC's constitutive documents and the norms and standards around accountability for sexual violence enshrined therein, on the other hand, have provided an important normative impetus for these developments, particular where catalysed by civil society organisations and domestic political actors acting as so-called 'norm entrepreneurs'.[12] This has implications for our understanding of positive complementarity and what kinds of effects we should or should not expect it to trigger at a national level. This thesis thus aims to contribute to illuminating both the prospects and the limitations of positive complementarity as applied to the fight against impunity for sexual violence crimes.

In this introductory chapter, I provide some general introductory remarks into the overall topic of this thesis, before delving deeper into the theoretical and analytical underpinnings of the research in the next chapter. The first section of this chapter will provide some background on the difficulties involved in investigating and prosecuting sexual and gender-based violence. This serves to illustrate the need to focus specifically on these types of crimes within my research on complementarity and the application of international criminal law at a national level. The subsequent section will set out in more detail the

[12] As described in more detail later in this chapter, Finnemore and Sikkink define norm entrepreneurs as follows: domestic or international actors who actively work towards changing existing norms and standards, or advocate the adoption of new norms, grounded in strong notions they hold about appropriate behaviour. Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organisation* (1998), at 893-897. See also: Susanne Alldén, *How do international norms travel? Women's political rights in Cambodia and Timor-Leste* (Umeå University, 2009).

framework of interaction between the ICC and national authorities provided for within the Rome Statute system of justice, from preliminary examinations through the opening of official investigations. Section three discusses the methodological choices I have made, as well as the methodological limitations of this research, before providing a general overview of the structure of this thesis in section four.

SECTION 1.1

ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED VIOLENCE

In 2015, the United Nations (UN) General Assembly designated 19 June of each year as the International Day for the Elimination of Sexual Violence in Conflict. The date was chosen to commemorate the adoption of UN Security Council Resolution 1820 on 19 June 2008, which, as part of the family of Security Council Resolutions on Women, Peace and Security (WPS), condemned sexual violence as a tactic of war. The first commemoration of this day on 19 June 2016 followed three momentous achievements in the judicial recognition of sexual violence that year. In February, a national court in Guatemala issued the first ever decision in the world by a national court convicting two former military officials of sexual violence, sexual slavery, and domestic slavery as crimes against humanity. The crimes were committed against 11 Maya Q'eqchi' women during the counterinsurgency war in the country in the early 1980s.[13] In March, the International Criminal Court (ICC) convicted Jean-Pierre Bemba Gomba for his responsibility as commander in chief for crimes committed by troops under his command in the Central African Republic. It was the Court's first conviction for rape, and the first judgment in international criminal law to classify rape against men as rape.[14] Subsequently, in May 2016, the Extraordinary African Chambers in Senegal convicted Hissène Habré of war crimes and crimes against humanity, including for acts of rape and sexual slavery. This was the first time a former Head of State of one country was held accountable before the courts of another country under the principle of universal jurisdiction.[15] These justice achievements, each the result of consistent and arduous advocacy and documentation efforts by women's rights and other civil society organisations, sometimes for many years, had been a long time coming.

[13] Naomi Roht-Arriaza, 'Guilty Verdict in Guatemala Trial on Sexual Slavery and Sexual Violence as Crimes Against Humanity', *IntLawGrrls* (2 March 2016), available at <https://ilg2.org/2016/03/02/guilty-verdict-in-guatemala-trial-on-sexual-slavery-and-sexual-violence-as-crimes-against-humanity/>, accessed 20 January 2017.

[14] Niamh Hayes, 'The Bemba Trial Judgement - A Memoral Day for the Prosecution of Sexual Violence by the ICC', *PhD Studies in Human Rights* (21 March 2016), available at <http://humanrightsdoctorate.blogspot.nl/2016/03/hayes-bemba-trial-judgement-memorable.html>, accessed 20 January 2017. As Hayes points out, while the ICTY did prosecute instances of sexual violence against male victims, such violence has generally been classified as acts of torture or inhumane acts, rather than as rape.

[15] 'Extraodinary African Chambers Grants Reparations to Victims in Habré Case', *International Justice Resource Center* (8 August 2016), available at <http://www.ijrcenter.org/2016/08/08/extraordinary-african-chambers-grants-reparations-to-victims-in-habre-case/>, accessed 20 January 2017.

These three significant achievements recognising rape and other forms of sexual violence within a formal (criminal) justice process, particularly those at a national level, are the exception rather than the rule. Although sexual and gender-based violence has been widespread both in conflict and in situations of so-called peace, justice processes around the world have consistently failed to recognise and address these crimes. This is not always due to a conscious decision to exclude such crimes, but more often results from misconceptions and limited legal frameworks. An example given by Xabier Agirre is telling in this respect:

> "*When drafting an indictment for an international tribunal in the late 1990s my modest attempt to include a reference to sexual violence under the chapeau of 'persecutions' (a crime against humanity) was stopped by two attorneys senior to me because in their view 'there was no sufficient evidence'. Later I discussed the issue with one of them and was puzzled when he explained that in his country as a prosecutor he always avoided sexual violence because it was 'very annoying and difficult to prove'.*"[16]

The investigation and prosecution of sexual and gender-based violence, whether at an international or national level, has been difficult for various reasons, which include societal obstacles, traditional attitudes and practices, and legislative barriers. These barriers affect each step of the process – from reporting crimes to the police to testifying in court, from the evaluation of (the credibility of) evidence to victims being able to speak out about these crimes in the first place.

Sexual and gender-based violence has been a widespread practice around the world in both international and non-international armed conflicts, and in other situations of widespread violence against civilian populations.[17] Both men and women are targeted through sexual violence, although in most conflicts it has disproportionally affected women

[16] Xabier Agirre Aranburu, 'Beyond Dogma and Taboo: Criteria for Effective Investigation of Sexual Violence', in Morten Bergsmo, Alf Butenschøn Skre, and Elisabeth Jean Wood (eds), *Understanding and Proving International Sex Crimes* (Beijing: Torkel Opsahl Academic EPublisher, 2012), at 269.

[17] Given the focus of this thesis on the investigation and prosecution of Rome Statute crimes, the focus here is on sexual and gender-based violence as war crimes, crimes against humanity, and genocide. For some, this distinction between sexual violence in situations of war and other violence against civilians and sexual violence in situations of so-called peace is somewhat arbitrary, arguing that the acts are part of a continuum of violence in general, and sexual violence in particular, that is premised on existing gender relations and patterns of discrimination and inequality. For more on this so-called "continuum of (sexual) violence", see, *e.g.*, Cynthia Cockburn, 'The Continuum of Violence: A Gender Perspective on War and Peace', in Wenona Giles and Jennifer Hyndmann (eds), *Sites of Violence: Gender and Conflict Zones* (Berkeley and Los Angeles: University of California Press, 2004). For a more critical view, see, *e.g.*, Elisabeth Jean Wood, 'Conflict-related sexual violence and the policy implications of recent research', 894 *International Review of the Red Cross* (2015).

and girls. While rape is the most well-known manifestation of sexual violence, in part due to a popularisation of the term "rape as a weapon of war" to reflect its strategic use by armed actors around the world, sexual violence encompasses a broad range of violent acts committed in both public and private settings. Other forms of sexual and gender-based violence include forced pregnancy, gang rape, rape using objects, forced prostitution, sexual slavery, forced marriage, forced abortion, the enforced use of contraception, child marriage, or sexual exploitation of young girls and boys. Sexual and gender-based violence can also include forced perpetration, for instance in the former Yugoslavia where male detainees were forced to commit fellatio on each other, or were forced to rape fellow female detainees.[18] Acts of sexual violence are often committed in public, sometimes even in front of family members.

Sexual violence is used as a form of social and territorial control, as a means of dividing communities, and to attack both individuals and their families. It has been a particularly strategic tactic in conflict due to the surrounding culture of denial and impunity, and the continued high levels of stigma in almost all countries around the world. Survivors of sexual violence, whether male or female, are generally hesitant to speak out about the crimes they have suffered for fear of rejection by their families and communities. For instance, in Colombia, there are widespread misperceptions that women who were sexually enslaved by paramilitary forces who controlled their communities colluded with these forces and willingly provided what communities saw as sexual services in exchange for protection. The ongoing diplomatic row between Japan and South Korea about the status of comfort women as victims of sexual violence during World War II is another such example.[19] Sexual violence is often used as a system of reward and punishment, or to silence female human rights defenders and others for speaking out against particularly powerful groups, persons, or their interests. The Lord's Resistance Army notoriously abducted young girls to be distributed as 'forced wives' to commanders as rewards for having successfully carried out attacks against civilians; kidnapping of young girls for this specific purpose was an integral part of those attacks. In the Central African Republic, women have reportedly been raped as punishment for trading with Muslim communities and to prevent their continued engagement with those

[18] Maria Eriksson, *Defiing Rape: Emerging Obligations for States under International Law?* (Leiden: Martinus Nijhoff Publishers, 2011), at 173.

[19] Merrit Kennedy, "Comfort Woman' Statue Sparks Diplomatic Row Between Japan and South Korea', *NRP* (6 January 2017), available at <http://www.npr.org/sections/thetwo-way/2017/01/06/508538196/comfort-woman-statue-sparks-diplomatic-row-between-japan-and-south-korea>, accessed 19 April 2017.

communities as they were now seen as 'spoiled' or 'dishonoured'.[20] The appalling acts of the so-called Islamic State in Syria and Iraq, "who have raped women pursuant to a plan of self-perpetuation aimed at transmitting their ideology to a new generation who can be raised in their own image"[21] with almost complete impunity, has magnified the strategic use of sexual violence as instruments of genocide and persecution in particular.

The consequences of these different and multivariate types of sexual and gender-based violence are extensive, and include physical, psychological, social, and economic harm. Survivors of sexual violence are often at great risk of being infected with HIV/Aids and other sexually transmitted diseases, and many suffer fistula, ruptures of their anus or vagina, severe bruising, and other physical consequences. Psychological trauma among survivors is equally widespread, and ensures the continued victimisation of survivors well beyond the immediate act of violence. Victims often risk ostracisation from their families and communities if they report crimes to the police, or speak out about their victimisation in any other way (whether in the context of conflict or in 'ordinary' situations of relative peace). They may be unable to (re)marry because they are seen as 'spoiled', or are blamed for their own victimisation. Sexual violence can also have severe economic consequences. For instance, in situations where women are unable to own property or land to cultivate food for their families, they may find themselves in a situation of extreme poverty if their husbands leave them and their communities reject them for having suffered sexual violence. Girls abducted by armed groups who escape and return home, some of whom may have born children as a result of their rapes, face additional stigma of being perceived as colluding with the enemy or armed group that forcibly abducted them.

These social, psychological, and economic consequences further compound the immediate physical harm done to victims and survivors through the acts of sexual violence. They equally prevent many victims from seeking the necessary support services, reporting crimes to the police, or speaking out to investigators or prosecutors. For instance, one woman in the DRC, Elisabeth, said that when she reported to the police that she had been raped by soldiers, the police responded: "you are too old, you can't be raped".[22] She goes on, "I didn't get justice. Nobody gets justice. They only told me: 'Go home! We will see what to do about

[20] United Nations, *Report of the Secretary-General on Conflict-Related Sexual Violence*, S/2016/361 (20 April 2016), at para 13.

[21] *Report of the Secretary-General on Conflict-Related Sexual Violence*, S/2016/361, at para 14.

[22] Women's Initiatives for Gender Justice & WITNESS, *Our Voices Matter: Congolese women demand justice and accountability* (2012) available at http://www.iccwomen.org/videos/index.php, at pt. 5:32.

it.' And then nothing happened."[23] Like Elisabeth, Feza says: "Here when a woman gets raped, she's rejected and compared to a pest."[24] Feza's husband of 34 years left her because she was raped.[25] While presented here as anecdotal evidence, these stories are not unique to either the DRC or to conflict situations.

In addition to barriers rooted in traditional perceptions and social stigma, *if* victims successfully manage to report crimes to the police they often face further legislative and other barriers. Sexual violence crimes are frequently conceived as crimes of honour or dignity, and often require corroboration and proof of lack of consent. Further, legal definitions of the crime of rape often conceptualise it as a crime exclusively committed by a *male* perpetrator against a *female* victim (thus invisibilising crimes that do not conform to this pattern). A 2014 survey of 189 countries showed that 32.8% (62) of criminal laws specifically exclude male victims of rape, and that 14.8% (28) of the countries exclude female perpetrators.[26] For instance, the Irish 1981 Criminal Law (Rape) Act defines rape as follows: "A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it […]."[27] Only women are accepted as complainants of rape under this Law.[28] In many countries, rape against male victims is recognised, *if* at all,[29] merely as (sexual) assault or torture rather than rape.[30] In other words, most national rape laws are premised on gendered assumptions and notions of "male aggression and female submissiveness".[31]

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[23] *Our Voices Matter: Congolese women demand justice and accountability* (2012), at pt. 5:38-35:50.

[24] *Our Voices Matter: Congolese women demand justice and accountability* (2012), at pt. 12:47-12:52.

[25] *Our Voices Matter: Congolese women demand justice and accountability* (2012), at pt. 13:25-13:52.

[26] Chris Dolan, *Into the mainstream: addressing seuxal violence against men and boys in conflict* (Refugee Law Project, 2014), at 6.

[27] Section 2, *Criminal Law (Rape) Act*, Republic of Ireland (1981). The Act was amended in 1990 to include a separate offence of rape entitled 'rape under section 4', which incorporates "*penetration, however slight, of the anus or mouth by the penis, or of the vagina by any object held or manipulated by another person*". It does not, however, remove the definition of rape as committed by a man against a woman from Irish criminal law. *Criminal Law (Rape) (Amendment) Act*, Republic of Ireland (1990).

[28] Section 1: *"'complainant' means a woman in relation to whom a rape offence is alleged to have been committed*", *Criminal Law (Rape) Act* (1981).

[29] Dolan's 2014 survey also found that 90% of men in conflict-affected areas live in situations where the law provides no protection against sexual violence committed against them. Dolan (2014), at 6.

[30] For instance, in Switzerland, rape (conceptualized as a crime against sexual liberty and honour) only covers sexual intercourse forced upon female victims (article 190 of the Swiss Penal Code). Male victims are covered by Article 189: "*Any person who uses threats, force or psychological pressure on another person or makes that other person incapable of resistance in order to compel him or her to tolerate a sexual act similar to intercourse or any other sexual act is liable to a custodial sentence not exceeding ten years or to a monetary penalty.*" *Code*

Most national criminal law definitions of rape revolve around an absence of consent.[32] A victim's alleged lack of consent is frequently challenged through questions about what a victim was wearing ('what was she thinking, wearing such a short skirt'), prior sexual conduct (tied to social norms of modesty or appropriate sexual conduct), or social expectations around appropriate behaviour ('she was out drinking with a man all by herself'). Under the laws of England and Wales, for instance, rape cannot be committed if the perpetrator "reasonably believed" the victim consented, leaving the door open to what such reasonable belief is.[33] Strict evidentiary requirements can further impede justice for these crimes. For instance, in Sudan, until 2015 rape was defined as sexual intercourse by way of adultery or sodomy with a person without their consent, to which restrictive evidentiary rules applied, such as requiring four male witnesses to prove the elements of the crime. This meant that there were high risks for women who reported rape to be prosecuted for adultery if they failed to prove lack of consent.[34]

At the same time, perceptions around the ability of victims to speak out (e.g. the idea that victims because of all the social barriers *definitely* do not want to speak to investigators) can equally affect investigators' perceptions of the difficulties of obtaining the necessary evidence. Where investigators assume victims do not wish to come forward, this may turn into a self-fulfilling prophecy. The exclusion of sexual violence from investigation and prosecution strategies, inadequate legal definitions or protection frameworks, inattention to sensitivities around interviewing victims or witnesses of these crimes, and traditional (mis)understandings around notions of consent and sex all negatively affect their successful investigation and prosecution. Indeed, as Kapur argued: "It is generally understood that SGBV crimes are underreported, often inadequately investigated, less likely to reach court, and result in a disproportionately high number of acquittals".[35] While important steps have been made in the recognition of such crimes in court, such as in Guatemala with the

pénale suisse | *Schweizerisches Strafgezetsbuch* | *Codice penale svizzero*, Switzerland (1937). For other examples of restrictive or narrow definitions of rape in national criminal law, see, *e.g.*, Chappell (2015), at 185.

[31] Dolan (2014), at 6.

[32] Chappell (2015), at 185.

[33] See, e.g., the Sexual Offences Act (2003): "*A person (A) commits an offence if—(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents. (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.*" Part 1, section 1, *Sexual Offences Act*, England and Wales (2003).

[34] African Centre for Justice and Peace Studies, *Sudan's new law on rape and sexual harassment: One step forward, two steps back?* (8 March 2016).

[35] Kapur (2016), at 11.

groundbreaking Sepur Zarco convictions, there is still a long way to go. The adoption of the Rome Statute, with its gender sensitive provisions, represented an important step in that direction.[36] However, as we will see in the next chapter, despite this advancement, it has thus far been difficult to translate these normative developments into an actual increase in accountability for these crimes at an international level.

The focus in this thesis specifically on crimes of sexual violence, therefore, is in recognition of the "history of under-enforcement"[37] of the norms around sexual violence. Further, the assumption is that the internalisation of these norms at a national level in particular can have important effects well beyond sexual violence crimes. For instance, if a domestic system were equipped to successfully and effectively investigate and prosecute sexual and gender-based violence crimes, this would generally mean that it is also able to do the same for other (non-sexual or gendered) crimes. Investing in the capacity of states to deal with these crimes, therefore, has the potential to catalyse improvements for the system as a whole. Yet the reverse may not be true: focusing on equipping a system to deal with murder as a war crime does not necessarily mean it is well equipped to deal with rape as a war crime, primarily due to the unique social features affecting the recognition of sexual and gender-based violence (see more on this in the next chapter). While there are risks associated with essentialising or 'singling out' sexual violence, such as a (perceived) overemphasis on one type of crime, or a focus on the vulnerability of survivors rather than their agency, I believe the benefits still outweigh these possible downsides. The reality is that sexual violence crimes are not yet on an equal footing with other crimes in terms of accountability efforts worldwide. Unless and until sexual violence crimes become part and parcel of the application of international criminal law at both a national or international level, they will continue to suffer from under-enforcement. This thus warrants their specific focus within my research on positive complementarity.

[36] The Rome Statute's gender justice provisions are discussed in greater detail in chapter 2 of this thesis.

[37] Margaret M. DeGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes', in Morten Bergsmo (ed), *Thematic prosecution of international sex crimes* (Beijing: Torkel Opsahl Academic EPublisher, 2012), at 14.

SECTION 1.2

UNDERSTANDING THE ICC: FROM PRELIMINARY EXAMINATIONS TO INVESTIGATIONS

The Rome Statute grants the ICC potentially universal jurisdiction over war crimes, crimes against humanity, and genocide (and, in the future, aggression), including for a wide range of sexual and gender-based violence crimes. However, as a 'membership' Court, the ICC does not (at present) have unlimited jurisdiction anywhere in the world: its jurisdiction is temporally and geographically restricted to crimes committed since the entry into force of the Rome Statute (July 2002) on the territory of a State Party or by a national of a State Party.[38] In other words, the ICC may only exercise jurisdiction over crimes committed by a particular individual if that individual's country of nationality or the country in which the crimes were committed has ratified the Rome Statute. The Court's jurisdiction can be triggered in three ways: States Parties can refer a situation to the ICC; the Prosecutor may initiate investigations on her own initiative; and the UN Security Council, acting under Chapter VII of the UN Charter, can refer a situation to the ICC. Non-States Parties may also submit a declaration under Article 12(3) temporarily accepting the ICC's jurisdiction in respect of a particular situation or crime. In addition, any individual or organisation can submit information on the commission of crimes within the Court's jurisdiction to the ICC under article 15 (these are referred to as 'article 15 communications'). The Prosecutor is not obliged to open an investigation upon the receipt of information – she has the sole prerogative, subject to judicial authorisation as required,[39] to initiate investigations into crimes within the Court's jurisdiction. She is, however, required to assess the merits of the information received.

For all crimes that are not manifestly outside the ICC's jurisdiction about which the Prosecutor has received article 15 communications,[40] and for all state or UN Security Council

[38] For States Parties who joined the Rome Statute system after its entry into force in July 2002, the Statute enters into force on the first day of the month after the 60th day of their ratification.

[39] When opening an investigation *proprio motu*, the Prosecutor must request authorisation from the Pre-Trial Chamber under Article 15(4), who evaluates whether the case falls within the jurisdiction of the Court and whether there is a reasonable basis to proceed with an investigation.

[40] Unlike the formal referral of a situation by a State Party of the UN Security Council, the submission of information to the ICC under article 15 does not automatically lead to the opening of a preliminary examination. The ICC will first conduct an initial assessment of the information contained in these article 15 communications as a filter mechanism. If the information is neither manifestly outside the ICC's jurisdiction, or does not relate to

referrals of situations, the Office of the Prosecutor will first open a preliminary examination. This pre-investigation or analysis stage, carried out by the Office's Situation Analysis Section (SAS) within the Jurisdiction, Complementarity and Cooperation Division (JCCD), allows the Office to determine questions of jurisdiction, admissibility, gravity, and interests of justice. In other words, during a preliminary examination, the Office of the Prosecutor examines whether there is any reason for it to initiate an investigation. This includes an assessment of whether alleged crimes fall within its jurisdiction, whether the situation (and any cases arising from a potential investigation) would be admissible, and whether the alleged crimes satisfy the Rome Statute's gravity threshold. The Prosecutor must also affirm that initiating an investigation would not be contrary to the interests of justice.[41] During preliminary examinations, where the ICC has not yet selected specific individuals and cases of interest, the focus is on the cases and individuals that would *most likely* form the subject of any potential ICC investigation. There is no specific time limit for the duration of such preliminary examinations; for instance, in the case of Libya, the Office engaged in a preliminary examination of only two weeks before opening a formal investigation,[42] whereas Colombia has been under preliminary examination for more than 12 years and remains under preliminary examination until today.[43]

For its preliminary examinations, the Office of the Prosecutor mostly relies on information received through external sources (these can be individuals, organisations, or states), as it does not have any formal evidence gathering powers before opening an investigation. Nonetheless, it may request information from states, the UN, intergovernmental or non-governmental organisations, or other reliable sources to assist its

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an ongoing preliminary examination, investigation or prosecution, the information will proceed to the first stage of analysis within a preliminary examination. Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), at paras 75, 78.

[41] The Office has indicated that its preliminary examination consists of four specific consecutive, though interrelated, phases: (i) initial assessment of information received; (ii) matters related to jurisdiction; (iii) admissibility of potential cases (complementarity and gravity); and (iv) the interests of justice. See: *Policy Paper on Preliminary Examinations*.

[42] The UN Security Council referred the Situation in Libya to the ICC on 26 February 2011, and on 2 March 2011, the OTP announced that, following a preliminary examination of the information received, there were reasonable grounds to open an investigation. Office of the Prosecutor, *ICC Prosecutor to open an investigation in Libya*, Press Release (2 March 2011).

[43] The OTP announced the opening of a preliminary examination into the situation in Colombia in March 2005. Other countries currently under preliminary examination are: Palestine (since January 2015), Honduras (since November 2010), Ukraine (since April 2014), Iraq (initially closed in 2006, but reopened in May 2014), Afghanistan (since 2007), Georgia (since August 2008), Guinea (since October 2009), and Nigeria (since November 2010).

determinations on jurisdiction, gravity, and admissibility.[44] The Prosecutor may also conduct field missions to the relevant country to meet with national authorities, victims and affected communities, NGOs, or other stakeholders. These limited information-gathering powers may be problematic when information gathered is incorrect but the Office has no mechanism available to check the veracity of the information it has received. For instance, in its preliminary examinations report of November 2015, the Office mistakenly reported that Colombia had adopted a protocol on the investigation and prosecution of sexual violence crimes; the protocol was still at the draft stage at this time and was adopted the following year.[45] Such mistakes are of course unlikely to be corrected by the relevant national authorities – particularly where they portray developments that may be seen as contributing to positive determinations on that state's ability or willingness and thus pre-empt an ICC intervention.

While the Office of the Prosecutor's preliminary examinations initially were perceived as confidential, in response to increasing pressure from external actors, in particular civil society, since 2011, the Office has published an annual report on its preliminary examination activities. These reports provide an update on national developments and activities of the ICC, and set out its analysis of jurisdiction, complementarity, gravity, and other questions concerning each situation under preliminary examination. The Office of the Prosecutor now regularly publishes information about its ongoing preliminary examinations for three reasons: transparency of its processes; the encouragement of domestic accountability through positive complementarity;[46] and the prevention of crimes.[47] Although this is generally in the form of annual reports,[48] since 2012 this has also included some country-specific reports.[49] These documents, whether country-specific or general, constitute

[44] Article 15(2), *Rome Statute* (18 July 2002).

[45] The protocol was only adopted in June 2016, but was not mentioned again in the subsequent November 2016 preliminary examinations report.

[46] The Office of the Prosecutor's interpretation of positive complementarity, also called a "positive approach to complementarity" is discussed in more detail in chapter 3 of this thesis.

[47] *Policy Paper on Preliminary Examinations*, at paras 93-106.

[48] Office of the Prosecutor, *Report on Preliminary Examination Activities 2011* (13 December 2011); Office of the Prosecutor, *Report on Preliminary Examination Activities 2012* (November 2012); Office of the Prosecutor, *Report on Preliminary Examination Activities 2013* (November 2013); Office of the Prosecutor, *Report on Preliminary Examination Activities 2014* (2 December 2014); Office of the Prosecutor, *Report on Preliminary Examination Activities 2015* (12 November 2015).

[49] See, e.g., in relation to Colombia: Office of the Prosecutor, *Situation in Colombia - Interim Report* (November 2012). In addition, when the Office closes a preliminary examination either because it proceeds to formal investigation, or because it decides not to proceed with a formal investigation, it issues a country-specific

important markers for the approaches taken by the Office of the Prosecutor, and the factors it considers relevant for its assessment of the quality of domestic proceedings.

A preliminary examination can result in one of two situations. When the Office of the Prosecutor determines that the criteria for initiating an investigation have been satisfied, a situation will proceed to official investigation (or the Prosecutor will seek judicial authorisation to open an investigation where required). Alternatively, when the preliminary examination shows there is no reasonable basis for an investigation, the decision to close the preliminary examination is communicated to those who provided the information and is made public. As of 31 May 2017, the Office of the Prosecutor has conducted 23 preliminary examinations. Ten of these have proceeded to a formal investigation,[50] and three were closed without opening an investigation.[51] Preliminary examinations remain ongoing in ten situations.[52]

As will be discussed in more detail in chapters 2 and 3 of this thesis, the preliminary examination stage is one where positive complementarity is said to be of particular importance. Through interactions with national authorities on the necessary steps they need to take to ensure a positive determination on their ability and willingness to investigate and prosecute Rome Statute crimes themselves (and therefore to prevent the ICC from intervening), the ICC may be able to facilitate and encourage progressive developments at a national level. For instance, Kapur argues that developments in the national justice process in Guinea, such as bringing charges or increasing security for judges to hear cases, often occur around visits from the Office of the Prosecutor, where ICC staff engage with Guinean authorities and discuss the progress of cases and investigations. Such ICC visits and engagements equally "empower[] civil society to mobilise more effectively and articulate their concerns at national and international levels".[53] These discussions and interactions among the different actors involved in national justice efforts and the ICC, in her view, may lead either directly or indirectly to the adoption of necessary investigative or prosecutorial measures at a national level. This effect has been referred to as complementarity's "catalyst

report. See, e.g., Office of the Prosecutor, *Situation in the Central African Republic II - Article 53(1) Report* (24 September 2014).

[50] Central African Republic; Central African Republic II; Côte d'Ivoire; Darfur, Sudan; Democratic Republic of Congo; Georgia; Kenya; Libya; Mali; Uganda.

[51] Honduras; Republic of Korea; Venezuela.

[52] Afghanistan; Burundi; Colombia; Gabon; Guinea; Iraq/UK; Nigeria; Palestine; Registered Vessels of Comoros, Greece and Cambodia; Ukraine.

[53] Kapur (2016), at 21.

impact", and will be discussed in greater detail in the next chapter. Furthermore, complementarity during the specific preliminary examination in Colombia is examined in chapter 4.

If, on the other hand, the Prosecutor determines that no or insufficient steps have been taken at a national level, she may decide to open an investigation. This essentially means the Prosecutor has determined: (i) that there are reasonable grounds to believe crimes within the jurisdiction of the Court have been committed; (ii) that there are no national investigations or prosecutions pre-empting the exercise of its jurisdiction under the Rome Statute's admissibility provisions; and, (iii) that the investigation would be in the interests of justice. At this stage, the situation is handed over from the Situation Analysis Section, in charge of the preliminary examination, to the Investigations Division and an integrated team composed of prosecutors and investigators is assigned to the situation. A cooperation adviser from the Office of the Prosecutor's International Cooperation Section within JCCD is also assigned to the team to manage the necessary relationships with states and coordinate any cooperation requests. These cooperation advisers operate as the central contact point between the Office of the Prosecutor and states, in particular the state in which the investigation takes places, but this may also include neighbouring or other relevant states,[54] and international or regional organisations. They maintain frequent contact with their national counterparts and regularly transmit requests for assistance (RFAs) to the national authorities on behalf of the Office. In 2015, for instance, the Office of the Prosecutor sent 647 such requests to different partners, including states (both States Parties and non-States Parties) and international and regional organisations.[55] These RFAs are very specific and may include issues such as getting access to court files from national court proceedings, or requests to interview a member of a national government or military. The OTP may also send bulk notifications of investigative missions to situation countries.[56]

[54] For instance, while having opened an investigation in the situation in Darfur, Sudan following a referral by the Security Council, the OTP has not been able to conduct investigations on the territory of Darfur and as such has had to rely upon conducting investigations within IDP camps and with individuals in neighbouring countries.

[55] The Registry also sends RFAs to states, and has done so 171 times in 2015. Assembly of States Parties, *Report of the Court on cooperation*, ICC-ASP/14/27 (22 September 2015), at para 2.

[56] In situation countries where the OTP has a high level of investigative activities, they may send out monthly bulk notifications of upcoming missions. These notifications do not have to specify the nature of the investigations or activities, but are merely to notify the authorities of the presence of OTP staff, and to request assistance with their access to the territory of the particular state. Bulk notifications are used, when the State agrees, to replace individual mission notifications, *unless* the matter (substantively) requires an RFA. Interview with representative of the Office of the Prosecutor (The Hague, September 2015), *on file with author*.

In other words, there is a high frequency of interaction between national authorities and the ICC during investigations, but these interactions are generally limited to facilitating the Office of the Prosecutor's work, rather than the broader engagement on domestic developments during preliminary examinations. On the other hand, as will be argued in this thesis, complementarity is certainly not an irrelevant consideration during investigations. With the ICC focusing on those most responsible for Rome Statute crimes – generally those at the higher echelons of military organisations, militia groups or states – there is still a need for domestic authorities to supplement investigations and prosecutions for lower level perpetrators to close the impunity gap.[57] This "burden-sharing" approach to complementarity during investigations is discussed in more detail in chapter 3, as well as in the DRC case study presented in chapter 5 of this thesis.

During investigations, the Office of the Prosecutor identifies specific incidents, crimes, and individuals that will be the subject of specific cases. Its investigations generally focus on those who bear the greatest responsibility for Rome Statute crimes, recognising that this may involve prosecuting lower level perpetrators "where their conduct was particularly grave and has acquired extensive notoriety".[58] The Office also aims "to represent as much as possible the true extent of criminality" within its cases.[59] It applies *mutatis mutandis* the same general criteria for the opening of investigations to the selection of cases within that investigation for prosecution, i.e. jurisdiction, admissibility, and the interests of justice, in addition to the gravity of crimes, an alleged person's level of responsibility, and the potential charges. Based on the evidence collected, the Office of the Prosecutor will submit a request for an arrest warrant against alleged perpetrators to the Pre-Trial Chamber, who will issue an arrest warrant when it is satisfied that there are reasonable grounds to believe the person is responsible for the alleged crimes.[60] Following a suspect's arrest and surrender to the ICC's custody (for which it again relies upon cooperation from states in the absence of its own police force), and the subsequent confirmation of charges against the accused, a trial will be held.

[57] In this respect, Tallgren has argued that complementarity involves "the coordination of the task between the international and domestic jurisdiction". Immi Tallgren, 'Completing the "international criminal order": the rhetoric of international repression and the notion of complementarity in the draft Statute for an International Criminal Court', 67 *Nordic Journal of International Law* (1998), at 109.

[58] Office of the Prosecutor, *Strategic Plan 2016-2018* (16 November 2015), at para 36.

[59] Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation* (15 September 2016), at para 8.

[60] Rome Statute, Article 58(1)(b), (7). The Prosecution may also decide to request the issuance of a summons to appear, rather than an arrest warrant, if the alleged perpetrator has indicated his or her willingness to appear voluntary before the ICC for trial.

Although it is a valuable and important exercise to investigate difficulties and challenges to provide accountability for sexual and gender-based violence within the ICC's own proceedings, this thesis tasks itself with a different objective. Within the Rome Statute's complementarity framework, the preference is for investigations and prosecutions for Rome Statute crimes to be conducted at a national level. Indeed, as the preamble states: "the most serious crimes of concern to the international community as a whole must not go unpunished, […] their effective prosecution must be ensured *by taking measures at the national level* and […] *it is the duty of every State to exercise its criminal jurisdiction* over those responsible for international crimes". The ICC will only exercise its jurisdiction in a complementary fashion as essentially a court of last resort. Critically, during both preliminary examinations and investigations, attempts can and should be made to encourage or facilitate national accountability for crimes within the ICC's jurisdiction. While taking the ICC as its central starting point – for this is where complementarity originates – this thesis therefore concerns itself with broader issues around gender justice and complementarity, looking specifically at the domestication and implementation of international criminal law at a national level.

SECTION 1.3

METHODOLOGY

In 2011, Nidal Nabil Jurdi argued that, "a textual analysis of the Rome Statute cannot reveal, in itself, the many factors that influence the relations between the ICC and state parties".[61] This has never rung more true to me than when doing the research for this thesis. It became clear to me over time that, while a doctrinal analysis of the Rome Statute's admissibility framework from a gender perspective (with which this project initially started) was important, to fully understand its gender justice limitations and prospects, my thesis should dig deeper and engage with legislative, jurisprudential and executive developments around sexual violence at a national level. This thesis therefore aims to move beyond such a textual analysis by engaging in a socio-legal analysis of the relationship between the ICC, its Rome Statute, and national accountability processes for sexual and gender-based violence in two situation countries. Furthermore, over time, the research shifted to becoming more about the developments triggered through engagements based on, and grounded in, the ICC's presence, and linked to the Rome Statute, rather than focusing upon the ICC's interactions with national authorities alone. Although interactions between the ICC and national authorities remain part of the story told in the case studies presented in chapters 4 and 5, they are only a part of the story. The story of normative interactions with the ICC's Rome Statute is a much more complex one, and a more interesting one in my view. In other words, my approach to positive complementarity, as discussed in more detail in the next chapter, is a wider one where the ICC – as an institution – encourages, facilitates, and assists national accountability processes most prominently through *indirect* means, for instance by providing a normative framework, which civil society organisations or domestic political actors use to improve national accountability frameworks.

In analysing interactions between the Rome Statute and national accountability processes for sexual violence crimes in the two specific case studies, my methodology is both descriptive and normative. There is a lot we can learn from examining current practice, but we have to move beyond merely describing what interactions are taking place. Critically, this thesis is not concerned with proving a *causal* link between the ICC's actions and certain

[61] Nidal Nabil Jurdi, *The International Criminal Court and national jurisdictions: a contentious relationship* (Farnham: Ashgate, 2011), at 265.

developments at a national level, but concerns itself with matters of *correlation*.[62] Furthermore, my thesis uses a qualitative socio-legal studies methodology. I analyse and study a wide variety of sources, including extra-legal sources such as guidelines, policies, and development reports. The primary reference material relating to these interactions are documents produced by the ICC, such as policy and strategy documents, reports, and judicial decisions, and legal and policy documents from national jurisdictions, such as laws, policies and legal frameworks enacted and cases adjudicated in national courts in the two countries under analysis. To better understand the context of these laws, policies, and cases, this study relies on NGO and UN reports, and on the vast academic secondary literature that exists.

My thesis relies to a large extent on document analysis and process tracing: it traces the processes through which the Rome Statute has become active and effective ('domesticated') in a national context by examining legal, policy, NGO, and other documents at both the international and national level. It does so to better understand the way in which positive complementarity for sexual violence crimes is negotiated and enacted in the two case studies. Conducting interviews with individuals involved at critical stages of this domestication process in the two countries is another essential aspect of my research methodology. To validate my analysis of written sources and to gather additional insights, I conducted 40 interviews with practitioners at both a national and international level, as well as (some) fieldwork in the spaces studied.[63]

My fieldwork included an 8-month stay at the ICC, during which time I was able to get a deeper understanding of the work of the Office of the Prosecutor's Jurisdiction, Complementarity and Cooperation Division.[64] While I am not able to cite or refer to all of the

[62] The Oxford English Dictionary defines correlation as follows: "a mutual relationship or connection between two or more things". Causality, on the other hand, describes an exclusive relationship of cause and effect. For instance, when we stand in the rain without an umbrella (cause), our clothes will get drenched (effect). The one leads to the other. By contrast, correlation revolves around issues of association. Certain developments are associated with, but not necessarily caused by, certain factors. For instance, following a raise given to employees, the employer notices that their morale has improved. While the two variables are linked, the raise is not necessarily the *only* cause and explanation for the effect of an improved morale, although the two are correlated due to their close occurrence in time.

[63] A small number of these interviews was carried out in the context of a consultancy position I held with the International Federation for Human Rights (FIDH) on a research project on increasing accountability for sexual and gender-based violence at the ICC and beyond (20 June – 30 November 2016). Consent was sought from interviewees to use the information from those dual-purpose interviews for both this PhD research and the consultancy project. I thank FIDH for agreeing to the dual use of this select number of interviews. The views expressed in this thesis can in no way be attributed to FIDH, and any mistakes are mine alone.

[64] In 2015, I worked in the International Cooperation Section of the OTP's Jurisdiction, Complementarity and Cooperation Division (April-October 2015 as intern; and October-November 2015 as a short-term contractor).

information I was privy to at the ICC for reasons of confidentiality, being able to work alongside colleagues allowed me to get a practical understanding of how the Office of the Prosecutor understands and implements its mandate. Conducting interviews with members of the Office of the Prosecutor as well as other sections of the Court strengthened these impressions. Except where reference could be made, this understanding has therefore infused this thesis in a subtler way as background and contextual information.

I also spent two weeks conducting fieldwork in both Colombia and the DRC.[65] My impressions of the two countries (although short) and the interviews I conducted there added important contextual information to my research, and served to gather information that is privately held among specific individuals. For instance, speaking to a member of parliament allowed me to better understand nuances in legislative debates and the context in which those debates took place, information difficult to get from written documents. Similarly, while my French and Spanish knowledge was sufficient to deal with primary materials from both countries as well as conduct interviews in these languages,[66] being able to confirm my understanding and interpretations of certain developments with people from the two countries working on these issues on a daily basis has been invaluable.

The conditions of consent given to me by many of the people I have spoken with at both the ICC and in Colombia and the DRC were such that I cannot refer to anyone by their name or position, or identify their individual participation in this research in any other way. For reasons of confidentiality, therefore, where reference is made to the substance of interviews, this has been done in an anonymised fashion. Where specific examples are given or cited, these have been anonymised to such an extent to prevent the identification of the interviewee, unless the interviewee specifically agreed to be cited by name. Allowing interviewees to speak to me under these conditions of confidentiality was a critical component in creating space for meaningful and fruitful discussions about sometimes very sensitive issues. While this may compromise the verifiability of my research interviews to some extent, as Sarah Nouwen describes so eloquently, "this is the price verifiability must

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The views expressed in this thesis can in no way be attributed to the Office of the Prosecutor, or the ICC, and any mistakes are mine alone.

[65] 19 June – 4 July 2016, Kinshasa, Democratic Republic of Congo; 17 September – 2 October 2016, Bogotá and Medellín, Colombia.

[66] In the DRC, I conducted my interviews in French without the help of a translator. In Colombia, I was assisted by Andrea Camila Acuna, a Colombian law student, who kindly assisted with small translations during my interviews and who transcribed the Spanish audio-recordings for me. I thank Marialejandra Moreno Mantilla for her subsequent help in translating these transcribed documents.

pay for research [on complementarity] in the line of fire".[67] Furthermore, because the interviews served to verify and confirm, or where relevant challenge, my interpretation of specific developments, they did not serve as primary data for this thesis, but rather formed part of triangulation efforts. As someone once said to me: there is a difference between intelligence and evidence. Evidence can be cited, intelligence cannot, but can be used to connect the dots, and to direct my research towards finding the necessary evidence. In other words, these interviews, like my time working for the ICC, in many ways, served as intelligence, rather than evidence. This intelligence gathering has, however, helped me in connecting the dots and finding the evidence that is cited.

I have selected Colombia and the DRC as my case studies for a number of reasons. The first is that when I started my PhD in September 2013, I was already familiar with the DRC, having previously worked with the Women's Initiatives for Gender Justice on various projects in countries under investigation by the ICC, in particular the DRC.[68] Colombia, a country I was less familiar with, was one I have always been interested in, but had done very little work on. In addition, there were also more objective and sound methodological reasons to select these two countries. The DRC and Colombia were two of the first countries to enter into an interactive process with the ICC. The DRC was the first country to which the ICC turned its attention in 2003, which it did very publicly. Following a (invited) self-referral by the DRC Government in early 2004, the country became the ICC's first investigation. While the ICC's interest in Colombia was not made public until much later, it has in fact been under analysis by the ICC since around the same time as the DRC investigation was opened (although it has not as yet opened an investigation in Colombia). As such, both countries have a long history of interaction or engagement with the ICC, yet the level and nature of those interactions is very different. The DRC situation almost immediately became an official investigation, whereas Colombia remains under preliminary examination. Finally, sexual violence has been notoriously widespread in both countries, as are the difficulties in achieving justice for these crimes. It thus seemed opportune to select these two countries for my analysis.

[67] Nouwen (2013), at 30.

[68] I worked in the legal team of the Women's Initiatives for Gender Justice from September 2010 through July 2013. I am grateful to all my colleagues there for having inspired my thesis, and for offering me my first taste of international criminal law in practice. It has inevitably shaped my path and determinacy in pursuing this research.

As mentioned, this thesis will draw on broader theories of norm diffusion, in particular Harold Koh's transnational legal process theory, to gain a better understanding of the realities of positive complementarity in the two countries. Although this theory and its applicability to this study of (positive) complementarity will be discussed in more detail in the next chapter of this thesis, a few words are necessary to explain the methodological choices that underpin this approach. Koh's transnational legal process theory essentially revolves around the study of the application of international human rights norms at a national level. In his view, through a series of repeated norm-interpretative interactions, states gradually come to not just comply with human rights norms, but internalise these into domestic practice. In other words, transnational legal process is about more than mere compliance for the sake of complying, but focuses on the process through which international norms and standards become standardised domestic practice on three levels, which he calls 'legal internalisation', 'political internalisation', and 'social internalisation'. Amrita Kapur has helpfully illustrated how Koh's theory can be mapped onto the complementarity discourse to understand why reluctant states might dedicate scarce resources to prioritise prosecutions for Rome Statute crimes. In her view, moments of interaction between the ICC, civil society, and state actors on that state's obligations with regard to the investigation and prosecution of Rome Statute crimes (i.e. the standard of appropriate behaviour, the norm) provoke interpretations of that norm, which, in turn, leads to internalisation.[69]

As we will see in chapter 3, if we approach complementarity through this transnational legal process lens, it becomes clear that the ICC focuses primarily on matters of *legal* internalisation, and perhaps to a more limited extent on political internalisation to the extent that this translates into investigations and prosecutions. For this reason, the case studies presented in chapters 4 and 5 of this thesis also focus primarily on investigating aspects of *legal* internalisation of Rome Statute norms and standards around accountability for sexual violence crimes in the DRC and Colombia. I do this with the caveat, however, that the developments analysed have sometimes also involved very clear elements of social and political internalisation (in fact, I will argue that the internalisation process is strongest where these three converge) – I will highlight those where relevant or where particularly tangible. The choice to focus on aspects of legal internalisation is also methodologically sound, given the limitations of my research: I am relying upon publicly available information, and

[69] "… the repeated dialogues (visits, correspondence, reports) between the ICC and States subject to preliminary examinations are exactly the type of 'interactions' and 'interpretations' that give rise to challenged norm interpretations at the national level", i.e. the constitutive elements of TLP. See: Kapur (2016), at 10.

information I was realistically able to gather in 2-week field research missions in Colombia and the DRC.

This brings me to the final issues I wish to highlight concerning my research methodology: its limitations. Undertaking interdisciplinary research by combining an international criminal law framework with a norm diffusion perspective inevitably risks doing justice to neither. While I am hopeful that I have done at least some justice to both fields of study, I am conscious that this research did not address a number of things due to logistical, resource, and other methodological constraints, and I wish to spell these out explicitly. These thoughts on constraints and limitations not only clarify what my research means to do (and, importantly, what it does not intend to do). These issues also point to further areas of research that I hope myself and others will continue to invest in so we can collectively move international criminal law forward and facilitate its progressive development where it matters most – at a national level where survivors of sexual violence can see justice done in their own courts, by their own judges.

For security and financial reasons, my fieldwork in the DRC and Colombia was limited to two weeks in each country in the urban areas (Kinshasa in the DRC, and Bogotá and Medellín in Colombia). I am acutely aware of the limitations of this for my research. Asking the same questions about the importance of the ICC and the relevance of the domestication of Rome Statute standards around accountability for sexual violence may deliver very different results if replicated in the (rural) areas most directly affected by conflict, such as North and South Kivu in the DRC, or Antioquia in Colombia. Legal anthropological or ethnographic research for longer periods of time into the translation of justice norms and understandings at those local levels would be important to broaden our understandings about the way in which justice is shaped and given meaning in those localised contexts, as well as the law's ability to challenge localised norms and understandings. For instance, Jessica Lynn Corsi provides an interesting perspective on the local internalisation of Rome Statute norms around sexual violence. Analysing NGO training programmes with rebel soldiers in the Central African Republic, she shows that discussions and trainings on international law, in particular the Rome Statute's definition of rape, gradually transformed the rebel soldiers' understanding of the crime of rape; the interactive process challenged an

existing norm that sex by force was sex, and not a violent crime.[70] Similarly, I remember an anecdote told to me by the coordinator of a women's rights organisation working in eastern DRC when I was still working with the Women's Initiatives for Gender Justice. Our partner organisations had distributed wristbands with the phrase "Gender Justice" to women in North and South Kivu. Wearing the wristbands made the women feel more secure, and they used them to remind militia groups that their areas were under the jurisdiction of the ICC. While those are very powerful examples, they are not the type of domestication this thesis is ultimately concerned with.

This research also did not concern itself with the emergence of what Sally Engle Merry calls individual norm consciousness: a "deeper understanding of how, where and under what conditions norm change takes place".[71] Research into such vernacularisation of Rome Statute norms around accountability at a local level, among the communities affected by violence, can also tell us more about the reality and potential of positive complementarity and the Rome Statute's broader goals of deterrence and prevention regarding sexual violence. Further research should also focus on conducting similar studies of the diffusion of Rome Statute norms in other countries, including those not party to the Statute. For instance, there are some indications that the Rome Statute normatively contributed to advancing the scope of the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill in India (a non-State Party) in 2005, which could contribute to challenging norms of impunity in the country.[72] Rather than focusing on local appropriation or norm creation, this thesis focuses on what could be described as the "elite level": the appropriation or domestication of the Rome Statute's gender justice accountability standards at a legislative, jurisprudential, and executive level in Colombia and the DRC – in line with Koh's transnational legal process.

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[70] Jessica Lynn Corsi, 'Managing Violence: Can the International Criminal Court Prevent Sexual Violence in Conflict?', in Marta Minow, C. Cora True-Frost, and Alex Whiting (eds), *The First Global Prosecutor: Promise and Constraints* (Michigan University Press, 2015). Another interesting story from the CAR is this: when a Catholic nun told a militia group that a camp of prisoners was under the jurisdiction of the ICC and that if anything happened to the prisoners the perpetrators could end up in The Hague, this deterred further commission of crimes. Jon Lee Anderson, 'The Mission: A Last Defence Against Genocide', *The New Yorker* (20 October 2014), available at <http://www.newyorker.com/magazine/2014/10/20/mission-3>, accessed 23 December 2016.

[71] Sally Engle Merry, 'Beyond Compliance: Toward an Anthropological Understanding of International Justice', in Kamari Maxine Clarke and Mark Goodale (eds), *Mirrors of Justice: Law and power in the post-Cold War era* (Cambridge: Cambridge University Press, 2010), at 34.

[72] Usha Ramanathan, 'The surprising impact of the Rome Statute in India', (7 November 2014), available at <https://www.opendemocracy.net/openglobalrights/usha-ramanathan/surprising-impact-of-rome-statute-in-india>, accessed 23 December 2016.

SECTION 1.4

OUTLINE OF THESIS

Following this introductory chapter, the next chapter discusses the normative and theoretical underpinnings of this thesis. It provides a detailed discussion of the principle of complementarity, the development of the idea of positive complementarity, and the link made in this thesis between these concepts and transnational legal process theory. It also places this research into the broader academic field of (gender and) international criminal law. It provides a brief background of the development of this field from a gender justice perspective, zooming in on the lack of attention traditionally given to crimes of sexual violence, and the hope placed with the ICC to change these dynamics. This serves as additional justification and clarification for the decision to focus this research specifically on connecting gender justice concerns to complementarity. Furthermore, we will see in chapter 2 that complementarity essentially has two configurations. The traditional understanding of complementarity is as part of the Rome Statute's admissibility test to determine whether the ICC can exercise its jurisdiction over a particular situation or case. A newer, broader, dimension to complementarity is what Sarah Nouwen has termed complementarity as a "big idea". The differences between the two, and the ongoing development of the latter, are discussed in more detail in chapter 2.

These two conceptions or understandings of complementarity at the ICC are dissected in more detail in chapter 3. This chapter serves to outline the pressure points I mentioned earlier that may negatively affect accountability for sexual and gender-based violence within the admissibility test, as well as the potential for positively influencing accountability mechanisms at a national level through complementarity's positive dimension. The chapter also cautions, however, against expecting too much from the ICC in terms of positive complementarity given an ever-increasing push by the Assembly of States Parties to minimise any such role for the Court or the Office of the Prosecutor. In other words, it serves to clarify the focus within this research on actors other than the ICC at a national level.

Chapters 4 and 5 investigate these ideas around positive complementarity and norm diffusion in more detail in Colombia and the DRC, respectively. The chapters illustrate that there are various ways in which the Rome Statute has normatively contributed to expanding possibilities of accountability for sexual and gender-based violence at a national level.

Although these developments are very often placed specifically into a complementarity narrative (e.g. the adoption of laws is justified as "implementation of complementarity"), even where no explicit reference is made, it is clear that domestic actors seek a link to the ICC through their judicial, legislative, or executive action. These processes of domestication have been important to advance the discussions at a national level around accountability for sexual and gender-based violence. Yet, many of these normative domestication processes have little to do with the ICC itself: such normative engagement with Rome Statute standards around accountability for sexual violence, oftentimes, is championed by actors formally external to the complementarity system. Most notably, the two case studies in this thesis illustrate that the ICC and its Rome Statute are expanding in all kinds of different ways we would not have expected when the Court was first created.

The sixth and last chapter of this thesis sets out comparative conclusions drawn from the two case studies, and addresses lessons learned from this analysis for (positive) complementarity, and its connection to broader norm diffusion theories. While some lessons learned are specific to issues of sexual and gender-based violence, many can be applied more broadly and as such, it is hoped that these conclusions will invite self-reflection among the different actors involved in complementarity work, whether or not they work on issues of gender justice or sexual violence. The conclusions highlight in particular the gender justice limitations and silences within the complementarity framework; address the link between positive complementarity and norm internalisation; and speak to the key actors and agents of change that underpin these domestication processes. Ultimately, it outlines what this analysis reveals about (positive) complementarity as a tool in the fight against impunity for sexual violence crimes.

2

NORMATIVE AND THEORETICAL FRAMEWORK

As mentioned, this research focuses specifically on sexual and gender-based violence crimes within the Rome Statute system of justice because these crimes have traditionally been largely ignored or invisibilised in international criminal law. As this chapter demonstrates, gendered systems of meanings and values that have been ascribed to different crimes and that have affected understandings of conflict continue to negatively affect the specific recognition of these crimes and therefore their inclusion within accountability efforts in this field. This second chapter thus discusses the normative and theoretical underpinnings of this thesis. The first section underlines the importance of focusing on sexual violence within international criminal law (ICL) in general, and the study of complementarity in particular by highlighting the way in which crimes of sexual violence have long remained invisible in ICL, as well as the progress made in this regard with the adoption of the Rome Statute. Section two then introduces the principle of complementarity, distinguishing between what Sarah Nouwen termed 'legal' complementarity and complementarity as a 'big idea'. The third and final section describes why and how this thesis combines the study of complementarity with a transnational legal process/norm diffusion theoretical approach.

SECTION 2.1

SEXUAL AND GENDER-BASED VIOLENCE IN ICL

Many people mistakenly assume that gender equals an exclusive focus on the rights, interests and lived experiences of *women*. On the contrary, we must remember the differences between sex and gender: sex refers to the biological differences between men and women, whereas gender refers to the socially constructed identities commonly associated with being male and being female. While sex arguably creates a binary distinction ('man' versus 'woman'), gender is a category that captures a broader array of identities linked to socially constructed roles and behaviour, and speaks to how power relations between people shape societies, communities, relationships, and institutions. Gender, in other words, does not speak exclusively to the interests of either women or men, but relates instead to the relationships (of power) between people and institutions and to how those are structured and shaped through meanings attached to and associated with masculinity and femininity. A helpful way to think of gender, therefore, is as "a discourse, a set of symbols, a system of meanings".[73] It is a way of "categorising, ordering and symbolising power, of hierarchically structuring relationships among different categories of people and different human activities symbolically associated with masculinity and femininity".[74] In other words, 'gender' structures relationships between persons, attaches expectations, characteristics and meanings to notions of masculinity and femininity, and orders these in a value system. For instance, in most societies, being male means to be a protector or provider, occupying a public space, whereas female is associated with care taking and other supportive responsibilities in more private spaces such as the home. The values placed upon these gendered expectations shape the development of norms, values, and practices. Critically, as Cohn underscores, these gendered meanings and values are far from neutral: "rather, those coded as masculine are consistently valorised over those coded as feminine, and those individuals and activities marked as masculine are considered to have more status and value than those seen as feminine".[75]

Accountability for sexual and gender-based violence in ICL has been difficult in part because of a lack of legal recognition of these crimes, which is rooted in gendered norms

[73] Carol Cohn, 'Women and Wars: A Conceptual Framework', in Carol Cohn (ed), *Women & Wars* (Cambridge: Polity Press, 2013), at 11.

[74] Cohn (2013), at 3.

[75] Cohn (2013), at 7.

around which kinds of victimisation IHL/ICL is intended to address, or which crimes are serious enough to require specific attention within accountability efforts. While always having been part of war and conflict, sexual and gender-based violence have long remained invisible in international law. Rape and other forms of sexual violence were seen as unfortunate side-effects of conflict or as booty of war because 'boys will be boys'; they were perceived as committed within the 'private' sphere and therefore outside the scope of regulation.[76] This disparity between attention for crimes (primarily committed) against women/girls and crimes (primarily committed) against men/boys is rooted in gendered notions of conduct of war and violations of such rules. These norms have focused primarily on violations committed against men because men are the traditional warriors and men lead public lives. Therefore, "IHL treaties, negotiated by men, tended to reflect the perspectives and concerns of men".[77] However, even though women are disproportionately affected by sexual violence in situations of armed conflict and political repression, sexual violence is not the only type of violence committed against women in conflict; neither is gender-based violence the same as violence against women. Men are equally victims of gender-based violence, and sometimes also of sexual violence.

Where women were included within the ambit of the early development of IHL (and therefore ICL), the focus was on their protection, their vulnerability, or their roles as mothers. For instance, while rape was included in the 1949 Geneva Convention, it was linked to issues of honour, decency and protection, holding that "women shall be especially *protected* against any attack on *their honour*, in particular rape, enforced prostitution, or any form of *indecent* assault". The 1977 Additional Protocols similarly emphasise the need for the special protection of women. As such, for a long time, IHL merely included a duty to prohibit rape and sexual violence (or rather, to protect women from becoming its victims) but did not specifically criminalise such acts. In other words, rape was conceptualised not as a crime against the woman, but as an offence against the men who failed to protect her.[78] This places women at the receiving end of the protection of the law, rather than conceptualising them as

[76] See, *e.g.*, Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law', 5 *European Journal of International Law* (1994); Hilary Charlesworth, 'International Law: A Discipline of Crisis', 65 *Modern Law Review* (2002), at 389; Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law', 46 *McGill Law Journal* (2000).

[77] Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure (third edition)* (Cambridge: Cambridge University Press, 2014), at 287.

[78] Suzanne Gibson, 'The Discourse of Sex/War: Thoughts on Catharine MacKinnon's 1993 Oxford Amnesty Lecture', 1 *Feminist Legal Studies* (1993), at 188. ("… a humiliation inflicted upon a nation, an affront to a man's pride as guardian of his women and a desecration of all that man holds dear.")

participants with agency in these processes. Furthermore, it left out entirely narratives of victimisation that did not conform to this idea of the vulnerable woman raped by an aggressive male perpetrator (e.g. sexual violence against men, or violence perpetrated by women).[79]

The mid 1990s, with the establishment of the ICTY and ICTR, signalled an important change in this respect. Both statutes establishing these *ad hoc* Tribunals recognise rape and other forms of sexual violence as war crimes and/or crimes against humanity.[80] Although it remained a restrictive, narrow approach to sexual and gender-based violence, focusing on rape,[81] their jurisprudence contributed to the development of comprehensive legal definitions of this crime.[82] In the absence of strong legal precedent in international law for the legal recognition of broader categories of sexual or reproductive violence, however, these courts struggled to give full recognition to the complex sets of harms affecting men and women in Rwanda and the former Yugoslavia.

When the Rome Statute entered into force in 2002 this was celebrated as a huge achievement because it incorporated a much broader set of gender justice principles. In doing so, the Statute underscores that female victims are affected differently than male victims in situations where war crimes, crimes against humanity and genocide are committed, and that this must be taken into account in the judicial response to that situation under the Rome Statute. While some crimes are gender-specific, this gender sensitivity also underscores that even when they are victims of the *same* crimes, the consequences of those crimes and perceptions of harm, and therefore their views on remedies, may be different for male and

[79] Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade', 2 *Melbourne J. of Int'l Law* (2009).

[80] The ICTY Statute only included rape as a crime against humanity (Article 5(g)). The ICTR, on the other hand, had jurisdiction to prosecute rape both as a crime against humanity (Article 3(g)) and as a war crime in a non-international armed conflict (a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, Article 4(e)).

[81] The ICTY Statute contains only one other reference to rape, limited to rape of women: "The Security Council … Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and *rape of women*, […]" (third preambular paragraph). Neither the term 'sex' or 'sexual', nor 'gender' features in the ICTY Statute. In addition to the crime of rape, the ICTR Statute also includes enforced prostitution within Article 4(e). Neither the term 'sex' or 'sexual', nor 'gender' features in the ICTR Statute.

[82] For an overview of the contribution of ICTY and ICTR to the development of international criminal law recognition of sexual and gender-based violence, see, *e.g.*, Anne-Marie de Brouwer, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR* (Antwerpen: Intersentia, 2005). For a more critical analysis, see, *e.g.*, Karen Engle, 'Feminism and Its (Dis)contents: Criminalising Wartime Rape in Bosnia and Herzegovina', 99 *The American Journal of International Law* (2005).

female victims. As mentioned, this acknowledgement of the importance of gender for an institution like the ICC presents a significant move forward in a field that traditionally largely ignored sexual violence and the impact of gender in times of armed conflict and political repression. In other words, the Rome Statute moved gender from the periphery to the heart of international criminal law.[83]

2.1.1 Gender justice advancements in the Rome Statute's legal framework

The Rome Statute presents a significant advancement in the understanding and treatment of sexual and gender-based violence in both IHL/ICL and when compared to national criminal law for a number of reasons. The first relates to its substantive jurisdiction and legal definitions: the Rome Statute contains the most advanced articulation of sexual violence crimes in international criminal law,[84] and thus provides a broad basis for their investigation and prosecution. The Rome Statute criminalises not only rape, but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender-based persecution, trafficking and other forms of sexual violence as war crimes, crimes against humanity and, in some circumstances, genocide. This was a significant development compared to the ICTY and ICTR Statutes, and the first time an international law instrument of this kind codified the crimes of sexual slavery, gender-based persecution, and forced pregnancy.[85] The catchall category of 'other forms of sexual violence' also ensures that there is room for the continued development of the capture capacity of international criminal law in regards to these types of crimes. Another such relevant catchall category of crimes would be the crime of 'other inhumane acts'. New and emerging types of sexual or reproductive violence, such as forced contraception or forced marriage by ISIS against Yazidi women and girls in Iraq and Syria,

[83] Cate Steains, 'Gender Issues', in Roy S. K. Lee (ed), *The International Criminal Court: the making of the Rome Statute--issues, negotiations, results* (The Hague; Boston: Kluwer Law International, 1999), at 358.

[84] Louise Chappell, 'Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court', in Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Basingstoke ; New York: Palgrave Macmillan, 2011), at 163; Inder (2013), at 320.

[85] Steains (1999), at 364, 370. In 2016, the first trial at the ICC involving charges for forced pregnany commenced against Dominic Ongwen. See, *e.g.*, Dieneke de Vos, 'A day to remember: Ongwen's trial starts 6 December', (5 December 2016), available at <https://ilg2.org/2016/12/05/a-day-to-remember-ongwens-trial-starts-on-6-december/>,

can be captured by these broader catchall categories, should the ICC be in a position to exercise jurisdiction over these crimes.[86]

In addition, Article 21(3) confers a broad obligation on the Court, including the Office of the Prosecutor, to apply and interpret the law in a manner that is non-discriminatory, including on grounds of gender.[87] In fact, the Rome Statute specifically mandates the Office of the Prosecutor to prioritise the investigation and prosecution of sexual or gender-based violence. Most notably, Article 54(1)(b) provides that the Office of the Prosecutor shall "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, […] and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children". As some have argued, this does not just provide the Office with a mandate to prosecute such crimes, but establishes an obligation to do so.[88]

The Elements of the Crimes (EoC) provide detailed (and progressive) legal definitions for each of these crimes of sexual violence, which enshrines in law many of the progressive steps taken through the case law of the ICTY and ICTR. For instance, rape is defined in a gender-neutral manner recognising both male and female victimhood *and* perpetration. The EoC provide the following definition: "The perpetrator invaded the body *of a person* by conduct resulting in penetration, however slight, *of any part of the body of the victim or of the perpetrator* with a sexual organ, *or of the anal or genital opening of the victim* with any object or any other part of the body". It specifies that the concept of 'invasion' is intended to be broad enough to be gender-neutral. Further, the emphasis is on the coercive circumstances through which these crimes are committed which render the notion of consent irrelevant (the focus is on force, threat of force, or coercion).

[86] The ICC currently does not have jurisdiction over crimes committed in Syria or Iraq, as neither has ratified the Rome Statute. The only possibility for the ICC to exercise its jurisdiction over ISIS, therefore, would be through a UN Security Council referral, or if the individuals are nationals of States Parties.

[87] Article 21(3) provides: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status." *Rome Statute* (18 July 2002). As Patricia Viseur-Sellers underscores, the use of the word "Court" in Article 21 means that this obligation falls on *all* organs and units of the Court. Sellers (2009), at 341.

[88] See, *e.g.*, SáCouto and Cleary (2009). ("… the Rome Statute and its drafting history suggest that the Court should not only prioritize sexual and gender-based crimes, but also ensure that allegations regarding such crimes feature prominently in the Prosecutor's investigation and charging strategy from the outset.").

Furthermore, the ICC's Rules of Procedure and Evidence (RPE) set out important procedural requirements to ensure the effective investigation and prosecution of sexual and gender-based violence. Crimes of sexual violence do not require corroboration,[89] and consent cannot be inferred from a victim's conduct or the (lack of) words or resistance, particularly when the coercive circumstances make the victim incapable of giving genuine consent.[90] Evidence of prior or subsequent sexual conduct of a victim or witness shall not be admitted into evidence.[91] Further, witnesses testifying before the ICC enjoy a broad range of protective measures under Article 68. In ordering protective measures, such as the use of pseudonyms, face and voice distortion, the hearing of testimony in closed sessions, or the presence of a psychologist in the courtroom, the judges must take into account the nature of the crime, in particular where it involves sexual or gender-based violence.[92]

Finally, the Rome Statute includes requirements in relation to the Court's institutional set-up, emphasising the need for expertise on issues of gender. It requires a "fair" representation of male and female judges on the bench,[93] and obliges States Parties to "take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children".[94] The Prosecutor is also required to appoint legal advisers with expertise on specific issues "including, but not limited to, sexual and gender violence and violence against children",[95] and the Registry's Victims and Witnesses Unit must have staff "with expertise in trauma, including trauma related to crimes of sexual violence".[96] In short, the Rome Statute's broad range of gender justice principles consolidates the move towards greater recognition both in law and in practice of sexual and gender-based violence in IHL/ICL.

[89] Rule 63(4), *Rules of Procedure and Evidence* (10 September 2002).

[90] Rule 70, *Rules of Procedure and Evidence* (10 September 2002).

[91] Rule 71, *Rules of Procedure and Evidence* (10 September 2002).

[92] Article 68, *Rome Statute* (18 July 2002).

[93] Article 36(8)(a)(ii), *Rome Statute* (18 July 2002). Article 36(8)(a) also provides for the representation of the principal legal systems of the world, and an "equitable" representation of the different geographical regions.

[94] Article 36(8)(b), *Rome Statute* (18 July 2002).

[95] Article 42(9), *Rome Statute* (18 July 2002).

[96] Article 43(6), *Rome Statute* (18 July 2002).

2.1.2 Continued obstacles to gender justice

The significant advancement of the Rome Statute in terms of legal recognition of sexual and gender-based violence and institutional capacity has not necessarily led to greater accountability for these crimes at the international level. Despite its advanced mandate, SGBV crimes have remained one of the most vulnerable categories of crimes at the ICC. This is due to a variety of factors, including insufficient, rushed or limited investigations, a lack of a clear prosecutorial strategy inclusive of gender concerns, weak evidence, and an initially very limited understanding among investigators, prosecutors, and judges of gendered harm in conflict.[97]

This brings us to an important, continuing, impediment to accountability for sexual and gender-based violence: the continued operation of gender-biased norms or operational standards that overlook, reduce or eliminate sexual violence crimes from investigations and prosecutions at key moments when decisions are made around selection and prioritisation. Jarvis & Vigneswaran have called these "pressure points"[98], a term I am adopting in this thesis to describe those moments where sexual and gender-based violence are particularly vulnerable to attrition or suffer from insufficient attention due to gender-biased norms. These 'pressure points' include operational standards enshrined in law or policies, such as around permissible evidence, as well as (unwritten) norms that influence people's perceptions of a victim's ability to seek justice or report crimes to the police. In situations where the law criminalises sexual violence, deeply ingrained notions of victim blaming or perceptions around what 'real' crimes the justice system should prioritise, result in under-enforcement of these legal provisions. While over time the ICL legal framework has advanced considerably, a range of (mostly unwritten) gender-biased norms or misconceptions continue to negatively

[97] For a more detailed assessment of the ICC's track record regarding sexual and gender-based violence, see *e.g.*: Niamh Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court', in William Schabas, Yvonne McDermott, and Niamh Hayes (eds), *The Ashgate research companion to international criminal law: critical perspectives* (Farnham, Surrey, England ; Burlington, VT: Ashgate, 2013). The Gender Report Cards on the International Criminal Court published between 2008 and 2014 by the Women's Initiatives for Gender Justice also provide an interesting analysis of the (internal and external) challenges the ICC faced in its first decade regarding sexual and gender-based violence.

[98] Michelle Jarvis and Kate Vigneswaran, 'Facing Challenges in Sexual Violence Cases', in Michelle Jarvis and Serge Brammertz (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016), at 35.

affect accountability for these crimes at both a national and international level, including at the ICC.[99]

The ICC's first case against Thomas Lubanga Dyilo (Lubanga) was widely criticised for excluding charges relating to allegations of sexual violence committed by his troops in Ituri, eastern DRC. While information was available to the Office of the Prosecutor that Lubanga's *Union des patriotes congolais* (UPC) was alleged to have committed sexual violence crimes,[100] the case focused exclusively on charges relating to the recruitment, conscription, and use of child soldiers (and in that did not address sexual violence committed against girl soldiers forcibly recruited into the UPC). In this case, the investigators went into the field with a very limited, preconceived idea of the case, which did not include sexual violence; because they were not looking for it, or were not even aware of the possibility of such crimes having been committed, they just did not see the evidence. Surprisingly enough, a majority of prosecution witnesses during trial did speak about sexual violence.[101] In this case, it was not a question of a lack of evidence, but it was a question of evidence being rendered invisible in the Prosecution's limited investigations and prosecutorial strategy and therefore non-justiciable at trial. While the Prosecution tried (belatedly) to add a gender dimension to the existing charges at the sentencing and reparations stage, and to have this sexual harm recognised indirectly, the judges indicated that for fair trial reasons, this was obviously too late.[102]

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[99] Chappell (2015), at 38-39.

[100] Several civil society organisations had submitted detailed information to the Office of the Prosecutor on these crimes. See, *e.g.*, Chappell (2015), at 110-111; Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War* (March 2005); 'Letter to the Prosecutor', *Women's Initiatives for Gender Justice* (16 August 2006), available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>, accessed 20 April 2017; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC, Women's Initiatives for Gender Justice, 'Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for leave to participate as Amicus Curiae in the Article 61 confirmation proceedings (with confidential annex 2)', ICC-01/04-01/06-403 (7 September 2006); *The Situation in the Democratic Republic of Congo*, ICC, Women's Initiatives for Gender Justice, 'Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae with confidential annex 2', ICC-01/04-313 (10 November 2006).

[101] Trial monitoring by the Women's Initiatives for Gender Justice suggests that 21 of 25 prosecution witnesses spoke about girl soldiers and at least 15 of these testified directly about sexual and gender-based violence. See, *e.g.*: Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2009* (2009), at 71-85.

[102] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC, Appeals Chamber, 'Order for Reparations (amended)', ICC-01/04-01/06-3129-AnxA (3 March 2015); *The Prosecutor v. Thomas Lubanga Dyilo*, ICC, Trial Chamber I, 'Decision on Sentence pursuant to Article 76 of the Statute', ICC-01/04-01/06-2901 (10 July 2012).

In this case, a desire to run a 'quick and easy' case led to a decision *not* to investigate allegations of sexual violence.[103] This decision likely stemmed in part from a perception that such investigations would render the case overly complicated, or that these crimes were (more) difficult to prove – for instance, then-Prosecutor Luis Moreno Ocampo claimed the sexual violence crimes "did not meet the crimes-against-humanity threshold test of being 'systematic'".[104] As Jarvis & Vigneswaran illustrate, the idea that sexual violence can only be prosecuted when the sexual violence acts themselves are widespread or systematic is a common misconception: the attack against the civilian population (the *chapeau* requirement for crimes against humanity and of which the sexual violence forms part) must be widespread or systematic, not each individual act.[105] They further illustrate that this misconception is rooted in the gendered norm or understanding that sexual violence acts tend to be 'opportunistic' and/or 'personally motivated', rather than part of a larger context of criminality. As a result, "there is a disproportionate tendency to assume that sexual violence is an isolated act when compared to other crimes".[106] These perceptions negatively influence choices that are made around which types of crimes to include in investigations, or what charges to pursue at trial, particularly in situations of already stretched resources.

Such 'pressure points' are not always moments in which a conscious decision is made to disregard sexual violence crimes in designing and implementing investigative and prosecutorial policies. Often, de-prioritising or overlooking these crimes happens through the operation of more informal or unconscious gender biases held by investigators, prosecutors, or judges, or biases embedded in certain institutional practices or structures. For instance, sexual and gender-based crimes are often not included in cases because of perceptions that these crimes are more difficult to investigate due to difficulties of gathering what is seen as "reliable" evidence. As Chappell explains: "This view is based on a range of gender-biased assumptions, including that the testimony of the victims of these acts – primarily women – is less reliable than others, that these victim are unlikely to want to testify, and that it is difficult

[103] Katy Glassborow, 'ICC Investigative Strategy Under Fire', *Institute for War and Peace Reporting* (27 October 2008), available at <http://iwpr.net/report-news/icc-investigative-strategy-under-fire>, accessed 23 September 2014.

[104] Chappell (2015), at 111. The irony is that the *Lubanga* case, rather than quick and easy, turned into one of the most complicated and lengthy cases at the ICC to date, involving several stays of proceedings and challenges to the charges. Originally indicted in February 2006, he was convicted six years later in March 2012, which was confirmed upon appeal in December 2014.

[105] Jarvis and Vigneswaran (2016), at 40.

[106] Jarvis and Vigneswaran (2016), at 39. See also Laurel Baig *et al.*, 'Contextualising Sexual Violence: Selection of Crimes', in Michelle Jarvis and Serge Brammertz (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016).

to devise investigation techniques for interrogating these sorts of crimes".[107] Other examples include the perception that sexual violence acts are matters of honour and dignity rather than violent crimes (which, as we have seen, had long been the perspective in IHL), that they are of comparatively lower gravity than other crimes, and the before mentioned idea that sexual violence is always or necessarily opportunistic.[108] These gendered assumptions or norms have resulted in the (disproportionate) exclusion of sexual and gender-based violence from investigations, prosecutions, or other responses to conflict.

At the same time, such gender norms *also* affect cases when sexual and gender-based violence crimes *are* investigated and prosecuted. Take for example the *Kenyatta* case at the ICC, where the Office of the Prosecutor brought charges of other forms of sexual violence for acts of penile amputation and forced circumcision committed against men of Luo ethnicity during the post-election violence in Kenya in 2007-2008. The Pre-Trial Chamber recharacterised these charges as other inhumane acts because in its view, they "cannot be considered acts of a 'sexual nature'".[109] While the Pre-Trial Chamber does not divulge into a detailed discussion of its findings, the decision appears to be grounded in a particular understanding of what it means for an act to be 'sexual', i.e. that it has *sexual intent*. Forced circumcision and penile amputation, acts against male sexual organs, for the Pre-Trial Chamber did not have any such sexual intent; the perpetrator derived no sexual pleasure or gratification out of the act. However, it is important to understand "the non-sexual intent behind what appear to be sexual acts".[110] Sexual violence, due to its stigmatizing effect, is committed against both male and female victims because of the meaning of gender in a society, because of what the act communicates to the victim about their gender and that of the perpetrator, and is embedded in gendered power relations. Sexual violence often has nothing

[107] Chappell (2015), at 39.

[108] Jarvis and Vigneswaran (2016), at 34-42. Jarvis and Vigneswaran also note that they did not "encounter the same tendency to assume that sexual violence against males is not a violent crime, that it is comparatively less serious, that it is disconnected from the conflict, and that it can only be prosecuted if it occurs in large numbers".

[109] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC, Pre-Trial Chamber II, 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', ICC-01/09-02/11-01 (8 March 2011), at para 27; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC, Pre-Trial Chamber II, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-02/11-382-Red (23 January 2012), at paras 264-266.

[110] Refugee Law Project, *Comments on the ICC Draft Policy Paper on Sexual and Gender Based Crimes* (23 February 2014), at para 36. See also Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi R. Cahn, 'Criminal Justice for Gendered Violence and Beyond', 11 *International Criminal Law Review* (2011), at 429. ("Perpetrators understand (as do the victims) that public sexual violence is a form of communication and power, and not only a sexual act.")

to do with sex. What the Chamber failed to understand was how gender contextualised these crimes of forced circumcision: the power relations/hierarchy between and within ethnic groups, and the gendered meaning of circumcision in Kenyan society are at the heart of their victimisation – it was about meanings of masculinity and femininity.[111] It is the context that makes these crimes gendered – they were committed because of their impact on conceptions of masculinities for the two main ethnic groups in Kenya. These acts were also sexual because they targeted the victim's sexual function, and not because there was anything inherently sexual about the perpetrator's motives (the latter is irrelevant for its classification as sexual violence).

In this decision, we see very clearly gendered norms or assumptions (for instance that only women are victims of sexual violence) operating to invisibilise male victims of sexual violence through the inaccurate labelling (or misrecognition) of their harm. In fact, this decision is "emblematic" of the general "disregard" in international criminal law for sexual violence committed against men.[112] As Sivakumaran illustrates, while the international criminal law framework is adequate to prosecute sexual violence regardless of the gender of its victims, in practice, sexual violence against male victims is often characterized as other (non-sexual) categories of crimes.[113] This is partly due to the gendered stereotype of the man as the perpetrator and the woman as the victim – the idea that men cannot be raped. It is also premised on the (gendered) notion that violence against men is of a different nature than violence against women – violence against men is violence against their standing in public, against their authority, and as such, is seen as a public violation (torture, inhumane treatment) rather than a private violation (sexual violence) and thus worthy of different attention. In this

[111] 'Kenya: Plea to ICC over forced male circumcision', *IRIN News* (25 April 2011), available at <http://www.irinnews.org/report/92564/kenya-plea-to-icc-over-forced-male-circumcision>, accessed 22 September 2014; Robbie Corey-Boulet, 'In Kenya, Forced Male Circumcision and a Struggle for Justice', *The Atlantic* (1 August 2011), available at <http://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/2/>, accessed 22 September 2014; Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2011* (2011), at 180-181; Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2012* (2012), at 108.

[112] Refugee Law Project, *Comments on the ICC Draft Policy Paper on Sexual and Gender Based Crimes*, at para 23.

[113] Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', 18 *European Journal of International Law* (2007), at 256-257; Sandesh Sivakumaran, 'Prosecuting Sexual Violence against Men and Boys', in Anne-Marie de Brouwer*, et al.* (eds), *Sexual violence as an international crime: interdisciplinary approaches*, *Series on transitional justice* (Cambridge; United Kingdom: Intersentia, 2013), at 97. See also Dolan (2014).

way, such subconscious gendered ideas around perpetrators and victims affect how crimes are evaluated and labelled.

Although the Office of the Prosecutor has brought cases involving charges for sexual and gender-based violence in many of its investigations,[114] it has struggled to see these cases through to trial. For instance, in its now fifteen years of existence, the ICC has only had *one* successful conviction for crimes of sexual violence in March 2016 in the Bemba case.[115] The case against Germain Katanga and Mathieu Ngudjolo Chui, two Congolese militia leaders, had also included two charges of rape as both a crime against humanity and as a war crime (in addition to two charges of sexual slavery: one as a crime against humanity and one as a war crime). However, because the Trial Chamber found the Prosecution had not provided sufficient evidence to link either Katanga or Ngudjolo to the crimes of sexual violence, they were acquitted. Ngudjolo was acquitted of all charges against him,[116] whereas Katanga was only partially acquitted of the charges of rape and sexual slavery, and of charges relating to child recruitment (he was convicted of other crimes).[117]

Nonetheless, since the election and inauguration in 2011 and 2012, respectively, of incumbent Prosecutor Fatou Bensouda – who made sexual and gender-based violence one of the spear points of her Office's strategic plans – and the subsequent adoption of the Sexual and Gender-Based Crimes Policy Paper in June 2014,[118] important steps have been made to counter this negative tendency. Notably, following his surrender to the ICC in January 2015, the Office of the Prosecutor conducted further investigations in the Dominic Ongwen case to include charges of sexual and gender-based violence in the case against him. Dominic Ongwen is an alleged senior commander in the Ugandan Lord's Resistance Army (LRA), who is charged with responsibility for war crimes and crimes against humanity committed by the LRA in various locations in Northern Uganda from at least 1 July 2002 to 31 December

[114] As of 31 May 2017, the Office of the Prosecutor has opened ten investigations; in six of these, one or more individuals have been charged with sexual violence crimes. It has brought SGBV charges in relation to the situations in the DRC, the Central African Republic, Côte d'Ivoire, Kenya, Uganda, and Darfur. No charges have (yet) been brought in relation to the second Central African Republic (CAR II) investigation, or the Georgia investigation. Although charges have been brought in relation to the situations in Libya and Mali, these do not include charges of sexual violence.

[115] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Trial Chamber III, 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08-3343 (21 March 2016).

[116] *The Prosecutor v. Mathieu Ngudjolo Chui*, ICC, Trial Chamber II, 'Judgement pursuant to Article 54 of the Statute', ICC-01/04-02/12-3-tENG (18 December 2012).

[117] *The Prosecutor v. Germain Katanga*, ICC, Trial Chamber II, 'Jugement rendu en application de l'article 74 du Statut', ICC-01/04-01/07-3436 (7 March 2014).

[118] Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014).

2005. With 19 of the 70 charges against him now relating to SGBV, it is the first time an accused faces such a broad range of SGBV charges at the ICC: they include several counts of rape, sexual slavery, enslavement, torture, outrages upon personal dignity, forced pregnancy and forced marriage (as an other inhumane act; it is described as primarily a gendered rather than sexual crime).[119] Similarly, Bosco Ntaganda, a former militia leader in the DRC, is charged with a range of crimes relating to the conscription of child soldiers and the use of children in hostilities, including for rape committed against girl child soldiers by members of the same militia.[120] At the same time, however, Prosecutor Bensouda has been criticised for not expanding (at least publicly) the investigations in Libya to include sexual and gender-based violence,[121] and for her failure to charge Ahmad Al Mahdi Al Faqi in the Mali investigations with such crimes, despite information from civil society organisations about his alleged responsibility for these crimes.[122]

In other words, even in situations where the legal framework is as comprehensive as the Rome Statute, the initial exclusion of sexual and gender-based violence from IHL/ICL may continue through de-prioritisation of these crimes in investigation and prosecution strategies, and (mis)understandings around notions of consent and sex, all linked to gendered systems of meaning.[123] Gendered understandings of conflict, of the types of harm that constitute crimes, of who is a victim and who is a perpetrator, of perceived divisions between public and private violations, and of which crimes are deemed 'important' or 'grave' and

[119] *The Prosecutor v. Dominic Ongwen*, ICC, Office of the Prosecutor, 'Prosecution's Pre-Trial Brief', ICC-02/04-01/15-533 (6 September 2016); *The Prosecutor v. Dominic Ongwen*, ICC, Pre-Trial Chamber II, 'Decision on the confirmation of charges against Dominic Ongwen', ICC-02/04-01/15-422-Red (23 March 2016).

[120] *The Prosecutor v. Bosco Ntaganda*, ICC, Trial Chamber VI, 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-1707 (4 January 2017).

[121] An arrest warrant was unsealed on 24 April 2017 in the Libya situation; the arrest warrant had been issued in March 2013 in relation to crimes committed by Libyan Security Forces in detention centres. It does not, however, classify acts of sexual violence specifically as sexual violence or rape, but rather as torture, other inhumane acts, cruel treatment and outrages upon personal dignity. This is yet another example of the general tendency to classify sexual violence against male victims as non-sexual categories of crimes. Nonetheless, should the accused be arrested and transferred to the jurisdiction of the ICC, the Prosecutor may seek additional charges at the confirmation stage to include specific charges of sexual violence. *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, ICC, Pre-Trial Chamber I, 'Warrant of Arrest for Al-Tuhamy Mohamed Khaled', ICC-01/11-01/13-1 (18 April 2013).

[122] See, *e.g.*, 'Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded', *FIDH* (30 September 2015), available at <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but>, accessed 20 April 2017. After his admission of guilt, Al Mahdi was convicted of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, and sentenced to nine years imprisonment in September 2016. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC, Trial Chamber VIII, 'Judgment and Sentence', ICC-01/12-01/15-171 (27 September 2016).

[123] Kapur (2016), at 11.

prosecutable can all negatively impact the law's (and a court's) capacity to capture and address sexual and gender-based harms. These gendered norms and assumptions operate not only at the surface, but equally infuse practices and policies in a more nuanced or unconscious manner. As we will see in the next chapters, such pressure points also operate to overlook, reduce, or eliminate sexual and gender-based violence within the framework of complementarity.

SECTION 2.2

DEFINING (POSITIVE) COMPLEMENTARITY

The parameters of the Court's jurisdiction were a much-contested issue during the Rome Statute negotiations. This involved a debate not just on jurisdiction in terms of the types of crimes that could be investigated and prosecuted by the Court (the *existence* of jurisdiction), but also, and perhaps more importantly, about when the Court should, and when it should not, be able to *exercise* that jurisdiction. To put it differently, it was a question of how to balance the ICC's jurisdiction with states' prerogative to control judicial proceedings over crimes committed on their territory or by their nationals, and how to solve conflicts between these two. Previous international tribunals, such as the ICTY and ICTR, had *primary* jurisdiction – this meant their jurisdiction superseded that of domestic courts, but most states were comfortable with this because the ICTY and ICTR had restrictive territorial and temporal jurisdiction. Now that they were discussing the establishment of a permanent court with potentially worldwide reach, states were very reluctant to give away all of their sovereignty to an independent prosecutor with unchecked powers. The compromise was that the ICC would be "complementary to national criminal jurisdictions".[124] Complementarity thus encompasses the idea that national systems have a primary role (and corresponding duty[125]) to prosecute and investigate Rome Statute crimes, and strikes a careful balance between state sovereignty and the necessity for international criminal jurisdiction in certain situations.[126]

[124] Article 1, *Rome Statute* (18 July 2002).

[125] Mauro Politi, 'Reflections on complementarity at the Rome Conference and beyond', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and complementarity: from theory to practice* (Cambridge ; New York: Cambridge University Press, 2011), at 145; Laplante (2010), at 636.

[126] Jo Stigen, *The relationship between the International Criminal Court and national jurisdictions: the principle of complementarity* (Leiden; Boston: Martinus Nijhoff Publishers, 2008), at 17; Olympia Bekou, 'In the hands of the state: Implementing legislation and complementarity', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011), at 830-831; Markus Benzing, 'Complementarity of the ICC - International Criminal Justice between State Sovereignty and the Fight against Impunity', 7 *Max Planck Y.B. U.N. L.* (2003), at 595, 597; Nidal Nabil Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?', 10 *International Criminal Law Review* (2010), at 73-74; Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?', 88 *International Review of the Red Cross* (2006), at 381; Carsten Stahn, 'Complementarity: A Tale of Two Notions', 19 *Criminal Law Forum* (2008), at 88; Politi (2011), at 144; Mark S. Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions', 1 *Hague Journal on the Rule of Law* (2009), at 81; Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', 12 *International Criminal Law Review* (2012), at 228.

Yet, surprisingly, the term 'complementarity' as such does not appear anywhere in the Rome Statute and remains undefined. Perhaps as a result, over time, the principle has begun to lead many different lives. Sarah Nouwen argues complementarity essentially has two: a "legal life" and a life as a "big idea".[127] The first is equated to the legal concept of admissibility (set out in article 17 of the Rome Statute), which regulates the Court's exercise of jurisdiction through providing when cases must be declared inadmissible before the Court. Under the Rome Statute's admissibility provisions, the ICC may only exercise its jurisdiction when a State that would normally have jurisdiction is not taking any action domestically or is unable or unwilling to do so genuinely.[128] The ICC must also declare a case inadmissible when national authorities have investigated the case, but those authorities decided not to proceed, provided those proceedings were genuine.[129] Further, a person may not be tried twice for the same conduct.[130] Inaction by domestic jurisdictions automatically renders a case admissible before the ICC.[131] In other words, it is a strict legal test that presents a "barrier to jurisdiction" for the ICC.[132] Under this strict view of complementarity, states are granted a high degree of flexibility; as Hunter has illustrated, 'admissibility proof' justice at a national level requires far lower adherence to Rome Statute standards than some have argued.[133] As a result, as we will see in chapter 3, complementarity in a legal sense, also called a "narrow", "procedural", or "classical" view of complementarity,[134] contains a number of gender justice

[127] Nouwen (2013), at 11. In a similar vein, Moffett divides the two as follows: "At its narrowest, [complementarity] is a line to demarcate where the ICC will and will not investigate. At its broadest, complementarity is a framework for transitional justice in countries dealing with the aftermath of international crimes." Luke Moffett, 'Complementarity's Monopoly on Justice in Uganda: The International Criminal Court, Victims and Thomas Kwoyelo', *International Criminal Law Review* (2016), at 3.

[128] Article 17(1)(a), *Rome Statute* (18 July 2002).

[129] Article 17(1)(b), *Rome Statute* (18 July 2002).

[130] Article 17(1)(c), *Rome Statute* (18 July 2002).

[131] *The Prosecutor v. Germain Katanga*, ICC, Appeals Chamber, 'Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', ICC-01/04-01/07-1497 (25 September 2009), at paras 1-2, 75-79; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC, Pre-Trial Chamber I, 'Decision on the Prosecutor's Application for a warrant of arrest, Article 58', ICC-01/04-01/06-8-Corr (10 February 2006), at para 40; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Pre-Trial Chamber I, 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-344-Red (31 May 2013), at para 58.

[132] Benzing (2003), at 595. See also Nouwen (2013), at 340. ("complementarity in the legal sense is a rule of priority that determines a competition for jurisdiction")

[133] Emilie Hunter, *The International Criminal Court and Positive Complementarity: The Impact of the ICC's Admissibility Law and Practice on Domestic Jurisdictions* (PhD thesis defended at European University Institute, 2014).

[134] Jann K. Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions* (Oxford ; New York: Oxford University Press, 2008), at 600; Chappell, Grey, and Waller (2013), at 5; Stahn (2008).

gaps or pressure points that may negatively affect accountability for sexual violence crimes at a national level.

Complementarity as a "big idea", on the other hand, captures various understandings that are not strictly linked to the Statute's admissibility criteria; in fact, Nouwen has shown that the "big idea" of complementarity has slowly become almost fully detached from its original meaning of a jurisdictional restriction. Similarly, Stahn has argued that, "complementarity is increasingly developing into a *structural principle* of a new system of justice".[135] This broader understanding is often said to be or do many things: it can be 'implemented',[136] 'complied with',[137] 'promoted',[138] or 'strengthened'.[139] In other words, complementarity as a "big idea" sees the concept as the cornerstone of a broader Rome Statute system, in which domestic courts and the ICC together create a web of accountability for perpetrators of international crimes.[140] In this way, more than resolving jurisdictional conflicts, complementarity is about "doing what the other could not or would not do through a division of tasks".[141] As argued by the first Prosecutor of the ICC in 2003, pursuant to

[135] Carsten Stahn, 'Introduction: bridge over troubled waters? Complementarity themes and debates in context', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and complementarity: from theory to practice* (Cambridge; New York: Cambridge University Press, 2011), at 1. Emphasis added. Stone has similarly argues: "we need to see the ICC along with domestic courts as part of a new, integrated system of international criminal justice". Christopher Stone, 'Widening the Impact of the International Criminal Court: The Prosecutor's Preliminary Examinations in the Larger System of International Criminal Justice', in Marta Minow, C. Cora True-Frost, and Alex Whiting (eds), *The First Global Prosecutor: Promise and Constraints* (Michigan University Press, 2015), at 288.

[136] Moffett (2016), at 2; Council of the European Union, *Joint Staff Working Document on advancing the principle of complementarity - Toolkit for bridging the gap between international and national justice*, SWD(2013) 26 final (31 January 2013).

[137] Simon M. Meisenberg, 'Complying with Complementarity?: The Cambodian Implementation of the ICC Statute', 5 *Asian Journal of International Law* (2015).

[138] 'Promoting implementation of the principle of complementarity', *No Peace Without Justice*, available at <http://www.npwj.org/ICC/Promoting-implementation-principle-complementarity.html;>, accessed 20 June 2017.

[139] 'Nakuru Forum on Strengthening Complementarity', *Wayamo Foundation* (22 August 2014), available at <http://www.wayamo.com/archives/nakuru-forum-on-strengthening-complementarity/>, accessed 20 June 2017.

[140] See, *e.g.*, Bekou (2011); Stahn (2011); Stahn (2008), at 1; Morten Bergsmo, Olympia Bekou, and Annika Jones, 'Complementarity and the construction of national ability', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011); Morten Bergsmo, Olympia Bekou, and Annika Jones, 'Complementarity After Kampala: Capacity Building the ICC's Legal Tools', 2 *Goettingen Journal of International Law* (2010), at 796; Phil Clark, 'Chasing cases: The ICC and the politics of state referral in the Democratic Republic of the Congo and Uganda', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011), at 1183; Sylvia Fernandez de Gurmendi, 'Foreword', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge ; New York: Cambridge University Press, 2011), at xx.

[141] Mohamed M. El Zeidy, *The principle of complementarity in international criminal law: origin, development, and practice* (Leiden ; Boston: Martinus Nijhoff Publishers, 2008), at 154.

complementarity, in an ideal world, the ICC would not have any cases to pursue because all prosecutions and investigations would happen at the domestic level (to a sufficient standard).[142] This arguably confers obligations on national systems to prosecute and investigate Rome Statute crimes, which has led some authors to argue that the threat of intervention by the Court can spur domestic authorities into action – complementarity's "catalyst" effect.[143]

Complementarity as a "big idea" is often captured by the term 'positive complementarity', which refers to the way in which the ICC, either directly or indirectly, encourages, facilitates, or assists national accountability processes.[144] Other conceptions include terms such as proactive complementarity,[145] negative complementarity,[146] reparative complementarity,[147] or radical complementarity.[148] For purposes of clarity, this thesis will refer to these broader ideas of complementarity collectively as "positive complementarity". Ultimately, what lies at the heart of these broader understandings of complementarity is the aim of encouraging national authorities to investigate and prosecute Rome Statute crimes at a

[142] "The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that *the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success*." (Emphasis added) Office of the Prosecutor, *Statement made by Mr Luis Moreno-Ocampo at the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court* (16 June 2003).

[143] Katherine L. Doherty and Timothy L. H. McCormack, '"Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation', 5 *Davis Journal of International Law and Policy* (1999); Jann K. Kleffner, 'Complementarity as a catalyst for compliance', in Jann K. Kleffner and Gerben Kor (eds), *Complementary Views on Complementarity* (The Hague: T.M.C. Asser Press, 2006); Kleffner (2008); Géraldine Mattioli and Anneke van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of the Congo', in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal African Society, 2008); Stahn (2008), at 92; Bekou (2011), at 839; Nouwen (2013); William W. Burke-White, 'Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice', 49 *Harv. Int'l LJ* (2008); Benjamin Perrin, 'Making sense of complementarity: the relationship between the International Criminal Court and national jurisdictions', 18 *Sri Lanka Journal of International Law* (2006), at 301, 312-315.

[144] Saxon, for instance, equates positive complementarity with capacity building activities when he writes: "During recent years, ICC officials have promoted a second dimension of the complementarity principle, the idea of 'positive complementarity', *or 'capacity building',* where by the ICC and other institutions will assist weaker judicial systems to achieve the standards necessary to comply with their prosecutorial obligations under international law." Dan Saxon, 'The International Criminal Court and the Prevention of Crimes', in Serena K. Sharma and Jennifer M. Welsh (eds), *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (Oxford: Oxford University Press, 2015), at 136-137. (Emphasis added)

[145] Burke-White (2008).

[146] Max du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', *EJIL: Talk!* (27 August 2012), available at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>, accessed 12 July 2014.

[147] Luke Moffett, 'Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court', 17 *The International Journal of Human Rights* (2013).

[148] Kevin Jon Heller, 'Radical Complementarity', *Journal of International Criminal Justice* (2016).

national level. While initially a concept used to refer specifically to the role the ICC / the Office of the Prosecutor plays, over time, positive complementarity has morphed into a broader idea capturing a range of activities and actors aimed at increasing accountability for Rome Statute crimes at a national level.[149] The specific definition given to the term by the ICC itself is discussed in more detail in the next chapter.

In other words, both these narrow and broad constructions of complementarity capture the idea that the ICC is only one element in a broader 'Rome Statute system of justice'. Fundamentally, achieving justice under the Rome Statute depends on States Parties *themselves* carrying out investigations and prosecutions of crimes within the Court's jurisdiction, including for sexual violence, pursuant to this principle of complementarity. Viewed in this light, the ICC constitutes one (important) link within this broader framework, one of its roles being the encouragement of domestic accountability processes either directly or indirectly.[150] In this respect, Stahn argued in 2009 that we were witnessing a paradigm shift in that the purpose of international criminal justice was no longer focused on its own performance, but instead shifted to its ability to build domestic capacity.[151] Chapter 3 will discuss in more detail how the Office of the Prosecutor understands its role within this broader idea of positive complementarity, particularly in relation to justice and accountability for sexual violence, as well as the contestations on this within the Assembly of States Parties. Chapters 4 and 5 investigate the relevance of positive complementarity in the fight against impunity for sexual violence crimes in two specific case studies.

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[149] Nouwen argues, for instance, that "[a]n increasingly important component of the idea of positive complementarity has been that actors other than the Court, for instance states parties to the Rome Statute, would implement the [Office of the Prosecutor's] policy of positive complementarity." Nouwen (2013), at 383.

[150] As an international court, the ICC is not 'just' a criminal court but has been ascribed many roles or responsibilities that far exceed a traditional criminal court's role. For instance, Perrin identifies six distinct roles for the ICC. He argues it acts as: a safety net, a catalyst, a monitor, a passive standard setter, and intervener, and a burden sharer. Perrin (2006). Similarly, McAuliffe argues that the ICC comprises three courts in one: a "criminal court *proper*", a "world court" when the UN Security Council refers a situation, and a "watchdog court" in monitoring national proceedings. He also argues that the ICC, due to a 'cosmopolitan creep', over time has transformed its roles into one of burden sharing. Pádraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism', 13 *Chinese Journal of International Law* (2014), at p. 260. On the multivariate roles often ascribed to international courts, see, *e.g.*, Mirjan Damaška, 'What is the point of international criminal justice?', 81 *Chicago-Kent Law Review* (2008), at 331; Triestino Mariniello, "One, no one and one hundred thousand': Reflections on the multiple identities of the ICC', in Triestino Mariniello (ed), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2015); Frédéric Mégret, 'What Sort of Global Justice is 'International Criminal Justice'? [Advance Access]', *Journal of International Criminal Justice* (2015), at 10.

[151] Carsten Stahn, 'The Future of International Criminal Justice', *The Hague Justice Portal* (9 October 2009), available at <http://www.haguejusticeportal.net/index.php?id=11106>, accessed 26 February 2015.

While the Court's role in building domestic capacity remains limited (as we will see in the next chapters), this thesis argues that it is ultimately through the setting of normative standards that the ICC may contribute to this aspiration. The philosophical justification for the specific attention on sexual violence within this study of positive complementarity, therefore, is grounded in what has been called the ICC's "expressive" foundation.[152] Within the broader Rome Statute system of justice, the ICC functions as a "powerful vehicle for norm expression":[153] the way in which the ICC interprets its mandate and the provisions of its Statute sets norms (or "standards for appropriate behaviour"[154]) against which we can measure the quality of national accountability processes for Rome Statute crimes.

Because it integrates such a broad range of gender justice principles, the Rome Statute is arguably a normative authority in relation to accountability for sexual violence. Indeed, it has been described as: a "mile-stone in setting new standards in the fight against sexual and gender-based violence";[155] "a model for advancing gender equality and justice within national jurisdictions";[156] and, "the most progressive international legal instrument in terms of articulating SGBV crimes".[157] Notably, UN Security Council Resolution 1325, adopted in 2000 (two years after the adoption of the Rome Statute but when it had not yet entered into force), calls on all parties to armed conflict to bear in mind the relevant provisions of the Rome Statute.[158] Since then, references to the Rome Statute's gender sensitive norms of justice and accountability and/or to the role played by the ICC in bringing a measure of accountability for sexual and gender-based violence have been incorporated into all

[152] DeGuzman (2012), at 15.

[153] DeGuzman (2012), at 33. Bower also argues: "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." Adam Bower, 'Assessing the Diffusion of International Norms: Evidence from State Incorporation of the Rome Statute of the International Criminal Court', MWP 2013/15 *EUI Working Papers* (2013), at 6.

[154] Finnemore and Sikkink define 'norm' as a standard of appropriate behaviour for actors with a given identity – norms thus have a prescriptive character, exerting an 'oughtness'. Finnemore and Sikkink (1998), at 891-892.

[155] Jelena Pia-Comella, Coalition for the ICC, *Talking points for panel presentation - Prosecuting gender-based crimes before the ICC* (6 March 2013).

[156] Emily Waller, Emma Palmer, and Louise Chappell, 'Strengthening gender justice in the Asia-Pacific through the Rome Statute', 68 *Australian Journal of International Affairs* (2014), at 367. Bastick, Grimm and Kunz also state: "The ICC's Rules of Procedure and Evidence *set a new international standard for good practice* as regards prosecuting sexual violence." (Emphasis added) Megan Bastick, Karin Grimm, and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2007), at 157.

[157] Kapur (2016), at 13.

[158] UN Security Council, *Resolution 1325*, S/RES/1325 (31 October 2000), at OP. 9.

subsequent WPS Resolutions adopted by the Security Council.[159] This was consolidated in the 2015 Global Study on the implementation of Resolution 1325, which calls for adherence to the standards and principles of the Rome Statute within a broader framework of accountability, justice, reconciliation, and participation.[160] Similarly, in General Recommendation No. 30, the CEDAW Committee reminds states of their obligation to "prevent, investigate and punish" sexual violence pursuant to the Rome Statute framework, recommends the enhancement of cooperation with the Court in relation to crimes of sexual violence, and encourages states to ratify this Statute.[161] The 2014 International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, as well as its second edition published in 2017, equally encourages states to adhere to Rome Statute standards and ICC practices in their domestic accountability efforts.[162]

Such assertions not only reaffirm the Rome Statute's normativity in relation to accountability for sexual violence, but suggest that these standards, when travelling to the national level, are seen to improve national accountability processes. For instance, as the case studies in this thesis confirm, the ratification of the Rome Statute may encourage states to amend their national criminal laws to reflect a more comprehensive understanding of crimes of sexual violence and of the procedures for dealing with such crimes.[163] Indeed, as mentioned earlier, from a complementarity perspective, the broader significance of the Rome Statute's gender justice principles and provisions "is their effect on the domestic practice of

[159] *Resolution 1325*, S/RES/1325; UN Security Council, *Resolution 1820*, S/RES/1820 (19 June 2008); UN Security Council, *Resolution 1888*, S/RES/1888 (30 September 2009); UN Security Council, *Resolution 1889*, S/RES/1889 (5 October 2009); UN Security Council, *Resolution 1960*, S/RES/1960 (16 December 2010); UN Security Council, *Resolution 2106*, S/RES/2106 (24 June 2013); UN Security Council, *Resolution 2122*, S/RES/2122 (18 October 2013); UN Security Council, *Resolution 2242*, S/RES/2242 (13 October 2015).

[160] UN Women, *Preventing Conflict, Transforming Justice, Securing Peace: A Global Study on the Implementation of United Nations Security Council resolution 1325* (2015).

[161] CEDAW Committee, *General Recommendation No. 30*, CEDAW/C/GC/30 (18 October 2013), at paras. 23, 81(j), 86(g).

[162] UK Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law* (June 2014); UK Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (2nd Ed)* (March 2017). The ICC and the Trust Fund for Victims contributed to the development of this protocol. International Criminal Court, *ICC, ASP and TFV join in Global Summit to End Sexual Violence in Conflict*, Press Release # ICC-CPI-20140611-PR1014 (11 June 2014).

[163] See chapters 4 and 5 of this thesis. On this same point, see also: Waller, Palmer, and Chappell (2014), at 359; Fionnuala Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law', 16 *International Feminist Journal of Politics* (2014).

ICL",[164] for instance through the "alignment of domestic standards with international norms".[165] In connecting complementarity to the Rome Statute's gender justice principles, this thesis thus examines the ways in which the Rome Statute's norms (standards) around accountability for sexual violence become active and effective (i.e. are domesticated) in two specific national settings, and to what extent those processes contribute to increasing accountability for these crimes. In doing so, it will approach positive complementarity from a transnational legal process/norm diffusion perspective, and seeks to analyse what these domestication processes reveal about positive complementarity as a tool in the fight against impunity for sexual violence crimes.

[164] Kapur (2016), at 14.

[165] Laplante (2010), at 637.

SECTION 2.3

TRANSNATIONAL LEGAL PROCESS THEORY AND NORM DIFFUSION

In 1996, in an attempt to explain why states obey international law, Harold Koh identified what he calls a distinct 'Transnational Legal Process' (TLP): a dialogic process through which international norms travel to national systems and gradually become embedded in domestic social, political and legal frameworks and structures. Through what he saw as a series of norm interpretative interactions between different actors at an international and national level, international standards of appropriate state behaviour (i.e. norms) gradually became standardised or normalised state practice. Critically, the substance of such norms is negotiated through a dialogic process that involves not just state actors, but that is decidedly non-statist, dynamic and normative.[166] It is about how certain actors, by interacting on the substance of a particular norm before a norm interpretative forum (e.g. a court, a legislative body, or a multilateral negotiation forum), can promote greater compliance with that international norm and affect changes in state practice through a three-fold process of legal, social and political internalisation. In other words: "[TLP] describes the theory and practice of how public and private actors – nation-states, international organisations, multinational enterprises, non-governmental organisations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalise rules of transnational law".[167]

Two aspects of this theory are important to highlight: the interactive or dialogic nature of TLP and its attention to processes of internalisation. As mentioned, TLP describes a "constructivist, dynamic, non-statist, and highly participatory process"[168] through which international legal norms and standards are made, interpreted, and domesticated. This process is highly participatory because anyone can participate by provoking norm interpretative interactions. For Koh, such interactions between various actors on the interpretation or

[166] Harold Hongju Koh, 'The 1994 Rosco Pound Lecture: Transnational Legal Process', 75 *Nebraska Law Review* (1996), at 184.

[167] Koh (1996), at 183-184; Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', 35 *Houston Law Review* (1998), at 627.

[168] Caleb J. Stevens, 'Hunting a Dictator as a Transnational Legal Process: The Internalisation Problem and the Hissène Habré Case', 24 *Pace International Law Review* (2012), at 191. See also, Kapur (2016), at 10.

substance of a particular norm play an important role in domestic internalisation of an international norm.[169] Norms only gain traction (or acquire "stickiness"[170]) when they become normalised standards of behaviour. Therefore, what is critical for Koh is the difference between mere compliance 'for the sake of complying' and internalisation. Rather than describing processes of external coercion and acceptance through sanction, TLP is about internalised or habitual obedience.[171] Kastner echoes this when he writes: "an internalised commitment is based on a stronger sense of obligation and may be more effective than an imposed obligation that can supposedly be enforced".[172] In other words, it is about how compliance with international norms becomes advocated as a matter 'of course'.

Koh identified three types of internalisation, which do not necessarily occur in a neat order or sequence:

- "*Social* internalisation, which occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it;
- *Political* internalisation, which occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy; and
- *Legal* internalisation, which occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or a combination of these three."[173]

Sally Engle Merry's idea of vernacularisation is in some ways similar to this idea of internalisation. Merry argued that when global organisations with norm-making powers, such as the ICC, interact with localised understandings of these norms, a process of 'vernacularisation' takes place.[174] While some norms are transplanted directly into the legal culture at the local level, others are subjected to translation, interpretation, and

[169] Koh (1996), at 199.

[170] Koh (1998), at 655.

[171] Koh (1998), at 628, 635. On this, see also Brunnée and Toope's 'interactional theory of law': Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).

[172] Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2015), at 172.

[173] Koh (1998), at 642; Harold Hongju Koh, 'How is International Human Rights Law Enforced?', 74 *Indiana Law Journal* (1999), at 1413.

[174] Sally Engle Merry, *Human rights and gender violence: translating international law into local justice* (Chicago: University of Chicago Press, 2006). See also Clarke on how notions of justice are negotiated and reinterpreted through contestations at a local level: Kamari Maxine Clarke, *Fictions of justice: the International Criminal Court and the challenges of legal pluralism in Sub-Saharan Africa* (Cambridge ; New York: Cambridge University Press, 2009).

reconfiguration. These norms, when applied at the local level, may look nothing like their international counterpart. Studying the transplantation of international legal norms around violence against women in five different countries, Merry focuses both on appropriation and translation. Whereas appropriation describes the process through which programmes or frameworks developed by activists in one country are replicated in another, translation describes "the process of adjusting the rhetoric and structure of these programmes and interventions to local circumstances".[175] For domestic legal changes to be successful, translation is important but not necessary. At the same time, Merry underscores that the higher the degree of translation (and therefore adaptation to the local context), the higher the "domestic resonance", i.e. internal acceptance (or domestic "buy-in"[176]) of international norms among local or national actors. As such, she emphasises the importance of studying the translators of norms – the actors, individuals, organisations or institutions that navigate between the international and national level and act as intermediaries.

Without using the specific term, in many ways, Koh's TLP equally emphasises the importance of domestic resonance when he speaks about internalisation (as opposed to compliance). This also closely aligns with Karen Alter's concept of "embedded international law", which describes how international legal norms become embedded (i.e. internalised) in a domestic system, while maintaining their international origin.[177] What is critical in Koh's TLP, as in Alter's embedded law, is the interaction between international norms and domestic processes. Critically, Koh observes that this transnational legal process is not state-centric, but that non-state actors, in particular non-governmental organisations, play the role of what Finnemore and Sikkink termed "norm entrepreneurs": domestic or international actors who actively work towards changing existing norms and standards, or advocate the adoption of new norms, grounded in strong notions they hold about appropriate behaviour.[178] These actors, also called "agents of change",[179] can be private individuals, national or international (civil society) organisations, domestic political actors, or courts. For instance, during the Rome Statute negotiations, women's rights organisations acted as norm entrepreneurs by advocating for the infusion of gender justice principles (or norms) within the Statute by

[175] Merry (2006), at 135.

[176] Ní Aoláin (2014), at 633.

[177] Karen J. Alter, *The new terrain of international law: courts, politics, rights* (Princeton: Princeton University Press, 2013).

[178] Finnemore and Sikkink (1998), at 893-897. See also: Alldén (2009).

[179] Harold Hongju Koh, 'Why Transnational Law Matters', 24 *Penn State International Law Review* (2006), at 746; Koh (1998), at 647.

lobbying states, drafting advocacy documents, or presenting specific proposals for language to be included in the Statute. In other words, norm entrepreneurs or agents of change "call attention to issues or even 'create' issues by using language that names, interprets and dramatises them".[180] Within TLP, following a pronouncement by a norm-interpretative body, e.g. an international or national court, on the interpretation of a norm, those same agents of change continue to work to persuade a resisting state to internalise that norm by repeatedly challenging non-conforming state practice.[181]

Mapping TLP onto the complementarity dialogue suggests that increased interactions between the ICC, states, civil society organisations, national institutions, courts, and individuals on the interpretation of norms enshrined in the Rome Statute, would lead to internalisation of these norms at a national level, and therefore an increase in domestic accountability for Rome Statute crimes. Importantly, in line with the broadening of positive complementarity to include other actors and indirect assistance provided by the ICC, TLP is a helpful framework because it emphasises and focuses on a broader range of actors. As Merry describes: "transnational legal process joins both international and domestic law, public and private actors, state and non-state actors, and the dynamic production of new rules – through interaction, interpretation and practice – which then shape further interactions and induce state compliance".[182] For example: a civil society organisation challenges a national prosecutor's failure to investigate sexual violence crimes through strategic litigation before a national court, or by submitting information to the ICC Office of the Prosecutor. Such actions provoke an *interaction* between various actors (the NGO, the government, the judges, and/or the ICC) on the particular way to *interpret* the government's obligations regarding the investigation and prosecution of crimes (i.e. the contested norm). This can subsequently lead to *internalisation* through the re-interpretation of a national norm that de-prioritises sexual violence crimes. For instance, in Colombia, the Constitutional Court has issued a number of decisions requiring greater attention by the Public Prosecutor's office for crimes of sexual violence within its investigations. The decision was, in part, based on information submitted to it by civil society organisations about the extremely high levels of impunity in the country for these crimes, and was fortified by building upon the ICC's analysis in this regard. To monitor compliance with this ruling, a number of civil society organisations were requested

[180] Finnemore and Sikkink (1998), at 897.

[181] Koh (2006), at 746-747.

[182] Merry (2010), at 33.

by the Constitutional Court to create a monitoring mechanism. These organisations regularly report to the Constitutional Court on progress and challenges. In other words, these civil society organisations act as agents of change and use the Constitutional Court's challenge to a norm that deprioritised attention for sexual violence to continue to put pressure on the relevant authorities to change their practices, and do so using international legal standards encapsulated in the Rome Statute. These (and other similar) dynamics are described in more detail in chapter 4 of this thesis. Chapter 5 investigates similar processes in the DRC.

This thesis thus attempts to harmonise the (primarily legal) literature on complementarity with these broader theories of interaction in international law and international relations by focusing on the processes through which positive complementarity is given shape and meaning in two domestic contexts in relation to sexual violence. In some ways, this thesis responds to Reed-Hurtado's call for applying a '*transnational* criminal law' lens rather than international criminal law *stricto sensu*.[183] It views the ICC's Rome Statute not merely as an abstract legal entity or document, but, to borrow from Kelly and Dembour, as a "complex social process", that is "not just part of some order that exists above and beyond the 'local', but [is] inherently given shape and meaning in specific local contexts".[184] In other words, it assumes that (positive) complementarity creates a process of interaction between the ICC (as an institution) and/or its Rome Statute and the specific national system, which is shaped and transformed by different actors at both a national and international level. In order to better understand these processes, and thereby assess their intended effect of an increase in investigations and prosecutions, positive complementarity is approached through TLP. In other words, this thesis seeks to extrapolate those moments of interaction at a national level around accountability for sexual and gender-based violence as a way of clarifying the ways in which domestication of Rome Statute gender justice norms happen, and thus as a way of contextualising positive complementarity.

Ultimately, as depicted in figure 1, below, this thesis sees the two fields of study of (positive) complementarity and norm diffusion as interrelated, but also separate fields of study. Norm diffusion is a lot broader and captures many processes that may have nothing to

[183] Michael Reed-Hurtado, 'International criminal law's incongruity in Colombia: why core crime prosecution in national jurisdictions should be included in analyses of transnational criminal law', 6 *Transnational Legal Theory* (2015), at 175-176.

[184] Tobias Kelly and Marie-Bénédicte Dembour, 'Introduction: The Social Lives of International Justice', in Marie-Bénédicte Dembour and Tobias Kelly (eds), *Paths to international justice: social and legal perspectives*, *Cambridge studies in law and society* (Cambridge: Cambridge University Press, 2007), at 6, 8.

do with positive complementarity. Similarly, positive complementarity includes activities and actions that are not related to the diffusion of norms. For instance, when a national court prosecutes a murder committed in the context of an armed conflict as an ordinary crime of murder, this may attest to very little diffusion of international norms, other than a commitment to providing accountability. The existence of the trial itself attests to positive complementarity only to a limited degree, in the sense of providing accountability for the crime at a national level. Similarly, placing the ICC into this framework also means there is a degree of overlap between both. The ICC through its proceedings can contribute to norm diffusion by the creation and enforcement of norms and the expressive value of its proceedings. However, not all its proceedings will necessary have such effects. Similarly, when the ICC interacts with national authorities on their obligations to investigate Rome Statute crimes, this can have normative effects that contribute to positive complementarity, but not necessarily. In other words, in the visual depiction below, this thesis is concerned with the part captured between the white lines, with the ICC being one, but not the only actor relevant for positive complementarity and its transnational legal process at a national level.

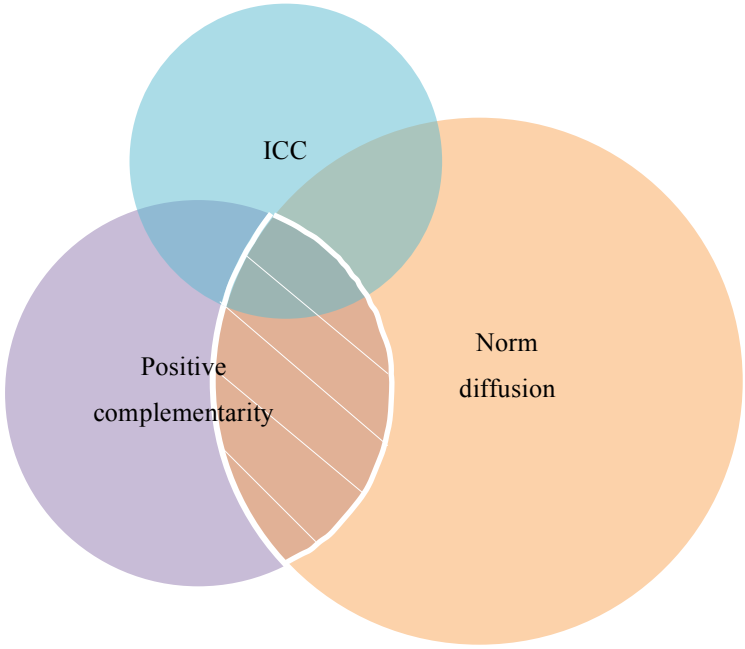

Figure 1 | Visual description of this thesis' primary field of investigation and analysis

3

THE ICC'S MODELS OF COMPLEMENTARITY

Antonio Cassese famously said of the ICTY that it was a "giant without arms and legs".[185] The same can be said of the ICC – without the "artificial limbs" of state support, the ICC cannot deliver on the promise of the Rome Statute to end impunity, or even carry out a single investigation or prosecution. Hence, within the Rome Statute system of justice, the Court's investigative, prosecutorial, judicial and regulatory activities are inextricably linked to (and sometimes even dependent on) the actions of states. At the same time, the Rome Statute created more than just an international court: it created a system of justice administered jointly by the ICC and by national jurisdictions. As such, national investigative and prosecutorial practices for Rome Statute crimes are also inextricably linked to the ICC through complementarity. This chapter explains the models the ICC uses to measure, assess, and 'achieve' complementarity. This model essentially has two dimensions: complementarity as admissibility (which corresponds to Nouwen's legal life of complementarity), and positive complementarity (Nouwen's concept of complementarity as a 'big idea'), whereby the ICC, directly or indirectly, encourages, facilitates or assists national accountability processes for Rome Statute crimes. Throughout the chapter, the focus is on demonstrating issues that may affect justice and accountability for sexual and gender-based violence within these models of complementarity. The next two sections examine in more detail these two lives of complementarity, respectively looking at gender justice and admissibility, or legal complementarity, and gender justice issues within the broader idea of positive complementarity.

[185] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998), at 13.

SECTION 3.1

GENDER JUSTICE AND LEGAL COMPLEMENTARITY

As discussed, the ICC is complementary to national criminal jurisdiction, meaning national courts have the primary duty and responsibility to carry out investigations and prosecutions from Rome Statute crimes. This legal dimension of complementarity as a jurisdictional restriction can be found in the Rome Statute's provisions on the admissibility of cases set out in Article 17.[186] While the Office of the Prosecutor carries out the majority of admissibility assessments, ensuring these assessments are gender inclusive is not exclusively the Office's domain. This section describes the admissibility test as set out by the judges, and will illustrate that pronouncements by ICC Chambers warrant caution in relation to the admissibility test as applied to sexual and gender-based violence.

This admissibility test essentially poses three (sets of) questions. First, are there domestic proceedings, and do they relate to the same case that is the subject of proceedings at the ICC, have such proceedings been completed or was a decision made not to pursue the case? Second, is or was the state genuinely able and willing to carry out those proceedings?

[186] Article 17 reads as follows:

"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling on unable genuinely to carry out the investigation or prosecution;

b. The case has been investigated by a State which has jurisdiction over it and the State decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

d. The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:

a. The proceedings were or are being untaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

Third, is the case of sufficient gravity to justify action by the ICC?[187] In other words, the ICC's jurisdiction is pre-empted when a state is undertaking/undertook prosecutions, or where a state has carried out an investigation but decided not to proceed in relation to the same case as that before the ICC. Where a state is carrying out domestic proceedings, the ICC will assess whether the domestic authorities are undertaking concrete, tangible, and progressive steps in relation to that case.[188] Relinquishing jurisdiction to the ICC, and surrendering a suspect to the Court, would not qualify as a 'decision not to prosecute' under article 17.[189] The Appeals Chamber in 2009 confirmed that the assessment of genuine ability or willingness is required only where there is or has been action by the state.[190] Inaction by domestic jurisdictions renders a case automatically admissible before the ICC, provided it is of sufficient gravity.

The assessment of admissibility can thus be reduced to three distinct elements: a test of sameness, a test of genuineness (tied to the ability or willingness of a state), and a test of gravity. Hunter[191] has illustrated that what she calls "admissibility proof" justice at a national level requires far lower adherence to these admissibility standards than some have argued: the legal standards that have emerged from the Court's case law on admissibility set a very low

[187] These three questions broadly align with the Office of the Prosecutor's conceptualisation of admissibility involving a two-fold assessment of complementarity (questions 1 and 2) and gravity (question 3). *Policy Paper on Preliminary Examinations*, at para 42.

[188] Where a state is carrying out domestic proceedings, the ICC will assess whether the domestic authorities are undertaking "concrete and progressive steps" in relation to that case. *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at paras 54-55, 73; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC, Appeals Chamber, 'Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"', ICC-01/09-02/11-274 (30 August 2011), at para 1; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Pre-Trial Chamber I, 'Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-239 (7 December 2012), at para 11.

[189] In 2009, Defence counsel for Germain Katanga alleged the Democratic Republic of the Congo (DRC) authorities had investigated Katanga for the same case as before the ICC, but had decided not to proceed. Defence counsel for Jean-Pierre Bemba Gomba presented similar arguments in relation to alleged investigations against Bemba in the Central African Republic (CAR) in 2010. However, in both instances, the national authorities in the DRC and the CAR, respectively, had made such decisions to relinquish jurisdiction to the ICC. The Appeals Chamber confirmed: "a 'decision not to prosecute' in terms of article 17(1)(b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC". *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-1497, at para 83; *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Appeals Chamber, 'Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges"', ICC-01/05-01/08-962 (19 October 2010), at para 74.

[190] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-1497, at paras 1-2, 75-79. See also *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, at para 40.

[191] Hunter (2014).

standard domestic proceedings must satisfy to pre-empt the ICC's intervention. From a gender justice perspective, the question that arises is whether those standards are interpreted in a gender-neutral manner. This section applies such a gender justice lens to these three tests of sameness, genuineness, and gravity. Following Chappell, Waller and Grey, it argues that "the bar for assessing complementarity appears to have been set very low, leaving significant impunity gaps for sexual violence crimes".[192] There is a risk that specific concerns around sexual violence crimes will be overlooked and remain unaddressed within admissibility assessments, which risks perpetuating impunity for these crimes.

3.1.1 Degree of 'sameness' between the domestic & ICC case

Whether a domestic system is successful in challenging admissibility firstly depends on whether that state's proceedings cover *the same case*. The Court has determined that for domestic proceedings to be considered "the same case" as before the ICC, they must cover "the same person" and "substantially the same conduct".[193] Hence, the essential characteristics of a 'case' for the purposes of admissibility challenges are both the *person* and the *conduct*,[194] which can be deduced from the arrest warrant or summons to appear issued by the Pre-Trial Chamber under article 58, or the charges confirmed by the Pre-Trial Chamber under article 61.[195] While the meaning of the 'same person' criterion is clear, what constitutes

[192] See also: Chappell, Grey, and Waller (2013), at 468.

[193] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC, Appeals Chamber, 'Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"', ICC-01/09-01/11-307 (30 August 2011), at para 40; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-274, at para 39.

[194] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at paras 61, 76; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 66. See also: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Appeals Chamber, 'Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"', ICC-01/11-01/11-547-Red (21 May 2014), at para 61; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at para 99.

[195] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, at para 40; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-274, at para 39. In 2014, the Pre-Trial Chamber dismissed Côte d'Ivoire's admissibility challenge in the case against Simone Gbagbo because Côte d'Ivoire had not submitted sufficient evidence to attest to concrete, tangible and progressive investigative steps in the domestic case against her. This made it impossible for the Chamber to determine the factual parameters of the domestic case, and as such, enter into a comparative analysis for the purposes of the "same conduct" test. It held: "If a State is unable to clearly indicate the contours of its national investigation, the State cannot assert that there exists a conflict of jurisdictions with the Court." *The Prosecutor v. Simone Gbagbo*, ICC, Pre-Trial Chamber I, 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ICC-02/11-01/12-47-Red (11 December 2014), at para 76. The Appeals Chamber confirmed the decision. *The Prosecutor v. Simone Gbagbo*, ICC,

'substantially the same conduct' remains more ambiguous. The use of the word 'conduct', rather than 'crime' or 'charge', suggests that the Court envisages some degree of flexibility for domestic authorities. What constitutes "substantially the same conduct", particularly when a domestic case is *substantially* the same, will depend on the facts and circumstances of a particular case, and therefore must be assessed on a case-by-case basis.[196]

Issuing its decision on the admissibility of two cases in the Libya situation,[197] Pre-Trial Chamber I stressed that in assessing the conduct that is the subject of domestic proceedings the focus must be on the crimes, not their legal characterisation.[198] In particular, the Pre-Trial Chamber found it unnecessary for domestic courts to characterise relevant conduct as 'international crimes', so long as the *underlying conduct* is covered by the charges.[199] The Appeals Chamber confirmed this interpretation.[200] Under this rationale, an act of murder as a war crime may be prosecuted domestically as an ordinary crime of murder, or an act of rape as a crime against humanity as 'ordinary' rape – such ordinary charges would not necessarily render a case admissible before the ICC. To substantiate its findings, the Pre-Trial Chamber relied upon article 20(3), which does not permit the ICC to prosecute if a person has already been tried for that same conduct (*ne bis in idem*).[201] Similar provisions in the Statutes of the *ad hoc* tribunals for Yugoslavia and Rwanda explicitly allowed these

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Appeals Chamber, 'Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"', ICC-02/11-01/12-75-Red (27 May 2015).

196 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at 77; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at 74; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Appeals Chamber, 'Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"', ICC-01/11-01/11-547-Red (21 May 2014), at 62, 71; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at 99-100. Judge Ušacka, in her dissenting opinion to the Gaddafi and Al-Senussi admissibility appeals, held that "'conduct' should be understood much more broadly than the current test". *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Anx2, at 58; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565-Anx2, at 5.

197 Pre-Trial Chamber I issued two decisions, one on the admissibility of the case against Saif Al-Islam Gaddafi, and one in the case against Al-Senussi. Both decisions have been appealed. The Appeals Chamber issued its decision the admissibility of the *Gaddafi* case on 21 May 2014, and on the *Al-Senussi* case on 24 July 2014, confirming the Pre-Trial Chamber's decisions. The case against *Gaddafi* was held admissible, whereas the case against *Al-Senussi* was deemed inadmissible.

198 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at para 85; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 66.

199 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at paras 85, 88. This finding by the Pre-Trial Chamber was not one of the grounds of appeal, and as such, the Appeals Chamber has not ruled on the correctness of these findings.

200 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at para 119.

201 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at para 86, fn136.

courts to assert jurisdiction over persons who had been charged only with ordinary crimes domestically.[202] The absence of such a provision in the Rome Statute in the Chamber's view suggested that the classification of crimes *as international crimes* is of no consequence to admissibility.[203]

Here we find the first pressure point for sexual violence. The still prevalent idea that sexual violence in conflict is incidental or opportunistic (overlooking the broader context of criminality in which they are embedded) means these crimes (if charged at all) are much more likely to be charged as ordinary crimes, rather than as crimes against humanity or war crimes.[204] This would not adequately represent the "scope, scale and gravity of the conduct".[205] While the Rome Statute contains no explicit obligation on states to implement its provisions *verbatim* into domestic criminal law, doing so would greatly contribute to states' apparent ability and willingness to prosecute international crimes.[206] Limited domestic legal frameworks may not be able to capture the full extent of criminality. As a result, "nuances in the definitions of sexual violence crimes are obscured in the application of the 'same person, same conduct' test".[207] Further, prosecuting SGBV crimes as ordinary crimes fails to

[202] ICTY Statute, article 10(2)(a) and ICTR Statute, article 9(2)(a) provide: "A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime […]."

[203] The discussion on international versus ordinary crimes prosecutions under the Rome Statute's admissibility provisions remains a contested issue among scholars. For instance, Heller argues that the legal classification of crimes is of no importance at all, because a reference to 'ordinary crimes' in Article 20(3) was explicitly taken out of the Rome Statute at the drafting stage. Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity', 53 *Harvard International Law Journal* (2012), at 91-93. By contrast, according to Benzing, "…it may be argued that a more flexible approach is called for than merely stating that the prosecution of such acts as 'ordinary crimes' automatically and without further requirement entails an exception to the rule of double jeopardy." Benzing (2003), at 616. See also: Charles Chernor Jalloh, 'Kenya v. The ICC Prosecutor', 53 *Harvard International Law Journal* (2012), at 227-243; Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem', 8 *Santa Clara J. Int'l L.* (2010), at 165-187; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'', 10 *Journal of International Criminal Justice* (2012), at 339; Spencer Thomas, 'A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War', 45 *Vanderbilt Journal of Transnational Law* (2012), at 604, 624-628. (He argues that prosecuting as ordinary crimes "trivialis[es] the crime and aid[s] impunity".)

[204] Jarvis and Vigneswaran (2016), at 39.

[205] Bergsmo, Bekou, and Jones (2010), at 801. See also: Chappell, Grey, and Waller (2013), at 464; Heller (2012), at 132; Chappell (2015), at 184.

[206] Benzing (2003), at 616. ("Where the charge chosen by national authorities does not reflect and adequately capture the severity of the perpetrator's conduct, or where the national legal system provides for excessively broad defences or statutes of limitation, this may be seen as conflicting with an intent to bring the perpetrator to justice or even to shield him or her from criminal responsibility and thus falls under one of the exceptions of article 20(3)(a) and (b).") See also: Marta Bo, 'The Situation in Libya and the ICC's Understanding of Complementarity in the Context of UNSC-Referred Cases', *Criminal Law Forum* (2014).

[207] Chappell, Grey, and Waller (2013), at 463.

recognise the context and meaning of these crimes.[208] This is particularly worrisome in relation to sexual and gender-based violence because, as Chappell *et al.* illustrate, such crimes have "historically been seen as separate to broader political conflicts when in fact they are often instrumental to those conflicts".[209] In other words, there is a disproportionate risk that sexual violence crimes remain overlooked and disconnected from the broader context in which Rome Statute crimes are committed in this admissibility context that places almost no emphasis on a crime's legal characterisation.

In order to qualify as 'the same case', ICC case law has determined that national proceedings do not have to cover all features of the ICC's case. There has to be a certain degree of 'sameness' but it does not have to be identical. Notably, the domestic proceedings do not have to cover all the same alleged *incidents*.[210] For instance, when the Office of the Prosecutor has charged murder or rape in locations X, Y, and Z on specific dates, a domestic case would not necessarily need to cover those exact same incidents. It would be sufficient for it to cover acts of similar conduct and/or only some of those incidents. So long as the domestic charges cover the same general "temporal, geographic and material parameters" of the ICC's charges, the sameness test will be met.[211] While not critical, the specific incidents alleged against the suspect do, however, "play a central role" in the comparison between the ICC's case and that before the national court.[212]

In some circumstances, specific incidents of a certain crime charged do have to be explicitly covered by the domestic case to successfully challenge admissibility. In this respect, the Appeals Chamber envisages a scale of overlap running from identical cases before the ICC and the domestic court, on the one end, and on the other, a domestic case that does not cover *any* of the incidents investigated by the ICC. The Appeals Chamber underscored that it is not possible to lay down a "hard and fast rule" to be followed for this

[208] Chappell, Grey, and Waller (2013), at 463. See also, Bergsmo, Bekou, and Jones (2010), at 801 ("… prosecuting core crimes as murder or rape, rather than their international equivalents, is not desirable since ordinary crimes do not represent the scope, scale and gravity of the conduct.") Heller equally argues: "there is no question that expressive value is lost when a state prosecutes an international crime as an ordinary crime". {Heller, 2012 #2261.

[209] Chappell, Grey, and Waller (2013), at 462.

[210] The Appeals Chamber defined 'incidents' as: "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators". *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, at para 62.

[211] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at para 75; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at paras 75, 77.

[212] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at paras 101, 105.

"degree of overlap",[213] but that this requires a case-by-case analysis as to whether or not the domestic case "sufficiently mirrors" that of the Prosecutor.[214] In other words, the *substance* of the overlap appears to be significant for the determination of sameness. Where the incidents included in the ICC's arrest warrant are "illustrative", "non-exhaustive", do not represent "unique manifestations of [the suspect's] alleged criminal conduct",[215] or are "very minor when compared with the case as a whole",[216] the domestic case is not required to cover these exact same incidents. However, when the incidents or events in the arrest warrant are considered to be "particularly violent", appear to be "significantly representative of the [suspect's] conduct",[217] or "form the crux of the Prosecutor's case and/or represent the most serious aspects of the case",[218] they must be included in the domestic case to warrant a finding of non-admissibility. Their absence may lead to a conclusion that the domestic proceedings do not cover 'substantially the same conduct', and that, as such, it does not involve the 'same case' for the purposes of the admissibility test.

Essentially, the Chamber incorporated a test of seriousness into the sameness determination. Yet, how is this test of 'seriousness' interpreted? When are crimes considered 'significantly representative' versus only 'minor' crimes? As discussed in chapter 1, sexual violence crimes have long been held (and often continue to be seen as) less serious than other crimes, and as a result have been deprioritised in post-conflict justice efforts. In this respect, one particular aspect of the Pre-Trial Chamber's decision in the Al-Senussi case needs to be mentioned. The acts of persecution in the case against Al-Senussi were qualified by the ICC Prosecutor as having been committed against certain individuals "because of [their] political

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213 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, at para 72. Emphasis added.

214 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, at paras 71-73. See also: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at paras 105-119. Judge Song issued a separate opinion to the Appeals Chamber decisions on this issue, writing that: "overlap between the incidents is not a relevant factor for the purposes of determining whether the national investigation covers the same conduct". *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Anx1, at para 6; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565-Anx1, at para 2.

215 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, at para 81-82. See similar findings in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 76.

216 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, at para 72.

217 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 79.

218 *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, at para 72.

opposition (whether actual or perceived) to Gaddafi's regime".[219] Despite finding that this "factual aspect"[220] of the charges against Al-Senussi did *not* form part of the charges with which Libya intended to charge him domestically – in fact no charges for persecutory conduct exist in Libyan criminal law – the Pre-Trial Chamber held that this did not render the case admissible before the ICC. It observed that these aspects would be taken into account by the Libyan court as aggravating factors at the sentencing stage (should Al-Senussi be convicted by the Libyan court). For the Chamber, this "sufficiently capture[d] Mr Al-Senussi's conduct" for the purposes of the admissibility test.[221]

This finding may be problematic in relation to sexual violence crimes for two reasons. As mentioned, domestic criminal law frameworks often do not criminalise or inadequately criminalise sexual and gender-based violence. Domestic definitions of these crimes, where they exist, often fall short of those included in the Rome Statute.[222] For instance, in two-thirds of the world's countries, criminal law only recognises female victims of rape and 67 countries criminalise men who report sexual violence due to domestic prohibitions on what may be deemed or are assumed to be 'homosexual acts'.[223] Faced with legal impossibilities to charging such conduct, domestic cases will not include specific charges for such conduct. Yet, following the Chamber's reasoning, this would not necessarily lead to a finding of admissibility and as such may allow the domestic case to proceed without any attention to such sexual violence charges. Concretely, Chappell *et al.* found that some of the crimes identified by the Office of the Prosecutor as part of its preliminary examinations, such as

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[219] *Situation in the Libyan Arab Jamahiriya*, ICC, Pre-Trial Chamber I, 'Warrant of Arrest for Abdullah Al-Senussi', ICC-01/11-15 (27 June 2011), at 5; *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-12, at para 65.

[220] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 166.

[221] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 166. This finding by the Pre-Trial Chamber was one of the grounds of appeal by the Defence for Al-Senussi. The Appeals Chamber confirmed this finding: "… the Appeals Chamber concludes that the conduct underlying the crime of persecution is sufficiently covered in the Libyan proceedings so that the conduct being investigated is substantially the same as that alleged before the Court." *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at paras 118-122.

[222] Chappell, Grey, and Waller (2013), at 462. ("Few penal codes include the range of sexual violence enumerated in the Rome Statute, and consequently various sexual violence crimes are often charged under one generalized term, rather than being differentiated in a way that properly recognizes the victim's lived experience of the crime.") See also: Valerie Oosterveld, 'The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals', 2 *Cambridge Journal of International and Comparative Law* (2013); Fionnuala Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication', Research Paper No. 13-19 *University of Minnesota Law School: Legal Studies Research Paper Series* (2013); Milli Lake, 'Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo', 4 *African Conflict and Peacebuilding Review* (2014).

[223] Dolan (2014), at 6.

sexual slavery in Guinea and forced pregnancy in Colombia, could not be prosecuted domestically "because they are not included in the domestic penal codes".[224] Nonetheless, the Office of the Prosecutor appears not to have considered these factors in its admissibility assessment.[225]

Second, this finding fails to appreciate one of the specific identifying characteristics of such acts. The discriminatory nature of acts of persecution, e.g. targeting individuals because of their political affiliation, is what distinguishes such acts from other crimes. The persecutory nature of a particular act, whether it is murder or rape, is a constitutive aspect of that crime, and, for reasons of fair labelling,[226] should be acknowledged as such. The discriminatory intent of these acts is "the underlying conduct" that makes it *persecution*.[227] It is problematic that the Chambers evaluate such a key aspect of a crime as outside the scope of 'the same case'. Even if we accept that international crimes may be charged as ordinary offences at the domestic level, at the very least, "these ordinary crimes must be *capable* of covering the same conduct as before the ICC".[228] According to the Pre-Trial and Appeals Chambers, the domestic prosecution does not have to cover the specific persecutory intent for it to qualify as the same case. In fact, following the Pre-Trial Chamber's reasoning, the domestic legal system does not even have to include the *possibility* to charge such conduct. By not requiring Libya to acknowledge the discriminatory motives underlying these acts in the domestic prosecution, the Chamber in effect allows domestic systems to apply legal frameworks that significantly alter the recognition of the harm suffered; this may not be an obstacle to a finding of inadmissibility.

[224] Chappell, Grey, and Waller (2013), at 474. At the time of their writing, Colombian penal law was quite restrictive in recognising SGBV. In June 2014, however, the Colombian penal code was amended to include, amongst others, the crime of forced pregnancy within its ambit. This is discussed in detail in chapter 4 of this thesis.

[225] Chappell, Grey, and Waller (2013), at 474.

[226] The principle of fair labelling, "is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking". Andrew Ashworth, *Principles of criminal law* (Oxford : New York: Clarendon Press ; Oxford University Press, 1995), at 86. See also: James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law', 71 *Modern Law Review* (2008), at 219. While there is much to say about the principle of fair labelling, this is beyond the scope of this thesis.

[227] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, Defence for Al Senussi, 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's "Decision on the admissibility of the case against Abdullah Al-Senussi"', ICC-01/11-01/11-474 (4 November 2013), at para 177.

[228] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-474, at 181. Emphasis added.

Like persecution, sexual and gender-based crimes "virtually always convey a message of discrimination".[229] They are committed against a person because of their gender, and because it relies on underlying inequalities and conceptions of masculinities and femininities. This discriminatory element of gender-based crimes, and the specific "nature, effect and rationale of these offences",[230] would be lost if it were charged as a different, more generic, offence. Similarly, as Green argued, recognising the gender specificity of crimes is "critical to the process of empowering victims, marginalising perpetrators, recognising the severity and gravity of sexual violence, eliminating the historic misunderstanding of rape and sexual violence, and contributing to the elimination of sexual violence altogether".[231] The Chamber's insistence on the 'underlying conduct'-requirement suggests that appropriate labelling of crimes is not taken into account. Characterising conduct as inhumane treatment rather than as sexual violence changes the perception and recognition of the harm suffered.[232] For instance, when a victim was repeatedly raped and died from those rapes, this crime could be prosecuted as an act of murder. While such prosecutions may (erroneously) be deemed easier or less complicated,[233] this does not capture the full extent of the harm, or the gendered particularities of the crime.[234] As Ni Aoláin reasons, such charges are "insufficient normatively".[235] Yet, following the 'underlying conduct'-rationale set out by the judges to determine whether a national proceeding relates to 'the same case', this would not be considered.

In other words, in adopting a seriousness perspective (which it interpreted loosely), the Chamber has weakened the interpretation of 'sameness' from a gender justice

[229] DeGuzman (2012), at 35-36.

[230] Ní Aoláin (2013), at 5.

[231] Laurie Green, 'First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court', 11 *International Criminal Law Review* (2011), at 531.

[232] Green (2011), at 531, 541. ("… by identifying an act of sexual violence as rape, torture or an outrage upon personal dignity society attributes specific meanings to the act and deems it morally and socially reprehensible in addition to acknowledging the spectrum of harms suffered" and "charging the perpetrators of such heinous atrocities for the full range of their crimes is an important and necessary step in changing societal attitudes that perpetuate sexual and [gender-based violence]."). See also Sivakumaran (2007), at 257. ("An accurate classification of abuse is important not just to give victims a voice, not only to break down stereotypes and not merely to accurately record the picture.").

[233] A common misconception that plagues the investigation and prosecution of sexual violence is the idea that these cases are necessarily more difficult or complicated to investigate or prove at trial.

[234] Chappell, Grey, and Waller (2013), at 462. ("While ordinary sexual violence crimes may be easier to prove from an evidentiary point of view, they do not necessarily locate the violence in its political context.")

[235] Ní Aoláin (2013), at 5. See also Chappell (2015), at 184; Daniela Kravetz, 'Promoting domestic accountability for conflict-related sexual violence: the cases of Guatemala, Peru and Colombia', 32 *Am. U. Int'l L. Rev.* (2017), at 735.

perspective. More concretely, under this part of the admissibility test, in a situation where the ICC charges an individual with murder, rape, torture, and pillaging, and the domestic system prosecutes that same individual only for the acts of murder, torture, and pillaging, this could qualify as 'substantially' the same conduct. If that same domestic system were found able and willing genuinely to prosecute that conduct, this would result in a finding of inadmissibility – the case would be left to the national court. The resulting impunity for gender-based crimes in this situation is clear. This is not to say that, when faced with a situation where a domestic case has not charged rape as an international crime, or even as a domestic sexual violence crime, the ICC would necessarily rule the case inadmissible. However, it illustrates the need for caution in the application of this part of the admissibility test if we take that as a standard to which we hold domestic authorities from a positive complementarity perspective. In short, the interpretation of the sameness requirement of admissibility "potentially reinforces gender misrecognition and misrepresentation" at a national level.[236]

3.1.2 Genuineness of ability or willingness

Once a Chamber finds that the domestic proceedings cover the same case as that before the ICC, the second limb of the admissibility test demands an assessment of the state's genuine ability and willingness to carry them out. In contrast to the factors relevant for 'sameness' (for which there are no legal requirements in the Statute), the Rome Statute sets out specific factors to be taken into account to assess unwillingness or inability.[237] Nonetheless, the exact terms remain open to interpretation. The *travaux préparatoires* suggest the drafters purposely left their interpretation to the Court.[238] In comparison to the first limb of the admissibility

[236] Chappell (2015), at 170.

[237] See Rome Statute, article 17(2) and (3).

[238] During the negotiations in the preparatory committee, many states indicated that qualifications such as "not well-founded" or "ineffective" national proceedings to trigger ICC jurisdiction, as had been suggested by the ILC and Ad Hoc Committee, were too subjective. Other suggestions such as "good faith", "diligently", or "sufficient grounds" were also rejected for leaving too much discretion to the court. States eventually settled for the somewhat ambiguous term "genuine", which proved "the least objectionable" term, and was able to "achieve broad consensus", despite its ambiguity. See: Proceedings of the Preparatory Committee during 25 March-12 April 1996, *Report of the Preparatory Committee on the Establishment of an International Criminal Court – Annex Complementarity: Compilation of concrete proposals*, UN Doc A/AC.249/CRP.9/Add.1 (8 April 1996), at paras 164-169; John T. Holmes, 'The Principle of Complementarity', in Roy S. K. Lee (ed), *The International Criminal Court: the making of the Rome Statute--issues, negotiations, results* (The Hague ; Boston: Kluwer Law International, 1999), at 48-50; John T. Holmes, 'Complementarity: National Courts versus the ICC', in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds), *The Rome statute of the international criminal court: a commentary* (Oxford ; New York: Oxford University Press, 2002), at 674; El Zeidy (2008), at 129.

test, however, much less has been said by Chambers about the factors that are relevant for an assessment of genuine ability and willingness. This is partly because most admissibility challenges were dismissed because there were either no domestic proceedings, or those alleged proceedings did not cover the same case as that before the ICC.[239] In line with Appeals Chamber jurisprudence, where states failed the first part of the test, Chambers did not enter into an assessment of the other parts of the test. Even the limited case law that exists on the "genuineness of ability or willingness"-test points to a number of gender justice pressure points that warrant caution in its application and may leave sexual and gender-based violence crimes vulnerable to exclusion unless proactively remedied.

Regarding unwillingness, article 17(2) provides that a state is unwilling to carry out proceedings when: (a) those proceedings were carried out with a view to shield the accused from justice; (b) there were unjustified delays; or (c) those proceedings were not carried out independently or impartially, and were inconsistent with an intent to bring the person to justice. The exact elements to satisfy any of these remain, however, less clear. Observing the widespread scale of sexual and gender-based violence in conflict, and the fact that such crimes remain largely unaddressed, Kapur concludes: "[i]f there is any type of crime the OTP can focus on to assess unwillingness, it is this category".[240] Patricia Sellers similarly argued that cases should be declared admissible by the ICC if there are procedural or substantive obstacles for women to access justice in their national jurisdictions, or if women "are subjected to gender 'sham' trials".[241]

However, the Appeals Chamber stated that this provision "should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection".[242] In other words, only where proceedings are carried out *as show trials*, with complete disregard for procedural requirements or the rights of accused persons or victims, would a case be deemed inadmissible pursuant to article 17(2)(a). This suggests the threshold for demonstrating the requirement of 'evading criminal responsibility' is high, and it remains

[239] The only case in which the judges entered into a substantive discussion on a state's alleged willingness and ability to carry out proceedings genuinely is the *Al-Senussi* case.

[240] Kapur (2012).

[241] Sellers (2009), at 22.

[242] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at para 230.

questionable to what extent inadequate gender justice procedures or other obstacles to accountability for sexual and gender-based violence could, following the Chamber's view, lead to a finding of 'evading criminal responsibility'. In fact, as this thesis will argue in chapter 4, while there exist a number of serious gender justice limitations in Colombia, these have not led the Office of the Prosecutor to open an investigation.

Emphasising the Rome Statute's gender inclusiveness, Susana SáCouto and Katherine Cleary argue that even when a state seems willing and able to prosecute *some* perpetrators for *some* crimes that would fall under the ICC's jurisdiction, the ICC Prosecutor must "dig deeper".[243] In their view, the assessment of legal complementarity should extend beyond a mere evaluation of a state's willingness and ability to prosecute international crimes in general. Such relevant procedures could include rules concerning the admissibility of evidence, the nature and type of evidence required, the classification of crimes of sufficient gravity to prioritise their investigations, or the protection of witnesses. Chappell *et al.* similarly argue that such gender biases in domestic legal systems impeding access to justice for these victims must be seen as evidence of a state's inaction and its unwillingness or inability to carry out proceedings.[244] Kapur gives the following example: "a failure to allocate resources to gender-sensitive training of interviewers of women victims of sexual violence or recruitment of female law enforcement officers may result in the constructive unavailability of the judicial system with respect to these crimes, resulting in an inability to prosecute them",[245] or to obtain the necessary evidence or testimony.

However, the relevant provisions of genuine ability or willingness, articles 17(2) and 17(3), indicate that the Court shall not consider a domestic system's *general* ability or willingness to carry out proceedings in evaluating a case's admissibility: it concerns an assessment of unwillingness or inability "in a particular case".[246] In other words, the assessment must be limited to an evaluation of a state's willingness and/or ability to carry out the proceedings in the case that is the subject of the admissibility challenge (or, in evaluating the opening of an investigation, relating to the types of cases that would most likely form the

[243] Susana SáCouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court', 17 *Am. UJ Gender Soc. Pol'y & L.* (2009), at 344.

[244] Chappell, Grey, and Waller (2013), at 455. See also: Inder (2013), at 322; Chappell (2015), at 160-189.

[245] Kapur (2016), at 78.

[246] The chapeau of article 17(2) provides: "In order to determine unwillingness *in a particular case*, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable […]." Likewise, article 17(3) reads, in relevant part: "In order to determine inability *in a particular case*, the Court shall consider […]." (Emphasis added).

subject of the ICC investigation).[247] Nonetheless, the Pre-Trial Chamber, in assessing Libya's ability and willingness to carry out proceedings against Al-Senussi, held that this "must be assessed i*n light of the relevant law and procedures applicable to domestic proceedings* in Libya".[248] As such, the general legal framework according to which proceedings are carried out forms a limited part of the admissibility test, and can provide important contextual information to assess genuine ability and willingness in a particular case. Similarly, assessing the admissibility of the *Bemba* case in 2010, the Trial Chamber concluded that the judicial system in the Central African Republic was 'unavailable' under article 17 due to its limited judicial and investigative capacity, which it linked to insufficient human resources, the large backlog of cases pending before national courts, and a shortage of judges in the country.[249]

This latter finding has not, however, been confirmed by the Appeals Chamber,[250] and subsequent jurisprudence suggests it may in fact rule such factors pertaining to the general system irrelevant to assess admissibility in a specific case. Furthermore, when asked to rule on the adequacy of general witness security to prove lack of independence or impartiality, the Appeals Chamber ruled that only situations where witnesses would "*deliberately* be exposed to, or *intentionally* left unprotected from, security threats" would render a case admissible under article 17(2)(c).[251] This finding suggests that general conditions leading to inadequate witness protection during trial that are outside the direct control of the authorities, are not relevant for the admissibility assessment. This may prove particularly problematic from a gender justice perspective given the difficulties victims of sexual and gender-based crimes often face during court proceedings and the inadequacy of many domestic systems to protect these witnesses. These inadequacies often do not stem from a deliberate or intentional policy to negatively position victims of these crimes, but result from the structural and institutional

[247] The Pre-Trial Chamber in Al-Senussi advanced a similar reading of the Statute. *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 202.

[248] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 203. See also para. 223, where the Chamber noted: "[…] the determination of whether there has been any such unjustified delay must be made not against an abstract ideal of 'justice', but against the specific circumstances surrounding the investigation concerned."

[249] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Trial Chamber III, 'Decision on the Admissibility and Abuse of Process Challenges', ICC-01/05-01/08-802 (24 June 2010), at paras 245-246.

[250] While this finding was one of the grounds of appeal of the Defence, the Appeals Chamber declined to rule of the correctness of this finding, as it held there had not been a decision not to proceed in the case. In line with prior jurisprudence, the Appeals Chamber stressed that the question of unwillingness or inability does not arise if the answer to the first question of the test (sameness) is negative. *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-962, at para 106.

[251] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at para 244(i); *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, at para 288.

biases (sometimes overtly, other times subconsciously) that affect SGBV in particular, i.e. the pressure points discussed in chapter 1.

For inability, under article 17(3), the Appeals Chamber confirmed that "the Court must be satisfied that there is *both* a 'total or substantial collapse or unavailability' of the national judicial system *and* that, as a result, 'the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'".[252] In this respect, Judge Song, in his separate opinion in the Gaddafi admissibility appeal, held that 'unavailability' includes a situation where "the national system is incapable of being used, which incorporates the notion of being inaccessible".[253] It remains unclear what degree of collapse or unavailability would qualify as 'substantial', as this has not yet been the subject of judicial assessment. The *travaux préparatoires* illustrate that states replaced the original suggestion of 'partial' collapse with 'substantial' collapse, which "seemingly avoided the situation where part of a State's judicial apparatus was incapacitated but significant portions remained intact".[254] This suggests the threshold for satisfying the "substantial collapse or unavailability" requirement to demonstrate inability is high.

In other words, the low "minimum standard" for national proceedings set by the ICC's judges sits uncomfortably with the reluctance in many national systems to prosecute sexual violence crimes. The analysis provided here suggests that the threshold for satisfying the requirements to demonstrate a state's inaction on the same case, or its inability or unwillingness, is high, which risks overlooking, reducing, or eliminating accountability for sexual violence. In short, the admissibility test of legal complementarity appears incapable of capturing the nuances and specific difficulties involved in the investigation and prosecution of sexual violence.

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[252] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, at para 265. Emphasis added.

[253] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Anx1, at para 25.

[254] Holmes (1999), at para 55; Holmes (2002), at 677. See the proposal made by Mexico in this respect: UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June-17 July 1998), *Official Records – Volume II: Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, UN Doc A/CONF.183/13 (Vol.II) (2002), at 317; UN Doc A/CON.183/C.1/L.14/REV.1 in: UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June-17 July 1998), *Official Records – Volume III: Reports and other documents*, UN Doc A/CONF.183/13 (Vol.III) (2002), at 240.

3.1.3 Assessment of gravity

In addition to an assessment of the existence and genuineness of domestic proceedings, the admissibility test also requires a positive determination on the gravity of a particular case. Although the Rome Statute deals with "the *most serious* crimes of concern to the international community",[255] article 17(2)(d) requires an additional assessment of the seriousness of potential cases: the ICC shall declare a case inadmissible when it is not of "sufficient gravity". In other words, even in a situation where national authorities are not investigating or prosecuting, or have not done so genuinely, the ICC may still decline to pursue a case when it deems it not grave enough to warrant investigation or prosecution at an international level. This third question to assess admissibility – gravity[256] – is arguably of a different nature than the first two, as it does not relate specifically to the quality of domestic proceedings. Nonetheless, it is an important criterion affecting both the ICC's exercise of jurisdiction and the selection and prioritisation of cases by the Office of the Prosecutor,[257] and as such conditions complementarity's "catalyst" or "encouragement" effect. Furthermore, as we will see in chapter 4, the ICC's requirements around gravity have equally been adopted in Colombia in the prioritisation of cases for investigation at a national level within its main transitional justice framework. In the absence of a specific definition of gravity, its interpretation also creates a number of gender justice pressure points, which may thus embed similar problematic assumptions within justice efforts at a national level, in particular where the ICC's interpretation is taken as authoritative/exemplary.

Before examining these potential pressure points within gravity assessments, however, a short note on how gravity is woven into the fabric of the Rome Statute. The Rome Statute essentially incorporates two types of gravity: "threshold gravity", setting out the minimum level of gravity for crimes to come within the ICC's jurisdiction, and "relative gravity", which speaks to the gravity of particular crimes, cases or situations relative to

[255] Preamble, *Rome Statute* (18 July 2002).

[256] On gravity, see, *e.g.*, Margaret M. DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court', 32 *Fordham Int'l LJ* (2008); Ray Murphy, 'Gravity Issues and The International Criminal Court', 17 *Criminal Law Forum* (2006); Matthew H. Charity, 'Defying Gravity: The Development of Standards in the International Prosecution of International Atrocity Crimes', 23 *Indiana International & Comparative Law Review* (2013); Margaret M. DeGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten', 12 *Washington University Global Studies Law Review* (2013); Anna Trenga, 'The Gravity Threshold of Article 17(1)(d)', 11 *Eyes on the ICC* (2015).

[257] *Policy Paper on Case Selection and Prioritisation*; *Policy Paper on Preliminary Examinations*.

others, all of which fall within the ICC's jurisdiction and are admissible.[258] The latter is essentially a criterion in the selection and prioritisation of cases and situations for investigation and prosecution by the Office of the Prosecutor and the exercise of its discretion in that regard: among all admissible cases, it will prioritise those assessed as most grave. Gender justice pressure points can be found in both, but are more pronounced in the latter.

The first gender justice pressure point is inherent in the very idea of gravity or seriousness. As mentioned before, one of the main obstacles to full recognition of sexual, gendered and reproductive harm in IHL/ICL has been the idea that these crimes are not as serious (in other words, as grave) as others, rooted in gendered notions of sexual violence crimes as issues of honour, rather than violent physical crimes.[259] Similarly, not seeing or treating sexual violence as part of "core work" hampered investigations and prosecutions of sexual violence at ICTY.[260] For instance, when faced with resource constraints and an overwhelming number of crimes, Jarvis explained, the ICTY Office of the Prosecutor initially (erroneously) prioritised the prosecution of killings at Srebrenica "to the exclusion of the crimes committed against the women, children, and elderly who were expelled".[261] The reality of the genocide would have been obscured through this prioritisation based on perceived gravity and seriousness (the decision was ultimately rectified).[262] Similarly, as SáCouto and Cleary illustrate, going through the Rome Statute's drafting history, the gravity requirement was included to ensure the ICC would focus its prosecutorial efforts on major offenders and not on perpetrators of isolated acts.[263] Given the still prevalent misconception that sexual violence crimes are isolated acts rather than an integral part of broader criminality, the very idea of gravity is necessarily subjective and gendered.

Gravity assessments are first conducted as part of the Office of the Prosecutor's determination of whether to open an investigation into a particular situation or case. It must determine whether the alleged crimes committed in a certain situation or by a certain suspect are sufficiently grave to justify its intervention. This is what DeGuzman calls "the gravity

[258] DeGuzman (2008), at 1403, 1405.

[259] Michelle Jarvis, 'Overview: The Challenge of Accountability', in Michelle Jarvis and Serge Brammertz (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016), at 13.

[260] Jarvis (2016), at 5; Baig *et al.* (2016), at 173.

[261] Jarvis (2016), at 14.

[262] Jarvis (2016), at 14.

[263] Susana SáCouto and Katherine Cleary, *The Gravity Threshold of the International Criminal Court* (War Crimes Research Office, 2008), at 17.

threshold for admissibility".[264] It sets a minimum threshold below which the ICC will not exercise its jurisdiction. The particular factors to be taken into account for an assessment of threshold gravity are both qualitative and quantitative, and include the scale, nature, manner of commission, and impact of crimes.[265] Other factors relevant for this assessment are the extent of damage caused, in particular the harm caused to victims and their families, the degree of participation of an accused person, the degree of intent, and the age, education, social and economic condition of the accused person.[266]

The ICC through its limited decisions dealing with gravity has set a relatively low standard for threshold gravity, which allows the ICC to virtually admit any case or situation provided crimes within the ICC's jurisdiction have been committed.[267] DeGuzman thus argues that threshold gravity "exclude[s] primarily war crimes that score low in each of the [above mentioned] categories […]: those committed in isolation from other crimes, causing the least harm, and by the lowest level perpetrators."[268] Crucially, however, as discussed earlier in chapters 1 and 2, it is exactly at these moments when assessing the degree of connection to broader criminality ('sexual violence as isolated acts'), the evaluation of the extent of harm ('private' versus public harm), or the possibilities of linking the harm to higher level perpetrators that sexual violence crimes have suffered disproportionately in ICL. Furthermore, the ICC Pre-Trial Chamber held that the mere fact that a case features Rome Statute crimes in articles 6-8 (i.e. war crimes, crimes against humanity or genocide) is not by itself sufficient to satisfy the gravity test – it must include additional features that render the conduct especially grave.[269] As such, sexual violence crimes may still be overlooked or eliminated through threshold gravity.

On the other hand, threshold gravity must be interpreted in line with the Rome Statute as a whole and its object and purpose.[270] Given the gender sensitivity included in its

[264] DeGuzman (2013), at 476.

[265] Regulation 29, Office of the Prosecutor, *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09 (23 April 2009). See also *Policy Paper on Preliminary Examinations*, at paras 61-65; *The Prosecutor v. Bahr Idriss Abu Garda*, ICC, Pre-Trial Chamber I, 'Public Redacted Version - Decision on the Confirmation of Charges', ICC-02/05-02/09-243-Red (8 February 2010), at para 31; DeGuzman (2013), at 480-481.

[266] Assessing gravity in the confirmation decision in the *Abu Garda* case, the Pre-Trial Chamber took guidance from Rule 145 regarding the determination of sentence, which sets out these factors. *The Prosecutor v. Bahr Idriss Abu Garda*, ICC-02/05-02/09-243-Red, at para 32.

[267] For a detailed discussion of these decisions, see, *e.g.*, DeGuzman (2013).

[268] DeGuzman (2008), at 1458.

[269] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-US-Corr, at paras 41, 45.

[270] Murphy (2006), at 286.

provisions, it seems unlikely that sexual and gender-based violence would be excluded on the basis of the gravity threshold alone. Furthermore, the Office of the Prosecutor has indicated that any motives of discrimination or the use of rape and sexual violence as a means of destroying groups are particularly relevant for an assessment of the manner of commission of crimes,[271] one of the factors of gravity. Its recent policy commitment to pay particular attention to sexual and gender-based violence crimes within all aspects of its work similarly underscores this point.[272] In other words, the likelihood that sexual violence crimes are overlooked or eliminated through the threshold gravity assessment may perhaps be getting smaller.

The pressure points become more acute when considering gravity as a prioritisation or selection criterion, i.e. when it concerns the assessed gravity of certain crimes or cases *relative* to others. Relative gravity constitutes a key factor for the Office of the Prosecutor in case selection (the other factors being the degree of responsibility of perpetrators and potential charges).[273] The factors relevant to threshold gravity also apply to the assessment of relative gravity, although the Office has indicated it may apply a stricter interpretation of those factors for the purposes of case selection given the potentially numerous cases that may be admissible.[274] It has nonetheless also indicated that it will pay particular attention to crimes that have been traditionally under-prosecuted, including sexual violence, in the selection of cases and charges.[275] In relation to *prioritisation*, on the other hand, sexual violence remains vulnerable to attrition. While the initial tendency by the Office of the Prosecutor to de-prioritise sexual violence appears to have been rectified in recent years since the adoption of the Sexual and Gender-based Crimes Policy (SGBC Policy) in June 2014 (as described earlier in chapter 2[276]), the Office's case prioritisation criteria still warrant caution. For instance, the Office of the Prosecutor will examine whether a person has already been investigated or prosecuted "by either the Office or by a State for another serious crime".[277] It would thus appear unlikely, for instance, that the Office of the Prosecutor would investigate or prosecute an individual specifically for sexual violence as a war crime or crime against

[271] *Policy Paper on Preliminary Examinations*, at para 64.

[272] *Policy Paper on Sexual and Gender-Based Crimes*.

[273] *Policy Paper on Case Selection and Prioritisation*, at paras 6, 34.

[274] *Policy Paper on Case Selection and Prioritisation*, at para 36.

[275] *Policy Paper on Case Selection and Prioritisation*, at para 46.

[276] See pages 42-43, above.

[277] *Policy Paper on Case Selection and Prioritisation*, at para 50.

humanity, when that same individual has been prosecuted before national courts for crimes of similar gravity yet excluding sexual violence. The continued impunity for crimes of sexual violence in such an instance is evident.

In other words, the test to assess admissibility (which involves a twofold assessment of complementarity and gravity) "does not address specific gender injustice dimensions of state criminal codes and practices".[278] These gender (in)justice pressure points, unless rectified through complementarity as a 'big idea', may (at best) result in a disproportionate lack of attention for sexual violence crimes or (at worst) perpetuate impunity for these crimes at both a national and international level. Indeed, as Chappell observes, in the absence of a formal link between the Rome Statute's gender justice principles and its complementarity framework, "the onus [is] on actors within and outside the ICC to make a conscious, concerted effort to bring gender justice perspectives to bear on complementarity deliberations".[279] Having examined the formal complementarity rules enshrined in the Rome Statute, the next section zooms in on this broader idea of 'positive complementarity', and its potential to advance the Rome Statute's gender justice principles.

[278] Chappell (2015), at 164.

[279] Chappell (2015), at 160.

SECTION 3.2

GENDER JUSTICE AND POSITIVE COMPLEMENTARITY

In addition to applying complementarity as an admissibility criterion, the Office of the Prosecutor has adopted what it calls a broader "positive approach to complementarity". Based on the analysis of public policy documents and interviews with representatives of the Office of the Prosecutor, this section will describe in more detail how the Office conceptualises this positive approach to complementarity. The section equally describes the increasing pushback from the Assembly of States Parties to such a positive approach; the Assembly firmly places the responsibility for encouraging, facilitating or assisting domestic accountability for Rome Statute crimes (i.e. positive complementarity) with actors other than the Court. Indeed, in reality, the Office of the Prosecutor's ability to take direct measures to encourage national accountability for Rome Statute crimes, including for crimes of sexual violence, is limited for various reasons. Nonetheless, the concept of positive complementarity over time has broadened to include activities undertaken by other actors – states or civil society organisations – in support of broadening accountability for Rome Statute crimes at a national level and addressing impunity. This broader dimension of positive complementarity holds potential for addressing gender justice concerns through encouraging the diffusion of international norms at a national level, which is assessed in more detail in the two case study chapters of this thesis.

3.2.1 The Office of the Prosecutor's "positive approach" to complementarity

In a 2003 *paper on some policy issues before the Office of the Prosecutor* adopted shortly after the ICC took up its seat in The Hague, the Office of the Prosecutor first indicated its commitment "to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes".[280] In its subsequently adopted

[280] Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor* (September 2003), at 5. Professor Morten Bergsmo, coordinator of the Office of the Prosecutor's preparatory team in 2002-2003, first suggested the term positive complementarity. He notes, however, that "for a number of years, there was not much interest in commencing a practice of positive complementarity"; it wasn't until the complementarity resolution was adopted during the Review Conference in 2010 that real engagement on the issue started. Morten Bergsmo, 'Institutional History, Behaviour and Development', in Morten Bergsmo, Klaus Rackwitz, and Tiangying SONG (eds), *Historical Origins of International Criminal Law: Volume 5*, *FICHL Publication Series*

Prosecutorial Strategy of September 2006, it defines this as a "positive approach" to complementarity, sometimes referred to simply as "positive complementarity": "encourage[ing] genuine national proceedings where possible; rely[ing] on national and international networks; and participat[ing] in a system of international cooperation".[281] It later specifies, however, that this positive approach does not involve the Office engaging in capacity building, or financial or technical assistance activities.[282] It may, however, include sharing information with national authorities (provided they have adequate security measures in place), providing information to UN or other special envoys involved in political mediation to support the ICC's work through other activities, or acting as "a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts".[283] In other words, it involves a "proactive policy of cooperation aimed at promoting national proceedings".[284] This includes national proceedings for those most responsible, as well as proceedings against other perpetrators or crimes that do not meet the threshold for ICC prosecution.[285]

There are essentially two dimensions to the Office of the Prosecutor's "positive approach" to complementarity. On the one hand, it involves encouraging domestic proceedings as a means to *avoid* the opening of investigations by the ICC (particularly during preliminary examinations). On the other hand, it involves a burden-sharing approach to the investigation and prosecution of Rome Statute crimes, with the ICC focusing on those most responsible, and national authorities complementing accountability efforts with proceedings against other perpetrators, to fully close the impunity gap.[286] Although the Office of the Prosecutor has referred to both of these as "positive complementarity", Thomas Obel Hansen helpfully distinguishes these two as the "hand-over version" of complementarity and the

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No. 24 (Brussels: Torkel Opsahl Academic EPublisher, 2017), at 15. See further discussion in: Morten Bergsmo and Tiangying SONG, 'The Principle of Complementarity in Practice', in Morten Bergsmo, Klaus Rackwitz, and Tiangying SONG (eds), *Historical Origins of International Criminal Law: Volume 5*, *FICHL Publication Series No. 24* (Brussels: Torkel Opsahl Academic EPublisher, 2017).

[281] Office of the Prosecutor, *Report on Prosecutorial Strategy* (14 September 2006), at 5.

[282] The expert consultation on complementarity held in 2003, however, had suggested that providing technical advice would be "generally consistent with the Office of the Prosecutor's mandate" since the Office would be building up "unique and unparalleled in-house expertise" on matters of international criminal law. They were more hesitant regarding training given the significant resources implications involved in that. Bergsmo and SONG (2017), at 752.

[283] Office of the Prosecutor, *Prosecutorial Strategy 2009-2012* (1 February 2010), at para 17.

[284] *Prosecutorial Strategy 2009-2012*, at para 16.

[285] *Prosecutorial Strategy 2009-2012*, at para 19.

[286] Interviews with representatives of the Office of the Prosecutor (The Hague, October and November 2015), *on file with author*.

"burden-sharing version" of complementarity, respectively.[287] The first applies generally to the preliminary examination stage, with the second more relevant for situations where the ICC has opened investigations. Overall, positive complementarity can be achieved in four ways: (i) through active encouragement and co-operation; (ii) through the prospect (or 'threat') of the ICC exercising jurisdiction; (iii) through the ICC's exemplary and standard-setting role; and (iv) by virtue of "its moral presence, which will shape perspectives and strengthen resolve on the need for accountability".[288]

While from a statutory perspective the aim of preliminary examinations is strictly to determine whether there is a reasonable basis for the ICC to open an investigation into a particular situation, the Office of the Prosecutor has indicated that "ending impunity through positive complementarity" constitutes a broader policy goal.[289] This means that "a significant part of the Office's efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes",[290] in particular for those potential cases that fall within the ICC's jurisdiction and that have been identified by the Office in the course of its examinations.[291] As the ICC generally focuses on those who bear the greatest responsibility for crimes within its jurisdiction,[292] its positive complementarity efforts at the preliminary examination stage, therefore, will focus primarily (although not exclusively) on encouraging those kinds of cases at a national level.[293]

Given that its ability to provide direct assistance is limited (due to resource and mandate limitations), the Office seeks to implement its positive approach to complementarity primarily through more indirect means. These include the publication of general reports on its preliminary examination activities or situation-specific statements, requesting updates from states about national proceedings, and "assist[ing] relevant stakeholders to identify pending

[287] Thomas Obel Hansen, 'The Policy Paper on Preliminary Examinations: Ending Impunity through 'Positive Complementarity'?', *SSRN Transitional Justice Institute Research Paper No. 17-01* (2017), at 19.

[288] Bergsmo and SONG (2017), at 750.

[289] *Policy Paper on Preliminary Examinations*, at para 100.

[290] *Policy Paper on Preliminary Examinations*, at para 100.

[291] *Policy Paper on Preliminary Examinations*, at para 101.

[292] The Office of the Prosecutor acknowledges, however, that this may involve a strategy of gradually building upwards. *Strategic Plan 2016-2018*, at paras 35-36; *Policy Paper on Case Selection and Prioritisation*, at paras 42-44.

[293] *Policy Paper on Preliminary Examinations*, at para 103.

impunity gaps and the scope for possible remedial measures".[294] Although the Office's travel budget is limited, situation analysts aim to travel regularly to the countries under preliminary examination, where they engage with state representatives, civil society organisations, and other information providers (where relevant).[295] The Office may also hold meetings with state representatives at the seat of the court, and may send specific information requests to states. Such meetings (or requests) primarily serve to ensure the Office has sufficient and correct information available to conduct its assessments of any relevant national proceedings.

In requesting further information on specific activities, for instance on the progress of a case against a certain individual at a national level, the Office indirectly communicates its priorities to the national authorities. Should a state be seeking to avoid the ICC's intervention, such questions by the Office of the Prosecutor may trigger further progress on that particular case. In exceptional cases, the Office of the Prosecutor also engages in public discussions on accountability and transitional justice issues, for instance in issuing statements on developments at a national level,[296] or engaging in public conferences on situations under preliminary examinations.[297] Finally, the Office of the Prosecutor also aims to facilitate information exchange between different actors working towards accountability at a national level. For instance, in the context of the preliminary examination in Guinea, the Office of the Prosecutor "facilitate[d] a constructive dialogue" between the Guinean investigative judges, political authorities, civil society organisations, UN representatives, and the diplomatic community in Conakry.[298] The Office of the Prosecutor does not, however, provide legal advice to prevent tainting possible future admissibility proceedings.[299] It also does not participate directly in capacity building activities at a national level, unless invited to

[294] *Policy Paper on Preliminary Examinations*, at para 102.

[295] Interviews with representatives of the Office of the Prosecutor, The Hague (October and November 2015), *on file with author*.

[296] On 24 September 2015, the Prosecutor issued a statement in relation to the preliminary examination in Colombia, expressing her hope that the then-announced Agreement on the Creation of a Special Jurisdiction for peace "would constitute a genuine step towards ending the decades-long armed conflict while paying homage to justice as a critical pillar of sustainable peace". 'Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia', *International Criminal Court* (29 September 2015), available at <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp_stat_24-09-2015.aspx>, accessed 13 April 2016.

[297] In May 2015, Deputy Prosecutor James Stewart participated in a conference on *Transitional Justice and the Role of the International Criminal Court* held in Bogotá. *Report on Preliminary Examination Activities 2015*, at para 162.

[298] *Report on Preliminary Examination Activities 2015*, at para 179. Interview with representative of the Office of the Prosecutor (The Hague, October 2015), *on file with author*.

[299] Assembly of States Parties, *Report of the Court on complementarity*, ICC-ASP/10/23 (11 November 2011), at para 32.

participate in a meeting organised by other actors, such as states or the UN, to share its best practices.[300]

In other words, during the preliminary examination stage, the Office of the Prosecutor primarily conceptualises its role in encouraging or facilitating national accountability efforts through normative or expressive means: by publicising, either through public reports or in meetings with relevant stakeholders, the factors it considers relevant for complementarity assessments, it is hoped that this may trigger a national response in relation to those specific issues. For instance, in late November 2014, the Office of the Prosecutor sent a letter to the Georgian authorities setting out the level of specificity and degree of "concrete, tangible and pertinent evidence" needed to demonstrate the sufficiency of national proceedings against those most responsible. When the Georgian authorities subsequently reported in May 2015 that national proceedings had been "indefinitely suspended", the Office proceeded to request authorisation from the Pre-Trial Chamber to open an investigation itself.[301]

In its 2014 SGBC Policy Paper, the Office of the Prosecutor made a particular commitment towards the encouragement of genuine national investigations and prosecutions for sexual and gender-based violence. It notes, for instance, that in relation to the preliminary examination in Colombia, it has urged national authorities to specifically prioritise the investigation and prosecution of sexual violence by including it as a priority area within its interim report on the situation.[302] As part of its positive approach to complementarity, it specifically seeks to encourage national authorities to address barriers to genuine proceedings for sexual violence at a national level.[303] The policy indicates that such barriers include:

> "*... discriminatory attitudes and gender stereotypes in substantive law and/or procedural rules that limit access to justice for victims of such crimes, such as inadequate domestic law criminalising conduct proscribed under the Statute; the existence of amnesties or immunity laws and statutes of limitation, and the absence of protective measures for*

[300] Interviews with representatives of the Office of the Prosecutor (The Hague, September-November 2015), *on file with author*. For instance, in the context of the Assembly of States Parties facilitation on complementarity, the focal points for complementarity, Sweden and Botswana, organized two regional meetings in Guatemala and Uganda in June and August 2015, respectively. Staff from the Office of the Prosecutor participated in both meetings to share their experience in investigating and prosecuting sexual and gender-based violence with national stakeholders. See: Assembly of States Parties, *Report of the Bureau on complementarity*, ICC-ASP/14/32 (10 November 2015).

[301] *Report on Preliminary Examination Activities 2015*, at paras 262-264.

[302] *Policy Paper on Sexual and Gender-Based Crimes*, at para 46, fn 48. The impact of the OTP's assessments in this regard are discussed in more detail in chapter 4 of this thesis.

[303] *Policy Paper on Sexual and Gender-Based Crimes*, at para 46.

> *victims of sexual violence. Other indicators of an absence of genuine proceedings may be the lack of political will, including official attitudes of trivialisation and minimisation or denial of these crimes; manifestly insufficient steps in the investigation and prosecution of sexual and gender-based crimes; and the deliberate focus of proceedings on low-level perpetrators, despite evidence against those who may bear greater responsibility.*"[304]

It is not clear, however, how the Office envisages addressing these barriers through its positive approach to complementarity, other than highlighting its interest in seeing these matters addressed at a national level.[305] Indeed, in my conversations with various representatives of the Office of the Prosecutor, it became clear that the Office primarily conceptualises its role in this regard as one of raising awareness about its concerns through the publication of documents, holding meetings with state authorities, or exchanging best practices.[306] Such an (indirect) approach to encouragement and facilitation would also comply most closely with the Office's limited mandate in this regard. Furthermore, as we will see in chapter 4 of this thesis, the Office's complementarity assessments in relation to the situation in Colombia suggest these factors alone, in the absence of overarching structural problems with a national system's ability or willingness, would not constitute sufficient grounds, in the Office's view, for a negative assessment of complementarity, and thus to open an official ICC investigation.

Although when opening of an investigation the ICC has already negatively assessed complementarity, its positive approach to complementarity does not seize. Rather, its nature changes in two ways. Firstly, at this stage, a state's cooperation obligations kick in,[307] which in turn also triggers possibilities for states of requesting assistance from the ICC in carrying out national proceedings under article 93(10).[308] During investigations, encouraging domestic

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[304] *Policy Paper on Sexual and Gender-Based Crimes*, at para 41.

[305] For instance, in its report concluding the preliminary examination and opening a second investigation in the Central African Republic, the Office of the Prosecutor indicates that it "will seek to encourage genuine national investigations and prosecutions by the State(s) concerned in relation to sexual and gender-based crimes" and "will also sensitize relevant national authorities and other entities to address potential barriers to genuine proceedings, and to provide support for the victims of such crimes". No further direction is given as to *how* this is supposed to be done. *Report on Preliminary Examination Activities 2015*, at para 249.

[306] Interviews with representatives of the Office of the Prosecutor (The Hague, September 2015-January 2016), *on file with author*.

[307] Pursuant to article 86, States Parties must cooperate fully with the Court "in its investigation and prosecution of crimes within the jurisdiction of the Court". Cooperation at the preliminary examination stage, therefore, is voluntary.

[308] Article 93(10)(a) provides: "The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the

proceedings can therefore include the sharing of evidence obtained during ICC investigations, exchanging on lessons learned and best practices, or encouraging domestic implementation of the Rome Statute for domestic proceedings against other perpetrators.[309] Secondly, the Office will shift its focus from encouraging domestic proceedings to avoid the need for its intervention (i.e. Hansen's "hand-over" version of complementarity), towards the "burden-sharing" version of complementarity.[310] Rather than competing with national courts for jurisdiction, the Office of the Prosecutor seeks to "combin[e] its own efforts to prosecute those most responsible with those of national proceedings against other perpetrators" by engaging with and supporting national authorities.[311]

In other words, the Office of the Prosecutor recognises that there is a strong incentive under its positive approach to complementarity to share relevant information with situation countries where an investigation has been opened as the ICC can only address a handful of cases – addressing impunity still requires relevant states to undertake investigations for other perpetrators within that same situation (i.e. "burden-sharing" complementarity). However, in practice, the Office's ability to provide such support to national authorities is again very limited, in part due to security considerations[312] and due to increasing push-back from the Assembly of States Parties, as described below, regarding any activities that are seen as outside its core mandate.

Nonetheless, there are a few examples where, within the constraints of its mandate, the Office has been able to share its expertise with domestic authorities to facilitate national proceedings. For instance, in 2010 and 2011, the Office provided direct assistance to the Ugandan authorities, which sought to carry out ('complementary' or 'burden-sharing') proceedings against other LRA members than those indicted by the ICC. This included sharing data of intercepted communications of relevance for the domestic case, and hosting

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jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State." Such assistance may also be provided to non-States Parties under article 93(10)(b).

[309] Office of the Prosecutor, *Speech of Mrs Fatou Bensouda, Prosecutor of the International Criminal Court, to the Workshop on 'Combating Impunity for Sexual and Gender-Based Crimes at the national level'* (20 May 2014). Interviews with representatives of the Office of the Prosecutor (The Hague, September & October 2015), *on file with author*.

[310] When asked about the meaning of positive complementarity during investigations, one member of the Office of the Prosecutor equated the principle with "burden-sharing".

[311] *Speech of Mrs Fatou Bensouda, Prosecutor of the International Criminal Court, to the Workshop on 'Combating Impunity for Sexual and Gender-Based Crimes at the national level'*.

[312] The Office will not "provide information without the proper security standards and national authorities' willingness to receive such information". *Report of the Court on complementarity*, ICC-ASP/10/23, at para 32.

consultations at the seat of the Court on witness protection and evidence handling to share its best practices.[313] Similarly, in relation to a case against two former members of the *Forces démocratiques de libération du Rwanda* (FDLR) before the German courts, the Office of the Prosecutor shared information with the German authorities and consulted on the conduct of its own investigations in the case against Callixte Mbarushimana (another alleged member of the FDLR). The Office also facilitated contact between the German investigative authorities and local DRC authorities.[314]

However, these two examples are the exception, rather than the rule. Despite its stated commitment to sharing information and evidence for the purposes of domestic proceedings,[315] overall, the ICC has been very cautious in sharing any of its evidence with states carrying out domestic proceedings, particularly in countries in which it has opened investigations. Although all OTP staff I spoke with recognised the important possibilities for positive complementarity through article 93(10) cooperation requests from states, they were all equally hesitant regarding its practical applicability. In some instances, cooperation requests sent by national governments to the ICC were either too broad or unsubstantiated, lacked the necessary assurances around confidentiality, or were denied because the Office was concerned for the security of its witnesses.[316] While open source information collected in the course of the ICC's investigation can be shared relatively easily, for much of its other evidence it may need to take an additional step of confirming with the information provider or witness whether information can be shared with national authorities. Similarly, internal work products or analysis documents may require heavy redactions before it can be shared. All of this necessarily complicates the evidence-sharing possibilities under its positive approach to (burden-sharing) complementarity.

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[313] *Report of the Court on complementarity*, ICC-ASP/10/23, at para 36.

[314] *Report of the Court on complementarity*, ICC-ASP/10/23, at paras 37-39.

[315] See, for example, the detailed description provided in a report to the ASP: *Report of the Court on complementarity*, ICC-ASP/10/23, at paras 34-44.

[316] Interviews with OTP representatives (The Hague, September & October 2015), *on file with author*. As discussed in chapter 5 of this thesis, when the DRC submitted a formal request for information in January 2007, the Office of the Prosecutor rejected this because of "security, confidentiality, and witness protection considerations" but offered to provide the DRC with summaries "subject to certain undertakings of confidentiality". *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Office of the Prosecutor, 'Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)', ICC-01/04-01/07-1007 (30 March 2009), at para 35.

This hesitancy and caution is understandable in situations where the ICC has opened an investigation and where it has essentially assessed the national system unable or unwilling to carry out the proceedings themselves. In reality, the successful requests for assistance from states to the Office of the Prosecutor have been the result of ongoing interaction and dialogue, either where the Office liaised with the relevant state in advance of the submission of the request, or where they came from a state with which the Office already had an ongoing 'interaction'.[317] Another challenge relates to limited resources, with requests for assistance often remaining pending "for too long".[318] Because the ICC "is not there every day to assist them",[319] in the Office's view, possibilities to implement its proactive approach to positive complementarity, including for sexual violence crimes, during investigations remain limited.

Nonetheless, there is more the ICC could be doing in this respect to increase domestic capacities within its existing resources and mandate. In situations where requests for access to evidence from states have to be denied, the ICC could proactively make suggestions in its response denying the request about the issues it is particularly concerned about. For instance, if the ICC is concerned about the (lack of) procedures in place at a national level concerning the handling of confidential information securely, it could make recommendations on the necessary reforms to improve the domestic framework with a view to potentially sharing evidence at a later stage.[320] This would not involve the ICC in actually building the necessary capacity (which should be left to others), but would make it easier for states to get access to such evidence in the future. Similarly, although none of my interviewees could recall specific cooperation requests in relation to sexual violence crimes, one indicated that cooperation advisers do sometimes engage with their national counterparts on cases of sexual violence more broadly (i.e. outside the context of ICC investigations and its own cases) to keep the issue on the radar.[321] This is incredibly important. In other words, with a little bit of creativity and flexibility, the OTP's positive approach to complementarity during investigations may be used to trigger awareness and activities around accountability at a national level, even in the face of increasing resource constraints and pushback from the Assembly of States Parties.

[317] Interview with representative of the Office of the Prosecutor (The Hague, September 2015), *on file with author*.

[318] This includes both requests for assistance received by the Office of the Prosecutor, and those it sends out. Office of the Prosecutor, *Strategic Plan 2012-2015* (11 October 2013), at para 64.

[319] Interview with representative of the Office of the Prosecutor (The Hague, September 2015), *on file with author*.

[320] Interview with NGO representative (telephone interview, October 2015), *on file with author*.

[321] Interview with representative of the Office of the Prosecutor (The Hague, January 2016), *on file with author*.

3.2.2 Pushback from the Assembly of States Parties

A significant limitation to the implementation of the Office of the Prosecutor's positive approach to complementarity, in either its hand-over or burden-sharing version, is increasing pushback from the Assembly of States Parties (ASP or Assembly) in this regard. The ASP, composed of representatives from all States Parties to the Rome Statute,[322] essentially functions as the Court's legislative body. While the Assembly cannot interfere with the Court's judicial function, as the Court's legislative body it has quite extensive powers to oversee the work of the Court. For instance, it approves external agreements entered into by the Court, such as with the UN or the Host State;[323] it adopted the Elements of the Crimes and the Court's Rules of Procedure and Evidence;[324] it receives reports of non-cooperation from the Court for further action by the Assembly;[325] and, importantly, it decides upon the Court's annual budget.[326] The ASP meets annually, but much of the consensus building actually happens during its intersessional working groups in New York and The Hague. The Assembly also appoints focal points each year in relation to specific topics, such as on universality, cooperation, and complementarity. These focal points are tasked with leading the discussions in the working groups between the Assembly meetings, and organising other activities throughout the year. While complementarity featured prominently during the 2010 Review Conference discussions among states, and has remained on the ASP's agenda since, the reality is that the appetite of the ASP to actively discuss, develop, or entertain concrete complementarity actions has proven very limited.[327] Furthermore, while the Secretariat of the ASP was designated to lead sharing of information and experience on complementarity efforts, in practice, its role is quite limited, restricting itself to providing an online platform through which states can voluntarily share information about lessons learned, but without actively seeking out any such information. The platform is, however, little used, and appears to be out-dated.[328]

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[322] As of 28 April 2017, there are 124 States Parties to the Rome Statute. Non-State Parties may also attend the ASP as observer states.

[323] Articles 2 and 3, *Rome Statute* (18 July 2002).

[324] Articles 9(1) and 51(1), *Rome Statute* (18 July 2002). Any subsequent amendments to the Elements of the Crimes or Rules of Procedure and Evidence also have to be approved by a two-thirds majority of the ASP.

[325] Article 87(7), *Rome Statute* (18 July 2002).

[326] Article 112(2)(d), *Rome Statute* (18 July 2002).

[327] Field notes, *on file with author*.

[328] For instance, in 2013, only Latvia and Malta responded to the ASP's call for information on any capacity-building needs in the area of investigation and prosecution international crimes, and only Côte d'Ivoire and Italy

Discussions on (positive) complementarity during the ASP and its working groups have focused primarily on activities undertaken by actors *other* than the Court. In fact, the ASP has repeatedly stressed that, whatever activities are done by the Court in furtherance of positive complementarity must be contained within its judicial mandate, and as such remain limited. A 2010 report on complementarity defined positive complementarity as follows:

> "… all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, *without involving the Court* in capacity building, financial support and technical assistance, but instead *leaving these actions and activities for States, to assist each other on a voluntary basis*".[329]

It subsequently delineates three primary categories of assistance: legislative assistance; technical assistance and capacity building; and construction of physical infrastructure. Such activities can include: providing drafting support for Rome Statute implementing legislation;[330] organising expert trainings for police officers, prosecutors and judges on international crimes;[331] deploying judicial advisers on sexual and gender-based violence;[332] or simply providing supplies and resources such as computers, communication tools, or transportation.[333] For the ASP, the Court's role is thus limited to being "a catalyst of direct State-to-State assistance and indirect assistance through relevant international and regional organizations and civil society".[334] In other words, for the ASP, the ICC's role within positive complementarity is limited to facilitating or triggering the implementation of positive complementarity on an indirect or normative level by carrying out its judicial activities, and exchanging information and best practices.[335] Critically, any activities aimed at increasing

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responded to a similar call relating to complementarity activities. The page has not been updated since. 'Responses to Notes Verbales', *Assembly of States Parties* (19 November 2013), available at <https://asp.icc-cpi.int/en_menus/asp/complementarity/Pages/Responses.aspx>,

[329] 'Report of the bureau on stocktaking: Complementarity', in: Assembly of States Parties, *Resolution Review Conference*, ICC-ASP/8/Res.9 (25 March 2010), at Appendix para 16.

[330] Assembly of States Parties, *Report of the Court on complementarity*, ICC-ASP/11/39 (16 October 2012), at paras 21-22.

[331] *Report of the Court on complementarity*, ICC-ASP/11/39, at paras 43-45.

[332] *Report of the Court on complementarity*, ICC-ASP/11/39, at para 46.

[333] *Report of the Court on complementarity*, ICC-ASP/11/39, at paras 47-49.

[334] *Resolution Review Conference*, ICC-ASP/8/Res.9, at Appendix para 42.

[335] The ASP's recommendations around complementarity in 2015 and 2016 included the following: "Encourages the Court to continue its efforts in the field of complementarity, including through exchange of information between the Court and other relevant actors, while recalling the Court's limited role in strengthening national jurisdictions…". Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/14/Res.4 (26 November 2015), at para 94; Assembly of

domestic accountability through capacity building or technical assistance are to be carried out by states through multilateral assistance or by international or regional organisations, *not* the Court.

While there is no specific legal obligation to incorporate any of the Rome Statute's provisions into national legislation,[336] such broader positive complementarity efforts often emphasise, or start from, domestic implementation of the Rome Statute. In 2013, for instance, the ASP reiterated that "the proper functioning of the principle of complementarity entails that States incorporate the crimes set out in articles 6, 7 and 8 of the Rome Statute as punishable offences under their national laws, to establish jurisdiction for these crimes and to ensure effective enforcement of these laws".[337] Several authors have equally emphasised the domestication of the Rome Statute as an important element of positive complementarity. For instance, in her discussion on gender justice and complementarity, Chappell addresses what she identifies as the "'positive' aspects of complementarity", namely "data on the implementation of [the] Rome Statute in states parties".[338] Lake similarly looks to the amendment or adoption of national laws in assessing the implementation of complementarity in the DRC.[339] Other authors have equally suggested that complementarity provides a powerful "incentive" or "encouragement" for States to initiate domestic proceedings and enact domestic implementing legislation.[340] According to these authors, it would be *favourable* for States to use Rome Statute definitions of crimes. In other words, while the Rome Statute does not explicitly oblige States to fully incorporate Rome Statute provisions (such as definitions of crimes) in its national laws, doing so will contribute greatly to the

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States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/15/Res.5 (24 November 2016), at para 108.

[336] From a strict legal reading of the Statute, States are not required to adopt implementing legislation that incorporates the Statute's exact definitions of crimes, apply the same types of procedural safeguards offered to victims and witnesses appearing before the ICC, refer to its sentencing or reparations guidelines, or use international crimes as charges in domestic trials (as opposed to ordinary crimes charges). However, as discussed below, several authors have argued that doing so would contribute greatly to the perceived willingness and ability of states to provide accountability domestically, and that, as such, complementarity provides a powerful incentive or encouragement for States to enact implementing legislation. See footnotes 342 and 343 below.

[337] Assembly of States Parties, *Resolution Complementarity*, ICC-ASP/12/Res.4 (27 November 2013), at para 4.

[338] Chappell (2015), at 181-186.

[339] Milli Lake, 'Ending Impunity for Sexual and Gender-Based Crimes: The International Criminal Court and Complementarity in the Democratic Republic of Congo', 4 *African Conflict and Peacebuilding Review* (2014), at 5;

[340] Stahn (2008), at 92; Lake (2014), at 5; Ní Aoláin (2014), at 9; Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', 13 *Journal of International Criminal Justice* (2015). For a more detailed discussion on the different sides of this debate, see: Hunter (2014), at 8-18.

perceived willingness and ability of states to provide accountability domestically.[341] Such broader ideas of positive complementarity "potentially offer a way to address the state-level gender injustices […], including inadequate legislation that fails to encompass a wide range of sexual and gender-based rimes or treats them as less grave, or inadequate investigatory and prosecution procedures".[342]

During the ASP discussions on complementarity and sexual violence in 2015,[343] only the second time sexual violence featured specifically on the official ASP agenda,[344] domestication of the Rome Statute was a prominent topic. State representatives from Uganda and Guatemala specifically spoke about their domestic experiences with accountability for sexual and gender-based violence as international crimes, and the Prosecutor addressed the implementation of her Office's SGBC Policy Paper. The general purpose of the discussions had been to "share knowledge and practices of the [SGBC] Policy and to facilitate exchange of experiences and practices among States and other actors".[345] Actual engagement on complementarity mechanisms or ways in which complementarity could be fostered was, however, limited. State representatives who took the floor during the discussion primarily emphasised the positive steps they themselves had taken to address sexual violence, or simply reiterated their continued support for the OTP's Policy Paper.[346] As important as such statements are from an expressive perspective in reiterating the importance given to accountability for these crimes by the ASP, in terms of implementation efforts around positive complementarity, the effects are ultimately small. In other words, the ASP's appetite

[341] Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', 5 *Journal of International Criminal Justice* (2007), at 423, 428; see also: Darryl Robinson, 'The Rome Statute and its impact on national law', in Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002).

[342] Chappell (2015), at 169.

[343] Sweden and Botswana, ASP co-facilitators on complementarity for 2015, decided to centre the Assembly's discussions on complementarity specifically on issues affecting justice and accountability for sexual and gender-based violence. In this context, they hosted two workshops in Uganda and Guatemala in June and August 2015, respectively, and organised a plenary discussion during the Assembly meeting in November 2015 on this issue.

[344] Under the leadership of cooperation focal point Ambassador Anniken Krutnes (Norway) in 2014, the ASP for the first time included sexual violence related matters in its formal agenda. Before 2014, sexual violence questions had featured in the general framework of the ASP, but were mostly concentrated in the numerous so-called "side events" organised by civil society organisations in the margins (e.g. at lunch time or in the evenings). During the 2014 session, in light of the recently adopted SGBC policy paper, a specific plenary session was dedicated to discussing cooperation between states and the ICC, as well as other actors, on sexual violence investigations and prosecutions. Secretariat of the Assembly of States Parties, *Concept note by the facilitator for cooperation Ambassador Anniken Krutnes (Norway)* (2 December 2014).

[345] Assembly of States Parties, *Statement by Sweden's Minister for Culture and Democracy, H.E. Ms. Alice Bah Kuhnke* (19 November 2015).

[346] Field notes, *on file with author*.

to actively discuss and engage on positive complementarity has unfortunately been very limited.

In response to the ASP's increasing pushback against funding any activities that it sees as outside the ICC's core judicial mandate of investigating and prosecuting the most serious crimes of concern to the international community, in recent years, the Office of the Prosecutor has started moving away from its stated positive approach to complementarity. It still endorses the general idea behind positive complementarity and its relevance for closing the impunity gap, yet neither its 2012 nor its 2015 Strategic Plans address the Office's envisaged role in much detail. In fact, whereas the 2012 Strategic Plan maintained "enhanc[ing] complementarity and cooperation by strengthening the Rome Statute System in support of the ICC and of national efforts in situations under preliminary examination or investigation" as a strategic goal,[347] this has fundamentally changed in the 2015 Strategic Plan. There, the focus has changed to "develop[ing] with partners a coordinated investigative and prosecutorial strategy to close the impunity gap".[348] My interviews confirmed this move towards a more conservative approach to positive complementarity, with many emphasising the important supportive role played by civil society organisations in making positive complementarity "effective".[349] In other words, in recognition of its limited resources and ability to truly enhance positive complementarity at a national level *itself*, and in response to pushback from states in that regard, the Office of the Prosecutor has gradually moved away from its positive approach to complementarity to a more collaborative approach. The latter specifically emphasises the role played by other stakeholders within the Rome Statute justice system. Indeed, as we will see in the next two chapters, in both Colombia and the DRC, the Rome Statute's impact is strongest where championed by civil society organisations and domestic political actors, not the ICC.

[347] *Strategic Plan 2012-2015*, at 28.

[348] *Strategic Plan 2016-2018*, at 31.

[349] Interviews with representatives of the Office of the Prosecutor (The Hague, September 2015-January 2016), *on file with author*. Interview with Congolese NGO representative (The Hague, November 2015), *on file with author*.

SECTION 3.3

CONCLUSIONS

In essence, the admissibility test outlined in the first section of this chapter sets a standard that national systems must adhere to if they wish to avoid the ICC's intervention. The interpretation of article 17 by the Court will tell states how they can show action, willingness, and ability to investigate and prosecute crimes within the ICC's jurisdiction. National governments will thus be looking to this test for guidance on what to focus their national proceedings on should they wish to pre-empt the ICC from exercising jurisdiction, or more broadly on how to fulfil their role within this complementary system of justice. As the first section of this chapter has illustrated, there are a number of gender justice pressure points within the ICC's legal complementarity model, primarily encapsulated in the legal test for admissibility, but equally in its gravity test. These pressure points render sexual and gender-based violence vulnerable to exclusion or continued deprioritisation at a national level unless specific attention is paid to addressing these gaps through complementarity in its positive configuration. This low threshold set for the assessment of admissibility, and the disconnect between admissibility and the Rome Statute's gender justice provisions, thus sets a low standard against which national systems must measure their own proceedings if they wish to avoid the ICC's intervention.

The lack of formal rules connecting complementarity to the Rome Statute's gender justice principles restricts the ICC's ability to "correct" justice for sexual violence crimes where this is absent at a national level. The admissibility rules enshrined in the Statute do not leave much space for taking into account specific gender injustices in national systems in determining whether cases should be declared admissible before the ICC. Notably, while attempts were made by women's rights groups during the Rome Statute negotiations to specifically enshrine gender justice concerns in the admissibility test (for instance by arguing that the Rome Statute's definition of inability in article 17 should specifically include situations "where procedural or evidentiary requirements particular to sexual violence preclude or unreasonably obstruct a proper conviction"[350]), they were ultimately unsuccessful

[350] The Women's Caucus had lobbied to have such factors be specifically recognised as elements in the admissibility test as defined in article 17, as otherwise "the standards reflected in article [17] could result in impunity for crimes of sexual and gender-based violence". As we have seen above, however, the test as set out in article 17 does not specifically address gender justice concerns, and in fact, as the Women's Caucus already

in doing so.[351] In other words, the lack of a formal connection between the Rome Statute's gender justice principles means that the ICC cannot claim jurisdiction over cases solely because of gender justice concerns. An inability or unwillingness of a national system to investigate properly crimes of sexual violence does not automatically transfer jurisdiction to the ICC. At the same time, while the drafters thought/claimed the admissibility test was "gender-neutral",[352] in the interpretation of the admissibility test by the ICC's judges, various pressure points (or silences) have arisen that risk overlooking or reducing gender justice concerns in assessing admissibility of cases and situations before the ICC, and thus risk perpetuating impunity for these crimes.

It seems unlikely that a situation would arise where the ICC has initiated a case against an individual for rape, pillaging and murder, and a state successfully challenges the admissibility of that same case by presenting progress before its national courts for a case against that same individual, but only charging him or her with pillaging and murder (although this is impossible to say with certainty since this situation has not yet presented itself). We must hope that in such a concrete scenario, the ICC would determine that in fact this does *not* constitute the same case. The situation becomes more acute, however, when the ICC has not yet initiated an investigation or identified specific individuals and cases. When the ICC assesses whether to open investigations in a specific situation, for instance, it assesses whether investigations or prosecutions are taking place at a national level for the same *types* of cases that would *likely* be the subject of any potential ICC investigation. Here it seems the test becomes a lot more fluid. Although the current Prosecutor has made it clear that sexual violence is a particular priority area for her Office, it is unclear whether she would open an investigation based on limited progress for sexual violence crimes at a national level alone (and indeed, the Colombian case study presented in chapter 4 warrants caution in this regard).

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warned, the interpretation of the standards raise concerns around impunity for sexual violence crimes. *Gender Justice and the ICC* (Rome: Women's Caucus for Gender Justice in the International Criminal Court, 1998), at 24-25.

[351] For a longer discussion on the unsuccessful attempts by the Women's Caucus for Gender Justice's attempts to formally introduce gender justice concerns in the Rome Statute's definitions of inability or unwillingness, see, *e.g.*, Chappell (2015), at 165-167.

[352] Chappell cites one of the members of the Women's Caucus recalling the negotiations as follows: "It became obvious in corridor discussions during the Rome Conference that many States considered matters related to the complex jurisdiction provisions to be "gender-neutral" and therefore felt either confused or hostile to the fact that the Caucus even had an opinion on the jurisdictional provisions." Chappell (2015), at 167.

Despite the absence of formal links between gender justice principles and complementarity, however, the idea of positive complementarity could still be used to advance the Rome Statute's gender justice principles. This is particularly so because positive complementarity, over time, has become detached from its legal sister concept of complementarity as admissibility. In other words, positive complementarity activities would not need to be linked specifically to admissibility concerns, but instead, may focus more generally on advancing the capacity of national jurisdictions to provide accountability for sexual and gender-based violence. Indeed, as the second section of this chapter illustrated, two separate understandings of positive complementarity seem to co-exist at the ICC in its interface with the ASP, and it has grown broader over time. At its narrowest, as used by the Office of the Prosecutor, it relates only to activities undertaken by the ICC. In its broader sense, positive complementarity captures activities undertaken by other actors within the Rome Statute system of justice.[353] Positive complementarity is no longer said to belong solely to the ICC, but is in fact seen as a shared responsibility of states, the ICC, and other stakeholders. In line with these developments, and to account for both the ICC's role and that of other actors, this thesis uses the following working definition of positive complementarity: *the way in which the ICC, either directly or indirectly, encourages, facilitates, or assists national accountability processes for Rome Statute crimes*.

In other words, while this thesis focuses in part on the way in which the ICC directly influences national accountability processes (i.e. positive complementarity's narrow construction), the bulk of the analysis in the case studies will be on the way in which the ICC *as an institution* indirectly facilitates, encourages or assists national accountability for sexual and gender-based violence (i.e. the broader understanding). As we will see in chapters 4 and 5, activities that are relevant for increasing accountability for these crimes in Colombia and the DRC are to be found within these broader ideas of positive complementarity, whereby other actors within the Rome Statute justice system use the ICC's existence and its normative framework to trigger important legislative, executive and judicial processes. The next chapters thus focus on analysing processes of legal internalisation that various actors, including but not limited to the ICC, have engaged in at a national level in both Colombia and the DRC in their efforts to achieve greater accountability for sexual and gender-based violence.

[353] Hansen argues the term positive complementarity should be reserved for "the ICC's *general* role in and ability *to catalyse* justice processes at the national level relevant to crimes under ICC scrutiny". Obel Hansen (2017), at 19. (Emphasis added)

4

COMPLEMENTARITY, NORM DIFFUSION, AND THE ICC IN COLOMBIA

One of the many times I was stuck in Bogotá traffic on my way back to my hotel after a meeting, my taxi driver, after I failed miserably to try to speak with him in my broken Spanish, turned on the radio and tuned in to a talk show about current affairs. The speakers were discussing one of most important events in recent Colombian history: the signing of the peace agreement between the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) and the Colombian government on 26 September 2016, which concluded one of the longest running armed conflicts in the world. Without directly referring to the ICC, one of the speakers stressed that, if this agreement would be implemented correctly, there would be no reason for "an international institution" "to interfere" in Colombia's affairs, and underlined the importance of compliance with international law and human rights for this reason. This perception of "international interference" in what are essentially seen as "domestic affairs" has been an important feature driving Colombia's engagement with the ICC since becoming a State Party in 2002, and particularly since the opening of a preliminary examination into the situation in the country in 2004.

This chapter explores this complex relationship between Colombia and the ICC, zooming in specifically on the relationship between Colombia's legal system and the ICC's Rome Statute. It examines how, why and to what extent the Rome Statute's standards around sexual violence have become active and effective through legal internalisation at a national level in a context of positive complementarity, and to what extent this contributed to increasing accountability for sexual violence crimes. As we will see, there have been some efforts towards harmonisation with the Rome Statute in the domain of accountability for sexual violence, both at a legislative level and through policy commitments. More specifically, this chapter highlights that in the context of the preliminary examination, the

ICC, to some extent, engaged in a dialogue with Colombia to encourage the domestic accountability process to stay on track, and that this has contributed in some respects to advancing those domestic justice processes. To a limited extent, particularly more recently, this interaction has also focused on sexual violence. The ICC's actions, however, were not alone in strengthening domestic accountability; broader advocacy from civil society, domestic political actors, and international organisations are important catalysers (or norm entrepreneurs). For these different actors, the Rome Statute – and to a more limited extent the ICC's preliminary examination – has been an important tool, including in relation to sexual violence crimes. It has been a tool of advocacy, a tool of law reform, and a tool of security or independence, particularly for the judiciary in warding off (political) interference in judicial processes. Nonetheless, while this has contributed to a number of important developments at a national level, accountability for sexual violence crimes remains challenging.

Before examining these different developments, the first part of this chapter puts complementarity in Colombia into its historical, geographical, legal, and political context. This will include a brief overview of the ICC's (legal) complementarity analysis in Colombia, an issue to which the conclusions return. In the subsequent sections, I analyse particular examples of legal internalisation of Rome Statute norms around accountability for sexual violence crimes, looking at the harmonisation of laws on sexual violence, the adoption of policies and strategies around sexual violence accountability inspired by and based on the Rome Statute, and the difficulties of including sexual violence within (transitional) justice processes. The chapter ends by looking ahead at possibilities of greater accountability and justice for sexual violence crimes within the peace process with the FARC, an area where there are some interesting instances of political and social internalisation. As we will see, a commitment to implementing (positive) complementarity underlies many of these internalisation processes. However, progress has been slow and the ICC has been heavily criticised for not opening an investigation. Overall, the chapter examines the different actors that have taken an active role in promoting and advocating for the integration of Rome Statute standards at the national level; this analysis illustrates the important and varied role played by civil society and the Colombian Constitutional Court as norm entrepreneurs, and the horizontality of their interactions.

SECTION 4.1

COMPLEMENTARITY IN CONTEXT

There is no "one size fits all" response to conflict; the idiosyncrasies of conflicts, as well as particular cultural or political factors necessarily influence the specific choices that are made in responding to conflict, including in the context of the Rome Statute. In order to understand the Colombian situation, it is therefore necessary to provide some background on the particularities of the Colombian armed conflict, Colombia's (ongoing) engagement with the ICC, and the main accountability landscape within which justice for sexual violence crimes is negotiated and enacted. This section provides a brief history of Colombia's conflict, outlines its evolving peace and justice framework, and analyses the involvement of the ICC.

4.1.1 A brief history of Colombia's conflict

While Colombia is considered to have a functioning legal system, is relatively democratic, and has one of the strongest economies in the region, the country is equally tainted by political instability, deep economic inequality, and conflict. The Colombian (internal) conflict, one of the longest in the world, is incredibly complex for the multitude of different actors that have been involved, its protracted nature, and its entanglement with Colombian politics.[354] Its roots are often said to lie in a period known as *La Violencia* (The Violence), a war between the Conservatives and Liberals that began with the 1948 murder of Jorge Eliécer Gaitán (the Liberal Party's presidential candidate) and lasted for almost 18 years.[355] Others point to 1964 as the origins of the contemporary conflict, when the FARC-EP, one of the most important guerrilla groups, took up arms against the state.[356] Regardless of its exact origins, the continuing violence is a result of repeated failures to adequately resolve

[354] Maria Paula Saffon and Rodrigo Uprimny, 'Uses and abuses of transitional justice in Colombia', in Morten Bergsmo and Pablo Kalmanovitz (eds), *Law in Peace Negotiations* (Oslo: Forum for International Criminal and Humanitarian Law, 2010), at 357-364. For an overview of the origins and different periods of the conflict, the modalities of violence, the impact of the conflict on the civilian population, and the patterns of violence and perpetrators, see also: Centro Nacional de Memoria Histórica, *¡Basta Ya! Colombia: Memories de Guerra y Dignidad* (2013).

[355] Jennifer Easterday, 'Beyond the 'shadow' of the ICC: struggles over control of the conflict narrative in Colombia', in Christian De Vos, Sarah Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015), at 436.

[356] Saffon and Uprimny (2010), at 357-358.

confrontations and conflicts with and between the various armed groups throughout Colombian history since independence.[357]

In 1958, a power-sharing agreement between the Conservatives and Liberals (known as the National Front) formally ended *La Violencia*. This did not, however, signify the end of the conflict. Various far-left groups who had been left out of this process created small peasant resistance groups in the countryside,[358] ultimately giving rise to the establishment of three main guerrilla groups in the mid-1960s: the FARC-EP, the *Ejército de Liberación Nacional* (ELN), and the smaller *Ejército Popular de Liberación* (EPL).[359] To protect against attacks by these guerrilla groups, in the 1970s, landowners and drug-lords established paramilitary self-defence groups; these united as the *Autodefensas Unidas de Colombia* (AUC) in the late 1990s. The paramilitaries purportedly worked closely with and/or were used as proxies by the Colombian armed forces in their fight against the guerrilla groups.[360] Further, in 2009, allegations of close connections between the Colombian political elite and these paramilitary groups emerged (known as the *parapolítica* scandal).[361] While many AUC paramilitaries demobilised in 2006, the process also gave rise to the creation of smaller regional criminal bands known as *bandas criminales* (BACRIM) causing instability in many of Colombia's rural areas.[362] Links between the different armed groups and drug trafficking both fuelled and further complicated the conflict.[363] In other words, the Colombian conflict is rendered particularly complex by the multitude of armed groups involved, many of whom have been closely linked to different parts of Colombian society and even the state.

In addition to being one of the world's longest running conflicts, the Colombian conflict is also known for its extreme violence. Allegations include murder, forcible transfer

[357] Beatiz Eugenia Sánchez Mojica, 'Antecedentes del conflicto Colombiano', in Miguel Peco Yeste and Luis Peral Fernández (eds), *El conflict de Colombia* (Bogotá: Ministerio de Defensa, 2005), at 13.

[358] Easterday (2015), at 436-437.

[359] Sánchez Mojica (2005), at 15-16.

[360] Virginia M. Bouvier, *Gender and the role of women in Colombia's peace process* (New York: UN Women, 2016), at 4.

[361] See, *e.g.*, Centro Nacional de Memoria Histórica, *¡Basta Ya! Colombia: Memories de Guerra y Dignidad*, at 249-255; Catalina Díaz, 'Colombia's Bid for Justice and Peace', in Kai Ambos, Judith Large, and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Berlin: Springer, 2009), at 494.

[362] In 2013, there were reportedly around 3,866 BACRIM members in 167 municipalities across Colombia. Bouvier (2016), at 4.

[363] Miguel Peco Yeste and Luis Peral Fernández, *El conflicto de Colombia* (Bogotá: Ministerio de Defensa, 2005), at 30-31; Isabella Bueno and Andrea Diaz Rozas, 'Which Approach to Justice in Colombia under the Era of the ICC', in Dawn L. Rothe, James Meernik, and Pórdís Ingadóttir (eds), *The Realities of International Criminal Justice* (Leiden & Boston: Martinus Nijhoff Publishers, 2013), at 215.

of population, widespread enforced disappearances, recruitment and use of child soldiers, torture, and various forms of sexual violence committed by all armed actors involved.[364] Human rights defenders and trade unionists (and their families), community leaders of displaced populations, public officials, and members of indigenous and afro-Colombian communities have been targeted specifically. Kidnapping of civilians and public officials, such as presidential candidate Ingrid Betancourt in 2002, was reportedly used by both the FARC-EP and ELN to finance their activities and exert control over a particular area.[365] Civilians and public officials have also been subjected to torture for their perceived support for a particular guerrilla or paramilitary group.[366] Many of the crimes are committed in a context of widespread forced displacement; as of June 2015, UNHCR recognised more than 6.5 million internally displaced persons (IDPs) in Colombia.[367] State actors have also been accused of deliberately killing civilians and presenting them as guerrilla fighters killed in combat. These '*falsos positivos*' (false positives) were perpetrated primarily by state armed forces, but sometimes jointly with the paramilitary forces and civilians, in order to "bolster success rates in the context of the internal armed conflict and to obtain monetary profit".[368] The practice was particularly widespread between 2002 and 2008, with reportedly more than 3,000 civilians killed 'in combat' as *falsos positivos*.[369]

Sexual and gender-based violence has been pervasive in Colombia, both within and outside the context of the armed conflict. It is estimated that in 2000, around 60-70% of Colombian women had been subjected to some form of violence,[370] and these numbers have reportedly only gone up in the last 16 years.[371] According to many of my interviewees, this

[364] *Situation in Colombia - Interim Report*; Easterday (2015), at 432.

[365] *Situation in Colombia - Interim Report*, at 22.

[366] *Situation in Colombia - Interim Report*, at 24.

[367] 'Statistical Snapshot - 2015 UNHCR country operations profile Colombia', *UNHCR* (June 2015), available at <http://www.unhcr.org/pages/49e492ad6.html#>, accessed 20 March 2016.

[368] *Situation in Colombia - Interim Report*, at para 8. See also: FIDH & CCEEU, *La guerra se mide en litros de sangre | Falsos positivos, crímenes de lesa humanidad: más altos responsables en la impunidad* (June 2012); Inter-American Commission on Human Rights, *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc 49/13 (31 December 2013).

[369] FIDH & CCEEU, *La guerra se mide en litros de sangre*, at 52.

[370] Amnesty International, *Colombia: Scarred bodies, hidden crimes - sexual violence against women in the armed conflict* (2004), at 9.

[371] Sexual violence has reportedly risen with 40% between 2003 and 2014, with cases of domestic violence increasing by 30%. Philipp Zwehl, 'Violence against women in Colombia fueled by machismo culture and 'institutional weakness'', *Colombia Reports* (29 January 2014), available at <http://colombiareports.com/violence-women-colombia-fueled-machismo-culture-institutional-weakness/>, accessed 19 December 2016.

widespread nature of sexual violence originates in what they call Colombia's "machista culture": the idea that women are inferior to men is pervasive and has created an environment in which discrimination of and violence against women, including but not limited to sexual violence, has become normalised or even socially acceptable.[372] This context of structural discrimination is exacerbated during the conflict, with sexual violence perpetrated by all actors involved. The first and most comprehensive survey on the prevalence of sexual violence in the context of the Colombian armed conflict estimated that, between 2001 and 2009, almost 500,000 women suffered some form of sexual violence by armed actors in Colombia, which amounted to six women every hour.[373] The vast majority of these women (82.2%) did not report the violence they suffered, due to, among other reasons, the continued presence of armed actors in their municipalities, which exposes them to high risks of reprisals. Significantly, 4 out of 10 women did not recognise themselves as victims of sexual violence; certain acts of sexual violence (such as forced sterilisation or sexual harassment) had become so normalised that they did not recognise these as crimes.[374] Similarly, a Colombian prosecutor explained to me that when her team first went into the field in 2006 to speak to victims, women would only mention that their husbands had been forcibly disappeared, or that their husbands or sons had been killed; women overwhelmingly saw themselves as victims in relation to others, but did not recognise their own victimisation.[375] In a country where discrimination against women is structural and pervasive, sexual violence continues to be "suffered in silence".[376] Statistics on sexual violence committed against men or boys are even more difficult to come by, although this has recently started receiving more attention.[377]

[372] Interviews with Colombian NGO representatives and Colombian prosecutors (Bogotá and Medellín, September 2016), *on file with author*.

[373] Campaign Rape and other Violence: Leave my Body Out of War, *First survey on the prevalence of sexual violence against women in the context of the Colombian armed conflict 2001-2009 | Executive Summary* (January 2011), at 7.

[374] Campaign Rape and other Violence: Leave my Body Out of War, *First survey on the prevalence of sexual violence against women in the context of the Colombian armed conflict 2001-2009 | Executive Summary*, at 8.

[375] Interview with a Colombian prosecutor (Medellín, September 2016), *on file with author*.

[376] Interview with civil society representative (The Hague, November 2015), *on file with author*; interviews with civil society representatives (Bogotá, September 2016), *on file with author*. See also: Bouvier (2016), at 8-11.

[377] Kravetz (2017); *Protocolo de investigación de violencia sexual - guía de buenas prácticas y lineamientos para la investigación penal y judicialización de delitos de violencia sexual*, Fiscal General de la Nación de Colombia (14 June 2016).

Sexual violence has been perpetrated by all armed actors, including state agents, and constitutes "a habitual, extensive, systematic and invisible practice".[378] Specific allegations include rape, torture, sexual mutilation, forced prostitution, forced nudity, and sexual slavery.[379] Sexual violence has been used as a tool to exert social and territorial control, to pressure communities into support, and to rule by fear. Women and girls are particularly vulnerable to suffering sexual violence during displacement, if they or their relatives are members of particular armed groups or are perceived as supporters of those groups (as retaliation for such support), or if they belong to particular indigenous communities.[380] Women's human rights defenders (and their families) are often targeted through sexual violence specifically because of their work.[381] In addition, sexual violence was also common within the different paramilitary and guerrilla groups, who reportedly systematically 'recruited' girls as sex slaves. For some groups, (forced) contraception became a policy, as did forced abortion for their female members if they became pregnant.[382]

Despite Colombia's generally advanced legal framework, for a long time its criminal law framework did not recognise these different forms of sexual and gender-based violence (either in or outside the conflict). It only recognised '*acceso carnal violento*' (violent carnal knowledge/rape) and '*acto sexual violento*' (violent sexual act) as ordinary crimes, and '*acceso carnal violento en persona protegida*', '*actos sexuales violentos en persona protegida*' and '*prostitución forzada o esclavitud sexual*' (forced prostitution or sexual slavery) as infractions of IHL. Furthermore, patriarchal attitudes among officials are

[378] Corte Constitucional de Colombia, M.P.: Dr. Manuel José Cepeda Espinosa, Auto 092/2008 (14 April 2008), at III.1.1.1. See also: Amnesty International, *'This is what we demand. Justice!' Impunity for Sexual Violence against Women in Colombia's Armed Conflict* (2011).

[379] *Situation in Colombia - Interim Report*, at 24-27, 44-45, 47.

[380] *Situation in Colombia - Interim Report*, at 25. The particular risks displaced women and girls face to suffer sexual violence has been the subject of two important decisions by the Colombian Constitutional Court: Auto 092/2008; Corte Constitucional de Colombia, M.P.: Luis Ernesto Vargas Silva, Auto 009/2015 (27 January 2015).

[381] *Situation in Colombia - Interim Report*, at 25. See also: Amnesty International, *Colombia: Scarred bodies, hidden crimes - sexual violence against women in the armed conflict*; ABColombia, Corporación Sisma Mujer, and US Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process* (November 2013).

[382] Interview with human rights attorney with experience in sexual violence litigation in Colombia, (The Hague, February 2016), *on file with author*. See also: Keith Stanski, 'Terrorism, Gender and Ideology: A Case Study of Women who Join the Revolutionary Armed Forces of Colombia (FARC)', in James J.F. Forest (ed), *The making of a terrorist: recruitment, training, and root causes* (Westport, Conn.: Praeger Security International, 2006). The FARC, while acknowledging its strict internal rules on contraception and against pregnancy, has vehemently denied that abortions were forced. 'Guerilla combatants are revolutionary, aware and free women', *Secretariat of the Central High Command of the FARC-EP* (2 January 2016), available at <http://farc-epeace.org/index.php/communiques/communiques-central-high-command/item/947-guerrilla-combatants-are-revolutionary-aware-and-free-women.html>, accessed 6 February 2016.

prevalent and sexual violence crimes are continuously de-prioritised or seen as minor issues within the justice system. For instance, a prosecutor explained to me that on average three individuals are assigned within the *Fiscalia* to deal with cases of homicide, whereas sexual violence cases are generally allocated to one, or maximum two, persons only.[383] Others mentioned that many prosecutors perceive being assigned to deal with sexual violence as a form of punishment.[384] Victims continue to face high levels of stigmatisation not only among families and communities, but also among police officers or judicial actors, and their stories are often questioned or disbelieved. For instance, one (male) prosecutor said: "The other day, a woman came to me to say she had been raped. But her story was not reliable as she was ugly and old."[385] The idea that women sought out the paramilitaries or guerrilla groups themselves remains equally pervasive.[386] In other words, impunity for sexual violence remains rife,[387] and is reinforced by structural patterns of gender discrimination and social and political inequalities. While the ICC's Office of the Prosecutor has expressed concern about all of these factors negatively affecting accountability for sexual violence (and essentially creating a system of impunity), they have not been deemed sufficient to satisfy the admissibility test to open an investigation (this will be discussed in more detail in the concluding section of this chapter).

4.1.2 An evolving peace and justice framework

A central facet of Colombia's legal and accountability landscape is its inextricable link to questions of peace – this has equally rendered the ICC's assessment of the need to open investigations more complex. There have been at least six attempts at peace negotiations with the various guerrilla and paramilitary groups since 1982, the latest ones of which commenced in 2012 (with the FARC-EP) and in 2016 (with the ELN).[388] These peace negotiations have

[383] Interview with a Colombian prosecutor (Bogotá, September 2016), *on file with author*.

[384] Interview with civil society representatives (Bogotá, September 2016), *on file with author*.

[385] Centro Nacional de Memoria Histórica, *¡Basta Ya! Colombia: Memories de Guerra y Dignidad*, at 77.

[386] Interview with Colombian prosecutor (Medellín, September 2016), *on file with author*. See also: Centro Nacional de Memoria Histórica, *¡Basta Ya! Colombia: Memories de Guerra y Dignidad*, at 77. The report cites the following opinion held by a male prosecutor: "Young women like the military. They look for them and feel proud when they are with someone."

[387] Kravetz (2017), at 726.

[388] Diego Acosta Arcarazo, Russell Buchan, and Rene Urueña, 'Beyond justice, beyond peace? Colombia, the interests of justice and the limits of international criminal law', 26 *Criminal Law Forum* (2015), at 293; Adriaan Alsema, 'Colombia announces formal peace talks with ELN', *Colombian Reports* (30 March 2016), available at <http://colombiareports.com/colombia-announced-formal-peace-talks-eln-rebels/>, accessed 5 April 2016.

inevitably been at the centre of the conversations in Colombia around justice and accountability, and therefore its relationship and interaction with international criminal law and the ICC.[389] Some have claimed this also influenced the dynamics of the conflict: "being aware that a military victory is unlikely, each side of the conflict trie[d] to gain, through violence, a better bargaining position – fully aware that sooner or later a new negotiation process [would] start".[390] In other words, the Colombian legal and accountability framework within which justice for sexual violence and other crimes is enacted is premised upon the outcomes of these peace negotiations. As these peace negotiations "[were] conducted in a global legal context that imposes strict legal limits",[391] over time, Colombia has moved towards an increasingly 'judicialised' conflict narrative: the conflict is increasingly talked about in terms of violations of rights, breaches of international and human rights law, and victims' rights to truth, justice, and reparations. As a result, while the peace negotiations traditionally incorporated blanket amnesties,[392] they have gradually transformed to focus on conditional amnesties or "conditionally reduced penalties".[393]

This has also inevitably complicated the ICC's involvement in Colombia; while the ICC has expressed its interest in seeing particular developments through (such as the move away from amnesties and reduced sentences towards criminal accountability), it has equally accorded Colombia a great deal of flexibility. While there have been various moments in the past 12 years when many different stakeholders had expected the ICC to open investigations (for instance when the *falsos positivos* scandal first came to light in 2009), each time a new stage is reached in the peace process, the ICC holds off and continuous its close monitoring of the situation. As important as the ICC's watchful eye has been to contribute to an increasing focus on accountability, it makes one wonder what is behind the ICC's reluctance to cut the Gordian knot, especially since, as this chapter illustrates, accountability for sexual violence has remained challenging within both ordinary and transitional justice in the country

[389] Bueno and Diaz Rozas (2013), at 218-220.

[390] Acosta Arcarazo, Buchan, and Urueña (2015), at 293.

[391] Alexandra Huneeus and Rene Urueña, 'Introduction to Symposium on the Colombian Peace Talks and International Law', 110 *AJIL Unbound* (2016), at 161.

[392] Acosta Arcarazo, Buchan, and Urueña (2015), at 292. In this respect, President Santos stated in 2010: "In the past, amnesties and pardons were the accepted practices for dealing with atrocities in pursuit of peace." Government of Colombia of Colombia, *Remarks by the President of the Republic of Colombia, Juan Manuel Santos, at the ninth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court* (6 December 2010).

[393] Kai Ambos, 'The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity', in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

(the ICC's apparent reluctance to open investigations will be addressed in more detail later in this chapter).

Colombia's main transitional justice framework is set out in Law 975 of 2005, which arose from peace negotiations between the Colombian government and the AUC (paramilitaries) that commenced in December 2002. Although these negotiations initially focused on setting up a legal framework for reintegration of the AUC into civilian life through amnesties and pardons, gradually the discussions evolved towards a more judicialised and punitive response (although limited). In July 2003, the AUC and the government signed an initial peace agreement regarding the cessation of hostilities, the AUC's demobilisation, and their reintegration into society.[394] A month later, in August 2003, the government introduced draft legislation known as the *Ley de Alternatividad Penal (*Alternative Penalties Bill) in an attempt to address the issue of accountability (about which the peace agreement had remained silent).[395] This proposed law would allow the government to suspend prison sentences for paramilitaries convicted of human rights violations (which were not subject to amnesties or pardons under existing laws[396]) in return for their full demobilisation. It quickly withdrew this proposal in June 2004 following international and national pressure and criticism that it constituted a complete impunity bill.[397] The withdrawal coincided with the ICC formally opening its preliminary examination into the situation in Colombia.

Following the withdrawal of the Alternative Penalties Bill in June 2004, at least nine further proposals were submitted concerning a legal framework for the AUC's demobilisation. These proposals differed widely in their preference for justice and/or peace, with on the one end of the spectrum a proposal for a 1/3 reduction in penalty but no less than

[394] *Acuerdo de Santa Fe de Ralito para contribuir a la paz de Colombia*, Colombia (15 July 2003).

[395] *Proyecto de Ley Estatutaria 85 de 2003 Senado por el cual se dictan disposiciones en procura de la reincorporación de miembros de grupos armados que contribuyan de manera efectiva a la consecución de la paz nacional*, Colombia (2003).

[396] On 23 December 2002, the Colombian government promulgated Law 782. This law, which prolonged the application of Law 418 of 1997, provided for official pardons for individuals who had been part of illegal armed groups but who were not involved in the commission of grave crimes. Bueno and Diaz Rozas (2013), at 221-222. Law 1106 of 2006 again extended the application of Law 418/1997 and 782/2002 through the end of December 2010.

[397] Saffon and Uprimny (2010), at 366; Alejandro Chehtman, 'The ICC and its normative impact on Colombia's legal system', 16 *DOMAC* (2011), at 18; Alejandro Aponte Cardona, 'Estatuto de Rome y procesos de paz: reflexiones alrededor del 'proyecto de alternatividad penal' en el case colombiano', in Kai Ambos, Ezequiel Malarino, and Jan Woischnik (eds), *Temas actuales del derecho penal internacional: contribuciones de América Latina, Alemania y España* (Berlin: Konrad Adenauer Stiftung, 2005); Díaz (2009), at 487-488.

20 years imprisonment, and on the other end a maximum sentence of 8 years community service, and conditional liberty once 2/5 had been served.[398] Various public and private hearings were held in Congress and before the Senate. The different proposals were ultimately united in Law 975, which would become better known as the Justice and Peace Law (JPL). Under JPL, demobilised paramilitaries that give a 'true and complete account' of their crimes, renounce their involvement with the paramilitary group, and contribute to reparations and truth for victims are eligible for a significantly reduced sentence of minimum 5 to maximum 8 years imprisonment. Paramilitaries must provide a full (i.e. complete and genuine) account of their crimes in order to qualify for benefits; sentence reduction is not permitted where crimes are not fully acknowledged in first instance.[399] In its early years, JPL was overwhelmed with cases and investigations, effectively stymieing the process; it has also been criticised for excluding crimes committed by state forces. In addition, as discussed in more detail later in this chapter, because the proceedings are triggered by and dependent upon confessions by paramilitaries, including sexual violence within its ambit has been particularly difficult.

In some ways, the Special Jurisdiction for Peace, which is to be established pursuant to the peace agreement between the government and the FARC-EP signed in 2016, follows in the footsteps of JPL. Under the Special Jurisdiction for Peace, individuals will be eligible for alternative sentences between 5 to 8 years upon their demobilisation and confession of political crimes; there is no provision for suspension of those sentences, although they can be served in alternative locations rather than prisons. International crimes, including sexual violence crimes, are not eligible for amnesties, and must be investigated and prosecuted. In other words, Colombia's justice framework has evolved in parallel with various peace processes, and over time, has incorporated a greater emphasis on criminal accountability for conflict-related acts of violence, in particular those acts classified as international or Rome Statute crimes. The country has walked a difficult path of balancing the interests of peace with the interests of justice, in which its perceived obligations under international law, including the Rome Statute, have assumed a central place. The results of this in terms of

[398] Nicolás Palau Van Hissenhoven, *Trámite de la Ley de Justicia y Paz: Elementos para el control ciudadano al ejercicio del poder político* (Bogotá: Fundación Social, 2006), at 116.

[399] Having entered into force on 25 July 2005, JPL was amended by the Constitutional Court in 2006, following a public challenge to its constitutionality filed by a group of 105 citizens, lead by Gustavo Gallón Giraldo, Director of the Colombian Commission of Jurists. Díaz (2009), at 489-490; Corte Constitucional de Colombia, M.P.: Manuel José Cepeda Espinosa, Jaime Córdoba Triviño, Rodrigo Escobar Gil, Marco Gerardo Monroy Cabra, Alvaro Tafur Galvis, Clara Inés Vargas Hernández, Sentencia C-370/06 (18 May 2006).

actual accountability for crimes of sexual violence, i.e. prosecutions and convictions for these crimes, as well as the relevance of international standards within those proceedings are discussed in more detail in section 4.4 of this chapter.

4.1.3 Identity politics and the "Shadow of the ICC"

Colombia deposited its instrument of ratification of the Rome Statute in August 2002. The ratification, presented as a "historic moment" by the Colombian Ministry of Foreign Affairs, was welcomed widely by human rights organisations.[400] It also gave rise to some controversies, however. Although article 120 of the Rome Statute does not allow reservations to be made, Colombia issued a number of interpretative declarations.[401] Its declaration addressed six specific issues, including amnesties, the interpretation of the Statute's admissibility clause, and the continued application of domestic legal norms in the territory of Colombia. In addition, as permitted under article 124,[402] Colombia postponed the ICC's jurisdiction over war crimes for a period of seven years. This particular declaration was controversial and sparked debate at both the national and international level as to whether or not it would perpetuate impunity for war crimes committed in the context of the Colombian conflict.[403] It is widely believed that this article 124 declaration was a measure implemented to attempt to facilitate the peace process between the government and the AUC, which was due to start in December 2002.[404] The declaration lapsed in 2009; as such, while the ICC has jurisdiction over crimes against humanity and genocide committed in Colombia or by Colombian nationals as of 1 November 2002, its jurisdiction over war crimes only commenced on 1 November 2009.

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[400] Universidad Militar Nueva Granada, Instituto de Estudios Geoestratégicos, *Colombia y la Corte Penal Internacional* (October 2002), at 3.

[401] For an overview of all interpretative declarations issued, see: 'UN Treaty Collection', *United Nations*, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>, accessed 18 January 2016.

[402] At the 14h ASP session in November 2015, the ASP moved to delete article 124 from the Rome Statute. The amendment will enter into force as soon as sufficient ratifications of the amendment have been made pursuant to Article 121(4) of the Statute. Assembly of States Parties, *Resolution on article 124*, ICC-ASP/14/Res.2 (26 November 2015).

[403] Universidad Militar Nueva Granada, Instituto de Estudios Geoestratégicos, *Colombia y la Corte Penal Internacional*, at 3; Bárbara Direito, 'Latinoamérica y la CPI: afrontar la impunidad en Colombia', 10 *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades* (2008), at 148.

[404] Amanda Lyons and Michael Reed-Hurtado, *Colombia: Impact of the Rome Statute and the International Criminal Court* (International Center for Transitional Justice, 2010), at 5.

The situation in Colombia was one of the first situations of interest to the ICC. The Court received its first communication under article 15 (pursuant to which any individual can submit information on Rome Statute crimes to the ICC) in relation to the situation in Colombia in June 2003.[405] The preliminary examination was officially opened in June 2004,[406] but was not made public until later.[407] On 2 March 2005, then-Prosecutor Luis Moreno Ocampo sent a letter to the Colombian government informing it that his Office had received numerous communications alleging that crimes within the jurisdiction of the Court had been committed in Colombia since 1 November 2002.[408] The Prosecutor invited the Colombian authorities to submit any information on alleged crimes, and on any investigations and prosecutions carried out by the Colombian authorities. He also requested to be kept up to date concerning relevant legislative developments. The Colombian government responded positively to the letter and confirmed it would cooperate with the Court.[409] While the relationship between Colombia and the ICC has varied over time, it has predominantly been defined by dialogue and interaction, and by a high level of public interest. The Office has engaged in constant dialogue with the Colombian authorities, regularly requesting information on national activities and travelling to the country to meet with government officials, the national prosecution authorities, members of the judiciary, and with representatives of civil society and academia.[410] It is selective in when it travels to the country, but when it does, this always triggers a lot of media attention and discussion.

In the context of the preliminary examination, the Office of the Prosecutor has directly interjected itself into ongoing discussions on transitional justice in Colombia a number of times. For instance, in the midst of parliamentary discussions on JPL in 2005, the Prosecutor sent a letter to Colombia indicating that it was necessary for the legislative

[405] Mariana Pena, *An ICC investigation in Colombia?* (AMICC, 2005).

[406] *Report on Preliminary Examination Activities 2015*, at para 136.

[407] This delay, and the absence of a public notice on the opening of a preliminary examination, has created some confusion among commentators as to when the preliminary examination was officially opened. Some speak about 2005; others mention 2006 as its starting date. See, *e.g.*, University of London, *In the Shadow of the ICC: Colombia and International Criminal Justice* (26-27 May 2011), at 9; Saxon (2015), at 140; Lyons and Reed-Hurtado (2010), at 2; Bueno and Diaz Rozas (2013), at 218; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014), at 123.

[408] 'Corte Penal Pide Cuentas a Colombia', *El Tiempo* (31 March 2005), available at <http://www.eltiempo.com/archivo/documento/MAM-1631764>, accessed 18 January 2016.

[409] Pena (2005); 'Gobierno colaborará con CPI para aclarar crímenes atroces', *El Pais* (31 March 2005), available at <http://historico.elpais.com.co/paisonline/notas/Marzo312005/cpi.html>, accessed 18 January 2016.

[410] *Situation in Colombia - Interim Report*, at para 28. Interview with representative of the Office of the Prosecutor (The Hague, October 2015), *on file with author*.

framework to comply with principles of "truth, justice, and reparations".[411] This reportedly made those involved "nervous" and reinforced discussions on the need to include at least some punitive aspect in the final agreement to avoid the ICC's intervention.[412] In March 2004, even before the ICC opened its preliminary examination, AUC representatives Salvatore Mancuso and Carlos Castaño reiterated that political assurances *against* the involvement of the ICC were critical for their participation in the negotiations.[413] At the same time, several parliamentarians warned that if the proposed Justice and Peace Law were to guarantee impunity,[414] this would allow the ICC to intervene.[415] Notably, in a leaked recording of the government's negotiations with the AUC, the High Commissioner for Peace is reported saying: "The government has proposed a draft law *that will block* the actions of the International Criminal Court".[416] While some were quick to dismiss the letter's importance,[417] those involved in JPL's drafting and implementation have cited the prospect of intervention by the ICC as one of the factors affecting their strategic policy choices.[418]

The ICC's intervention was not only a fear of the paramilitaries. The government equally did not (and still does not) want the ICC to intervene. The political costs for the Colombian government if the ICC were to open investigations are very high.[419] As a result,

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[411] Chehtman (2011), at 18.

[412] Jennifer Easterday, 'Deciding the fate of complementarity: a Colombian case study', 26 *Arizona Journal of International & Comparative Law* (2009), at 97.

[413] 'Con los pies sobre la tierra', *Autodefensas Unidas de Colombia* (16 March 2004), available at <https://web.archive.org/web/20051202025553/http://colombialibre.org/detalle_col.php?banner=editorial&id=4434>, accessed 6 April 2016.

[414] See, *e.g.*, the comments made by Senator Oswaldo Darío Martínez Betancourt during the debate on 8 March 2005: Fiscalía General de la Nación, *Antecedentes Ley 975 de 2005 - Exposición de motivos de proyectos de la Ley de Justicia y Paz* (April 2013).

[415] This led some to question whether some parliamentarians were more concerned about pleasing the ICC than reaching agreement with the paramilitaries on the scope of JPL. Alfredo Rangel Suarez, 'No maduros para el pardón', *El Tiempo* (8 April 2005), available at <http://www.eltiempo.com/archivo/documento/MAM-1694086>, accessed 8 April 2016. Some also made this point during the parliamentary discussions. See: Fiscalía General de la Nación, *Antecedentes Ley 975 de 2005 - Exposición de motivos de proyectos de la Ley de Justicia y Paz*.

[416] Lyons and Reed-Hurtado (2010), at 5; Easterday (2009), at 97. See also: 'Revelaciones explosivas', *Semana* (24 September 2004), available at <http://www.semana.com/nacion/articulo/revelaciones-explosivas/68391-3>, accessed 5 February 2016.

[417] Representative Roberto Camacho reportedly stated: "*eso no tiene importancia*". 'Corte Penal Pide Cuentas a Colombia' (2005).

[418] *Report of the Court on complementarity*, ICC-ASP/10/23, at para 33(b); Bueno and Diaz Rozas (2013), at 223. See also the submissions regarding this letter by Senator Darío Martínez Betancourt in June 2005 in Fiscalía General de la Nación, *Antecedentes Ley 975 de 2005 - Exposición de motivos de proyectos de la Ley de Justicia y Paz*, at 242.

[419] Acosta Arcarazo, Buchan, and Urueña (2015), at 305-306. This was confirmed in interviews with members of Colombian civil society, (The Hague, November 2015, and Bogotá, September 2016), *on file with author*.

Colombia is keen to keep up its international reputation, and this has an impact on the space it is willing to create for interactions with the ICC; it wants to be seen as complying in good faith with the Rome Statute. Some even claim Colombia has a "national policy to respond to [the ICC's] demands".[420] Both within and outside the context of the Rome Statute, Colombia often positions itself as a loyal State Party, loyal not only to supporting the ICC, but to its duties under the Rome Statute, and its broader commitment to peace, truth, justice and reparations for victims.[421] Colombia advances this positive self-image as a loyal, justice-focused State Party also beyond the immediate context of the Rome Statute framework. Notably, in its comments to the 2013 draft report by the Inter-American Commission on the situation in Colombia, Colombia highlighted that the ICC frequently cites Colombia as "an example of positive complementarity, precisely because the domestic legal order respects the prevalence and application of international treaties, as well as the needs of international cooperation".[422] In other words, the positioning of Colombia as a State Party loyal to the Rome Statute, cognisant of its obligations, and committed to ending impunity is a central component of its (self-constructed) identity within the international community and, in turn, may foster increased commitment to investigate and prosecute crimes at a national level. The fact that Colombia has been under preliminary examination by the Office of the Prosecutor since 2004, and its strong wish to avoid the opening of a formal ICC investigation, amplifies this constant self-promotion – the idea being that, "so long as Colombia plays nice, so will the ICC".[423] In short, the 'shadow' of the ICC looms large.[424]

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[420] Bueno and Diaz Rozas (2013), at 218.

[421] Colombia is one of the more active States Parties at the ASP and in its intersessional Working Group in The Hague, and in December 2010, President Santos was the first Head of State (ever) to address the ASP's plenary meeting during its opening ceremony in New York. In his remarks, he stressed Colombia's commitment to the fight against impunity within the complementary system of the Rome Statute and reiterated his country's support for the Court's work. In 2012, Colombia also proudly presented information in response to the Assembly's call for information on the domestic implementation of the Rome Statute in the context of its ongoing peace and justice processes. In its submission, Colombia not only stressed that it is a State Party, but underscored its commitment to the broader normative framework of the ICC's RPE and EoC. Government of Colombia, *Response to ICC-ASP/11/SP/PA/12*, ICC-ASP/11/POA/2012/COL-ENG (8 August 2012), at 3; *Remarks by the President of the Republic of Colombia, Juan Manuel Santos, at the ninth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*. Field notes, *on file with author*.

[422] Observations of Colombia on the Draft Report of the Inter-American Commission on Human Rights, Note S-GAIID-13-048140, 2 December 2013, para 36, cited by *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc 49/13, at 21.

[423] Reed-Hurtado (2015), at 186.

[424] Many interviewees I spoke with during my field research in Colombia confirmed that the desire to prevent an ICC intervention has contributed to accountability developments in Colombia and the government's increasing commitment to criminal or punitive justice. On the other hand, while all agreeing that the ICC's preliminary examination continues to be an important element in moving justice efforts forward on a national level, several

The Colombian situation has now been under preliminary examination for more than 12 years. In November 2012, in response to "the high-level of public interest generated by the Colombian preliminary examination", the Office of the Prosecutor exceptionally published a separate 93-page Interim Report on Colombia.[425] This Interim Report was the first (and to date only) report dedicated to a *specific ongoing* preliminary examination.[426] It indicated that important advances had been made at the national level concerning the prosecution and investigation of crimes within the ICC's jurisdiction, and that there was no reason to conclude these were not genuine; in other words, in the OTP's view, developments in Colombia could pre-empt ICC jurisdiction on grounds of non-admissibility/complementarity. However, the Office did not make a definite determination yet, and the preliminary examination of the situation remained open. In particular, the Interim Report highlighted five specific priority areas for the ongoing preliminary examination: (i) the implementation of the (so-called) Legal Framework for Peace and other legislative developments regarding the emergence of new illegal armed groups; (ii) proceedings regarding the promotion and expansion of paramilitary groups; (iii) forced displacement; (iv) sexual violence; and (v) the *falsos positivos* cases.[427] Since the adoption of the peace agreement with the FARC, the ICC has also expressed a particular interest in the implementation of criminal accountability aspects of that process.

Within these five priority areas, the analysis is directed to determine "whether national proceedings encompass persons who appear to bear the greatest responsibility for the most serious crimes and are genuine".[428] As we will see later in this chapter, these priority areas have been 'internalised' (or appropriated) by the Colombian authorities in developing national criteria for prioritisation within its transitional justice measures in attempts to comply with or implement its complementarity 'obligations'. As important as some of those measures are to direct specific attention to crimes of sexual violence, at the same time, progress in terms of accountability in practice has been minimal. The ICC continues to

interviewees also indicated that this catalyst impact has also diminished over time. Some suggested that when the Office of the Prosecutor did not initiate investigations in 2008/2009, when the extent of the *parapolítica* scandal became more widely known, it lost some of its credibility and therefore catalyst influence.

[425] *Situation in Colombia - Interim Report*, at para 1.

[426] Since Fatou Bensouda assumed office as Prosecutor, separate reports have also been issued upon the closure of preliminary examinations (so-called Article 53(1) reports). The Colombian report is the only report for an *ongoing* preliminary examination.

[427] *Situation in Colombia - Interim Report*, at paras 22, 224.

[428] *Situation in Colombia - Interim Report*, at para 27.

express its concern over the lack of developments in that respect; yet, it has not led to opening an ICC investigation.

The Colombian preliminary examination is currently in "phase 3", which means the Office of the Prosecutor's assessment revolves specifically (and only) around admissibility. Unlike the ten situations in which the Office has already opened investigations, all of which resulted from a determination of *inaction* on the part of relevant state authorities, the admissibility assessment in the Colombian situation is arguably less clear-cut. The well-developed nature of its legal system, coupled with a number of changes and reforms introduced in response to the ICC's concerns (described later in this chapter), means the Colombian authorities have the general *capacity* to conduct proceedings in relation to Rome Statute crimes. Its judicial system is not generally "unavailable"[429] and has not "collapsed"; evidence can be gathered, and individuals arrested. As discussed further in this chapter, a number of important cases have progressed through its transitional justice framework, including for perpetrators at the higher echelons of responsibility, which could arguably fall squarely within the ICC's territory. This essentially precludes an assessment of inaction or inability, or at a minimum makes it unlikely the ICC were to conclude that the Colombian situation would be admissible on these grounds.

In order to open an investigation in Colombia, in other words, the Office of the Prosecutor would have to enter the unchartered territory of 'unwillingness'. This assessment is complicated by the fact that, as we will see, a number of important internalisation steps have been taken that focus specifically on sexual violence, such as the adoption of policies modelled on ICC practice, and the organisations of annual trainings on international crimes. This makes it difficult to conclusively find a general unwillingness on the part of the Colombian authorities or a specific unwillingness to deal with sexual violence,[430] even though the result of the ongoing difficulties means impunity specifically for sexual violence

[429] Although, it can be disputed whether the justice system is 'unavailable' for a particular category of victims, namely victims of sexual violence.

[430] It must be said, however, that it has also not meant a conclusive assessment that the steps taken *are* indeed sufficient. Interview with representative of the Office of the Prosecutor (The Hague, October 2015), *on file with author*. Similarly, as the Office of the Prosecutor's 2003 expert consultation paper on complementarity, reproduced by Bergsmo and SONG, indicates, there may be intrastate divergences of 'unwillingness': "For example, the judiciary may be 'willing', whereas the executive is not. Investigators may be willing but an 'unwilling' military may frustrate and hinder investigative efforts. Unwillingness in one branch of government may create 'inability' in another branch attempting sincerely to investigate or prosecute. There is also a possibility of selective 'willingness': authorities may be eager to investigate crimes by rebel groups but be reticent with respect to government forces." Bergsmo and SONG (2017), at 763.

crimes. In many ways, therefore, the Colombian internalisation process around sexual violence accountability norms epitomises the gender justice limitations of admissibility / complementarity. At the same time, it also illustrates the gender justice prospects of the broader idea of positive complementarity, particularly when Rome Statute norms and the ICC's interest in the country are leveraged by civil society organisations. The conclusions will return to the relevance of potential gender justice gaps in the ICC's admissibility assessment in the Colombian context after having examined the legal internalisation of the Rome Statute in the next three sections.

The subsequent sections of this chapter analyse three specific examples of legal internalisation of Rome Statute norms around accountability for sexual violence. They examine, respectively, the harmonisation of laws on sexual violence, efforts to prioritise investigations of those most responsible for the most serious crimes, and limited efforts to expand accountability for sexual violence crimes by the incorporation of Rome Statute norms in transitional justice efforts. The examples illustrate not only a high degree of mimicking the ICC and the Office of the Prosecutor's policies and practices within a narrative of complementarity and in an effort to avoid negative determinations of Colombia's ability or willingness, but equally show the importance of norm interpretative interactions among different actors to generate internalisation. It highlights in particular the multivariate role played by civil society organisations and the Colombian Constitutional Court in 'implementing' positive complementarity. Nonetheless, this analysis equally cautions that while the adoption of these frameworks has been important, fighting impunity for sexual violence crimes remains a challenging and ongoing endeavour. Each of the three sections includes a discussion and analysis of the particular example by looking at both the process and substance of the relevant interactions and changes introduced; they each end with a short interim conclusion on what the example tells us about (positive) complementarity and the norm diffusion process. The fourth section of this chapter provides the chapter's overall conclusions, drawing together the ICC's complementarity framework and the relevance of the legal internalisation processes in that respect.

SECTION 4.2

HARMONISATION OF LAWS ON SEXUAL VIOLENCE

As a monist country with a "deep tradition of legalism",[431] Colombia's legal system has traditionally been very receptive to the incorporation of international legal norms or obligations. Article 93 of the Constitution confirms that international human rights prevail over the internal legal order. This openness to interpreting national law through international legal obligations is strengthened by the Constitutional Court's broad interpretation of the "*bloque de constitucionalidad*".[432] Since the early 1990s, the Constitutional Court has held that, in line with the superiority accorded by article 93 of the 1991 Constitution to international treaties that "pertain to human rights or international humanitarian law", such treaties have become part of this block of constitutionality, and therefore of the norms governing the country's legal order.[433] Such norms thus enjoy constitutional authority and can be relied upon in the Court's constitutional review of proposed laws and legislative acts. Furthermore, through this liberal interpretation of the *bloque de constitucionalidad*, "crimes can be adjudicated as international crimes even if they were not recognised as such in the domestic law in force when the crimes were committed".[434] For instance, in the *Mancuso* case, the Justice and Peace Tribunal relied upon the incorporation of rape and sexual slavery as war crimes within IHL norms to convict the accused, despite (at the time of commission of the crimes) an absence of such characterisation in domestic criminal law.[435]

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[431] Easterday (2015), at 440. See also: Huneeus and Urueña (2016), at 161.

[432] Aponte Cardona (2005), at 97. This 'block of constitutionality' refers to the fact that the constitutional norms applicable in a certain legal system may be broader than those explicitly contained in the constitution. In 1995, the Constitutional Court held: "*El bloque de constitucionalidad está compuesto por aquellas normas y principios que, sin aparecer formalmente en el articulado del texto constitucional, son utilizados como parámetros del control de constitucionalidad de las leyes, por cuanto han sido normativamente integrados a la Constitución, por diversas vías y por mandato de la propia Constitución. Son pues verdaderos principios y reglas de valor constitucional, esto es, son normas situadas en el nivel constitucional, a pesar de que puedan a veces contener mecanismos de reforma diversos al de las normas del articulado constitucional stricto sensu.*" For a detailed description of the doctrine of *bloque de constitucionalidad* and its historical development, see: Rodrigo Uprimny, 'El bloque de constitucionalidad en Colombia', *Universidad Nacional - ENS Colombia* (2005).

[433] Corte Constitucional de Colombia, M.P.: Alejandro Martínez Caballero, Sentencia C 225/95 (18 May 1995), at 12.

[434] Kravetz (2017), at 747.

[435] Kravetz (2017), at 747; *Salvatore Mancuso Gómez y otros*, Tribunal Superior de Bogotá, Sala de Justicia y Paz, M.P.: Léster M. González R., 'Sentencia', 11 011 22 52 000 2014 00027 (20 November 2014), at 2142-2145, 2177-2185, 2192-2195, 2215-2226, 2250-2260, 8651-8654, 8686-8688. For a detailed analysis of the

In 2012, the Constitutional Court confirmed that, while the Rome Statute cannot be classified as an international treaty "pertaining to" human rights or international humanitarian law, certain parts of it nonetheless form part of this block of constitutionality.[436] On a case-by-case basis, several provisions of the Rome Statute have thus become part of the Colombian constitutional law framework. According to the Constitutional Court, these include: the Statute's Preamble;[437] articles 6, 7, and 8 pertaining to the Court's jurisdiction *ratione materiae*;[438] the principle of *res judicata* enshrined in article 20;[439] and the rights of victims contained in articles 19(3), 65(4), 68, 75 and 82(4).[440] This means that in a constitutionality review of (certain provisions of) any (draft) national law, the Constitutional Court can specifically rely upon these provisions of the Rome Statute (as well as other international human rights conventions) in testing that constitutionality. This indirectly incorporates at least some of the Rome Statute's gender justice provisions into the Colombian legal framework from a constitutional perspective before any of its provisions had become fully integrated into domestic legislation. In other words, through the *bloque de constitucionalidad*, the Rome Statute's criminalisation of a broad range of sexual violence crimes is also indirectly criminalised in Colombia since its entry into force in 2002 (when it had not yet been incorporated into domestic criminal law).

Beyond the *bloque de constitucionalidad*, there have been some efforts aimed at specifically harmonising the national level framework with the Rome Statute. The first such transplantation of particular aspects of the Rome Statute that became enforceable in domestic law took place in 2011 with Law 1448 (also known as the Law on Victims and Land

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decision see: Humanas & Lawyers Without Borders Canada, *Contributions of Justice and Peace decisions to women's rights in Colombia: A case study* (December 2015).

[436] Corte Constitucional de Colombia, M.P.: Humberto Antonio Sierra Porto, Sentencia C-290/12 (18 April 2012).

[437] Corte Constitucional de Colombia, M.P.: Dr. Jaime Araujo Renteria, Sentencia C-928/05 (6 September 2005).

[438] Genocide: Sentencia C-928/05. Crimes against humanity: Corte Constitucional de Colombia, M.P.: Dra. Clara Inés Vargas Hernández, Sentencia C-1076/02 (5 December 2002). War crimes: Corte Constitucional de Colombia, M.P.: Dr. Manuel José Cepeda Espinosa, Sentencia C-291/07 (25 April 2007); Corte Constitucional de Colombia, M.P.: Dr. Jaime Córdoba Triviño, Sentencia C-172/04 (2 March 2004); Corte Constitucional de Colombia, M.P.: Dr. Mauricio González Cuervo, Sentencia C-240/09 (2009).

[439] Corte Constitucional de Colombia, M.P.: Dr. Eduardo Montealegre Lynett, Sentencia C-004/03 (20 January 2003); Corte Constitucional de Colombia, M.P.: Dra. Clara Inés Vargas Hernández, Sentencia C-871/03 (30 September 2003).

[440] Corte Constitucional de Colombia, M.P.: Luis Ernesto Vargas Silva, Sentencia C-936/10 (23 November 2010).

Restitution).[441] The law recognises victims of the armed conflict, and confirms their rights to truth, justice, and reparations. The law also contained some important provisions regarding sexual violence. About three years later, on 18 June 2014, the Colombian Congress passed Law 1719, a more comprehensive piece of legislation that guarantees greater protection and access to justice specifically for victims of sexual violence committed in the context of the conflict.[442] The law amends key provisions of the Colombian penal code and penal procedure code, and enshrines important obligations in Colombian law regarding the investigation and prosecution of sexual violence, and on victims' rights to protection, medical assistance, and reparations. Both Law 1448 and Law 1719 internalise substantive aspects of the Rome Statute and its Elements of Crimes: they harmonise domestic legal standards regarding sexual violence with the Rome Statute, and integrate its provisions within the domestic criminal law framework.

This section first outlines the drafting history of both laws, focusing on the plurality of actors involved in their adoption. This illustrates the importance of norm entrepreneurs and government sponsors working together to internalise norms on a legislative level: these laws were the product of repeated norm-interpretative interactions between civil society organisations, the international community, and Colombian lawmakers. The ICC has not engaged in this process at all, other than welcoming the process and the law's adoption in its annual preliminary examination reports. Nonetheless, the ICC *as an institution* (i.e. its existence) has been of some relevance through the principle of complementarity; civil society organisations and national political actors reinforced their harmonisation efforts by leveraging the ICC's watchful eye and the Rome Statute's normative clout. Moving away from the process towards the substance, the second part of this section delves into a more detailed analysis of specific aspects of the laws, focusing on its normative strengths and weaknesses regarding sexual violence, with a view towards understanding what aspects of Rome Statute norms around sexual violence were internalised.

[441] *Ley 1448 de 2011 por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones*, Colombia (10 June 2011).

[442] *Ley 1719 de 2014 por la cual se modifican algunos artículos de las leyes 599 de 200, 906 de 2004 y se adoptan medidas para garantizar el acceso a la justicia de las víctimas de violencia sexual, en especial la violencia sexual con ocasión del conflicto armado, y se dictan otras disposiciones*, Colombia (18 June 2014).

4.2.1 Process: Norm entrepreneurs and governmental sponsors

Law 1448 of 2011 finds its origins in the relationship between a key political actor and a civil society organisation. Senator Juan Fernando Cristo of the Liberal Party, himself a victim of the ongoing armed conflict, first proposed a law on victims in 2007; he organised a first public hearing of victims before the Senate on 24 July 2007, together with the NGO *Víctimas Visibles*.[443] There was only little parliamentary interest or support, however; only few senators stayed until the end of the hearing.[444] His *Proyecto de Ley 157* of 2007 was nonetheless swiftly accepted during the first reading in the Senate in December,[445] after which it stalled. Due to internal conflict and polarisation between the major parties, it was not until Juan Manuel Santos made an electoral promise to ensure the recognition of victims' rights in June 2010 that the law was revived. Three months later, in September 2010, Santos, now President, personally deposited the proposed law with the Colombian Congress (an unusual move for a President to submit a *Proyecto de Ley*).[446] After intense debates and some revisions to its text, Law 1448 was finally adopted on 24 May 2011, and promulgated in June that year.[447] It entered into force in January 2012. Where Senator Cristo's personal commitment to the draft Victims' Law, underpinned by civil society activism, had proved insufficient in the face of intense political polarisation, a change in the political landscape and Santos' executive action ultimately created the necessary space to allow the law to advance. The commitment by Santos' government to human rights and international law has remained

[443] Gaceta del Congreso 884/08, *Ponencia para segundo debate al proyecto de ley numero 044 de 2008 Camara, 157 de 2007 Senado por la cual se dictan medidas de protección a las victimas de la violencia* (3 December 2008).

[444] 'Una "vieja deuda" del Congreso con las víctimas', *Semana* (9 September 2012), available at <http://www.semana.com/politica/articulo/una-vieja-deuda-del-congreso-victimas/256124-3>, accessed 15 February 2016. Semana reports that only 30 parliamentarians stayed to listen to the victims, in stark contrast to a previous public hearing in 2003 on the proposed Justice and Peace Law with members of the AUC (and alleged perpetrators of violence) Ramón Isaza, Ernesto Báez and Salvatore Mancuso, where more than 268 members of congress participated. 'Listado de los senadores que permanecieron en la audiencia con las víctimas', *El Tiempo* (25 July 2007), available at <http://www.eltiempo.com/archivo/documento/CMS-3652932>, accessed 15 February 2016.

[445] Rodrigo Urrego Bautista, 'Cuatro años ocupó al Congreso una ley para las víctimas', *Semana* (25 May 2011), available at <http://www.semana.com/nacion/articulo/cuatro-anos-ocupo-congreso-ley-para-victimas/240317-3>, accessed 13 February 2016.

[446] Bautista (2011); Christine Evans, *The right to reparations in international law for victims of armed conflict* (Cambridge: Cambridge University Press, 2012), at 219-220.

[447] *Ley 1448 de 2011* (10 June 2011).

an important factor in moving the Colombian conversation on justice and accountability forward.[448]

The legislative history of Law 1719 similarly illustrates the importance of a favourable political climate, government supporters, and strong civil society lobbying to enable progressive law making on sexual violence. While sexual violence had been an integral component of the Colombian conflict, it was not recognised as an issue of particular concern until 2009,[449] when the first report was published on the prevalence of sexual violence. Subsequently, a 2011 Amnesty International report on the pervasive impunity and the quest for justice by victims further reinforced discussions on Colombia's obligations towards victims of sexual violence.[450] Together with reports from the Inter-American Commission and various UN human rights treaty bodies, these NGOs reports formed the background to the subsequent legislative debate, which was led by representatives Ángela Robledo and Iván Cepeda. The relationship and close cooperation between civil society organisations and these two political actors proved an important catalysing factor.

Iván Cepeda and Ángela Robledo's personal commitment to bringing Colombian law in line with international obligations was critical – they are what Koh would call 'government sponsors'.[451] It also opened up their willingness to work with civil society, and to continue pushing for the adoption of the law even in the face of opposition.[452] External actors – NGOs, international courts, and UN agencies – reinforced their work. For instance, as members of Parliamentarians for Global Action (PGA), Robledo and Cepeda were able to draw on international expertise and a transnational support network to help develop the law.[453] While they initially worked on the draft law without the support from PGA, their work really came together after a 2013 workshop organised by PGA for its Latin-American members in

[448] Interviews with Colombian civil society representatives (Bogotá, September 2016), *on file with author*.

[449] Interview with NGO representative (telephone interview, December 2015), *on file with author*; Interview with MP Angela Robledo (Bogotá, September 2016), *on file with author*.

[450] Amnesty International, *'This is what we demand. Justice!' Impunity for Sexual Violence against Women in Colombia's Armed Conflict*.

[451] Koh (2006), at 746; Koh (1998), at 647.

[452] Interview with MP Angela Robledo (Bogotá, September 2016), *on file with author*.

[453] A 2013 workshop organised by PGA on challenges to the effectiveness of the Rome Statute system in the Americas provided substantial input to the legislative process. Interview with NGO representative (telephone interview, January 2016), *on file with author*; Interview with Colombian Member of Parliament (Bogotá, September 2016), *on file with author*. For a discussion on PGA's role in supporting the development and adoption of this law, see: 'Colombia - Recent Developments', *Parliamentarians for Global Action* (18 June 2014), available at <http://www.pgaction.org/campaigns/icc/americas/colombia.html>, accessed 7 February 2016.

Montevideo, Uruguay, on challenges to the effectiveness of the Rome Statute system in the Americas.[454] Consultations on the substance of the law and nature of the changes proposed were also held with Colombian civil society in March 2012, notably with women's rights organisations such as Humanas, Sisma Mujer, and Casa de la Mujer.[455] The draft law subsequently introduced on 25 July 2012 was born out of these consultations and interactions; the explanatory memorandum draws extensively on civil society reports to underpin and explain the rationale behind the changes proposed.[456]

To some extent, the ICC also reinforced the momentum for legislative reform, both directly and indirectly. In its 2012 Interim Report on Colombia, the Office of the Prosecutor highlighted sexual violence as a specific area of concern and it welcomed specific legislative developments, including Law 1448.[457] At the same time, it notified Colombia that it would closely follow the implementation of the law in terms of national proceedings.[458] While the text of the explanatory memorandum attached to the draft law suggests that the proposal emerged from broader human rights obligations, rather than constituting an immediate response to the ICC's findings, it is clearly substantively based on the Rome Statute. Those involved in the drafting of the law confirmed this to me. Furthermore, the fact that the ICC was watching was an important catalysing factor in pushing forward with the reforms. Whether the ICC's watchful eye ultimately convinced those opposing the law is something that is difficult to tell, but at a minimum, it strengthened the voices of those working towards the adoption of Law 1719. In the words of one of my interviewees: "I need 'El Coco' for the operational standards to rise. … [When] Prosecutor Bensouda says 'we will be attentive', it helps; it helps us to develop the law and to have more guarantees for sexual violence crimes in Colombia".[459]

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[454] Interview with NGO representative (telephone interview, January 2016), *on file with author*.

[455] Ángela Robledo, 'Denunciamos el horror que significa para miles de mujeres vivir en media de la guerra', *Congreso Visible* (9 March 2012), available at <http://www.congresovisible.org/agora/post/denunciamos-el-horror-que-significa-para-miles-de-mujeres-vivir-en-medio-de-la-guerra-angela-robledo/3291/>, accessed 12 February 2016. See also: Ángela Robledo, 'Amnistía Internacional pide al gobierno colombiano respaldar proyecto de justicia a víctimas de violencia sexual', available at <http://www.angelarobledo.com/amnistia-internacional-pide-al-gobierno-colombiano-respaldar-proyecto-de-justicia-a-victimas-de-violencia-sexual/>, accessed 6 May 2017.

[456] Interview with MP Angela Robledo (Bogotá, September 2016), *on file with author*. *Proyecto de Ley 037 de 2012*, Colombia (25 July 2012).

[457] Interview with NGO representative (telephone interview, January 2016). On the catalyst effect of the Office of the Prosecutor's Interim Report, see: Kapur (2016), at 19.

[458] *Report on Preliminary Examination Activities 2014*, at para 125.

[459] Interview with MP Angela Robledo (Bogotá, September 2016), *on file with author*.

Cepeda and Robledo presented their *Proyecto de Ley 037* to Congress on 25 July 2012, after which it underwent several readings in both the *Cámara* (House of Representatives) and the *Senado* (Senate). Once formally introduced, civil society organisations again rallied around the law in support. Compliance with international criminal law, in particular the Rome Statute, assumed a central place in these discussions. For instance, Amnesty International published a second influential report on sexual violence, in which it specifically called upon the Colombian government to adopt the proposed legislation to comply with its obligations under the Rome Statute "to investigate sexual crimes that may amount to crimes against humanity or war crimes", and warned of possibilities of an ICC investigation for failing to do so.[460] Amnesty, and other organisations, also met with government officials to reiterate these points. The UN team of experts on the Rule of Law and Sexual Violence in Conflict equally contributed to assessing and improving the draft legislation.

Following the law's adoption, civil society organisations filed a challenge before the Constitutional Court. Whereas previous draft laws had provided for the mandatory provision of health services to victims of sexual violence, the law as adopted made this optional. The Constitutional Court granted the challenge and ordered an amendment to the law.[461] Here again, civil society organisations worked closely together with one of the drafters of the law, Angela Robledo.[462] Similarly, as described in more detail below, civil society organisations have also submitted communications to the ICC challenging the Colombian government's limited implementation of its obligations to address sexual violence. In other words, repeated norm-interpretative interactions between civil society organisations and political actors before various norm-interpretative fora (e.g. the parliament, the Constitutional Court, and the ICC) contributed to the quality of the norms ultimately internalised. Such advocacy and litigation by civil society organisations using the Rome Statute's normative influence was an essential component in the interactions that ultimately contributed to the legislative internalisation of the Rome Statute's norms around accountability for sexual violence. The law is generally regarded as an important advancement for the rights of victims of sexual violence committed in the context of the conflict in Colombia. It can be seen as a successful example of the integration of Rome Statute justice while adapting it to the specific national

[460] *Colombia: Hidden from Justice - Impunity for Conflict-Related Sexual Violence, a Follow-up Report* (Amnesty International, 2012), at 32.

[461] Interview with Colombian NGO representatives (Bogotá, September 2016), *on file with author*.

[462] Interview with Colombian NGO representatives (Bogotá, September 2016), *on file with author*.

context, as described below. Critically, the enactment of these laws was the result of repeated interpretations and interactions (i.e. the constitutive elements of TLP) on the issue of sexual violence by civil society, key political actors in Colombia, and international legal actors, including the ICC.

4.2.2 Substance: partial transplants and mirroring of Rome Statute provisions

Both Law 1448 and Law 1719 integrated international standards and principles, including those of the Rome Statute, into Colombian law, and form an important part of its transitional justice legal framework. Many of the innovative provisions first included in Law 1448 were given more depth and rendered operative through Law 1719. While the laws draw directly upon the Rome Statute in many areas (at times explicitly, at times more impliedly), they also depart from it in others. Before zooming in on specific provisions and aspects of the laws, a brief note on the overall substance and significance of the two is in order.

Law 1448 is significant in many respects, most notably because it constituted the first official recognition (in law) by the government of the existence of an armed conflict in Colombia. It recognises the victims of violence associated with the armed conflict, and acknowledges their right to integral reparations. It includes provisions on the restitution of land, and provides for special attention to the needs of various groups and communities, including women, survivors of sexual violence, trade unionists, victims of forced displacement, and human rights defenders.[463] The implementation of many of these aspects is extensively covered elsewhere, and will not be rehearsed here.[464] Ultimately, the law is based on an integration of the right to *restitutio in integrum* of human rights law, applying this specifically to the context of the Colombian armed conflict. Regarding victims of sexual violence, Law 1448 reaffirms their right to full reparations, mandates the establishment of mechanisms of support and assistance, such as a Centre for Integral Attention to Victims of Sexual Violence, and recommends the adoption of a protocol on the investigation of sexual

[463] Article 13, *Ley 1448 de 2011* (10 June 2011).

[464] See, *e.g.*, Paula Martínez Cortés, *Ley de víctimas y restitución de tierras en Colombia en contexto: Un análysis de las contradicciones entre el modelo agragio y la reparación a las víctimas* (FDCL & TNI, 2013); *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc 49/13, at paras 475-512; Amnesty International, *A land title is not enough: ensuring sustainable land restitution in Colombia* (November 2014).

violence.[465] It incorporates the Rome Statute's general principles of evidence regarding sexual violence,[466] provides for specific attention to victims' vulnerabilities during questioning,[467] and calls for specialised medical and psychosocial assistance for victims of sexual violence.[468] However, it does not include definitions of sexual violence, nor a specific legal obligation to investigate or prosecute these crimes. In this respect, Law 1719 complements and strengthens Law 1448.

In contrast to Law 1448, which primarily sought to integrate international *human rights* standards, Law 1719 primarily (although not exclusively) incorporates international *criminal* and *humanitarian* law principles and standards into the Colombian legal context. Notably, the explanatory memorandum of *Proyecto de Ley 037* provides that "Colombia must comply with *its obligations of complementarity*, according to which its internal legislation must comply with these [international] standards".[469] More specifically, Law 1719 specifically brings Colombian penal legislation in line with the developments in international law regarding the recognition of sexual violence, embodied in the Rome Statute. For instance, the law broadens the types of sexual violence included in the Colombian penal code. Other advancements relate to rules of procedure and evidence, the non-applicability of statutes of limitations, and the irrelevance of consent in light of coercive circumstances. The law also provides a general definition of violence and sexual violence taking into account the specific circumstances of the armed conflict. In addition, it sets out clear obligations to investigate and prosecute these crimes, to provide protection and assistance to victims, includes a reparations framework, and establishes a technical expert committee to lead investigations and prosecutions. In other words, like Law 1448, Law 1719 is grounded in the recognition that Colombia's impunity problem regarding sexual violence requires a more wholesale approach than merely amending the legal regime; it must entail an integrated response from different governmental agencies.[470]

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[465] Article 38, *Ley 1448 de 2011* (10 June 2011). See also: ABColombia, Corporación Sisma Mujer, and US Office on Colombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process*, at 19; FOKUS, *Violencia sexual relacionada con los conflictos* (May 2012), at 6. As we will see later in this chapter, this protocol was finally adopted in June 2016.

[466] Article 38, *Ley 1448 de 2011* (10 June 2011).

[467] Articles 41-42, *Ley 1448 de 2011* (10 June 2011).

[468] Article 47, *Ley 1448 de 2011* (10 June 2011).

[469] *Proyecto de Ley 037 de 2012* (25 July 2012). My translation; emphasis added.

[470] For instance, the explanatory memorandum notes that while certain types of sexual violence included in the new law would in theory already have been covered by the crime of "violent sexual acts", the reality is that if they are not explicitly listed in the penal code, such crimes are simply not investigated.

Furthermore, Law 1719 is significant as it is the first law to incorporate the notion of crimes against humanity into the Colombian legal framework. The Colombian penal code does not contain any provisions on crimes against humanity as such (although it does list a number of crimes that on an international level would have been classified as such).[471] Article 15 of Law 1719 requires judges to declare particular conduct a crime against humanity when the contextual elements of those crimes (which must be interpreted using the Rome Statute) are satisfied. While this does not integrate the category of crimes against humanity fully into the Colombian criminal legal framework, and therefore does not allow for either the direct charging or conviction of crimes against humanity *as such*, it means prosecutors, when charging conduct as war crimes, can request judges to declare the conduct also constitutes crimes against humanity.[472] In other words, it integrates crimes against humanity indirectly into the Colombian legal framework through judicial interpretation. This has been an important avenue in several recent JPL cases to advance the capture capacity of Colombian criminal law regarding sexual violence crimes. Similarly, by classifying sexual violence as international crimes, the law lifts the statute of limitations that may otherwise have been applicable. This is particularly important for crimes of sexual violence because victims face many obstacles in reporting crimes at the time of their commission and often only report crimes years or decades later.[473]

Three features of Law 1448 and Law 1719 are worth examining further with a view to understanding how the Rome Statute's provisions were translated into the national context: (i) legal definitions; (ii) procedures and principles of evidence; and (iii) specialised mechanisms and expertise.[474] Regarding the first, legal definitions, Law 1719 significantly expands the list of sexual violence crimes in Colombian law and provides detailed definitions of each. Before the adoption of Law 1719, the Colombian penal code only recognised three types of sexual violence as violations of international humanitarian law:[475] abusive sexual intercourse ('*acceso carnal*'), violent sexual acts, and enforced prostitution or sexual slavery

[471] Kravetz (2017), at 742.

[472] Kravetz (2017), at 743.

[473] Interview with a Colombian prosecutor (Medellín, September 2016), *on file with author*.

[474] It is interesting to note that these same three categories proved important in similar harmonization efforts in the DRC, as described in more detail in chapter 4.

[475] The Colombian penal code separates offences committed as violations of international humanitarian law, which it defines as having been committed in relation to and during the armed conflict ('*con ocasión y en desarrollo del conflicto armado*'), and other criminal offences. It only includes two crimes of sexual violence outside the context of IHL: abusive sexual intercourse and violent sexual acts.

(these two it conceptualised as one crime). Law 1719 separates enforced prostitution and sexual slavery into two distinct offences, and criminalises all Rome Statute crimes of sexual violence not yet included in Colombian law.[476] Importantly, Law 1719 also incorporates three additional crimes: sexual exploitation, forced nudity, and forced abortion (a crime of particular relevance to the Colombian context). In other words, the momentum created by a push for harmonisation with the principle of complementarity was used to expand Colombian law well beyond the Rome Statute, and to reflect the specific context of the armed conflict.

Instead of including a description of the use of force or threat of force with each specific crime, as in the Rome Statute, the Colombian legislation makes a general reference to these crimes being committed "by violence", and provides a separate definition of what it understands as violence. In doing so, it consolidates earlier pronouncements by the *Corte Suprema de Justicia* regarding circumstances of force, or fear of violence, drawing on the Rome Statute's Elements of Crimes.[477] Amended article 212A of the Colombian penal code now provides that acts committed by violence includes the use of force, or threat of force; physical or psychological coercion, such as that caused by fear of violence, duress; illegal detention; psychological oppression or abuse of power; the use of a coercive environment and similar circumstances that render a victim incapable of giving genuine consent. This closely mirrors the Rome Statute's provisions regarding the use of force, or threat of force, as particular elements of crimes of sexual violence.

In general, Law 1719 very closely mirrors the Rome Statute's definitions of crimes, as it does for this definition of violence, and endorses the Statute as its interpretative framework. For instance, article 15 provides that crimes of sexual violence when committed as part of a widespread or systematic attack on the civilian population, and in the knowledge of that attack, constitute crimes against humanity "in accordance with the definitions of article 7 of the Rome Statute and the Elements of the Crimes of that Statute". In some instances, its definitions are more restrictive than the Rome Statute. Most notable in this regard is the absence of any definition for abusive sexual intercourse (or rape) as a violation of IHL. On

[476] Colombian law now includes the following crimes as violations of international humanitarian law: abusive sexual intercourse; other sexual acts; enforced prostitution; sexual slavery; treatment of persons with the goal of sexual exploitation; enforced sterilization; forced pregnancy; forced nudity; and forced abortion.

[477] *Proyecto de Ley 037 de 2012* (25 July 2012). The explanatory memorandum confirms: "*Se incorpora la definición que trae los elementos de los Crímenes del Estatuto de Roma a través de la definición de la violencia en el Código Penal (Ley 599 de 2000), definición que coincide con el contenido que de la misma ha hecho la jurisprudencia de la Corte Suprema de Justicia en el país, con el propósito de eliminar todo tipo de duda en los operadores jurídicos, en donde se pueda limitar el significado de la violencia a la utilización de la fuerza física.*"

the other hand, in relation to others, its definitions are more lenient. For instance, the Rome Statute includes a somewhat restrictive definition of forced pregnancy, which must be carried out "with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law". Colombian law simply states that it refers to forcing someone who became pregnant due to any of the sexual violence crimes listed to carry the pregnancy to term (article 8). Similarly, the Colombian definition of sexual exploitation includes acts such as forced marriage, sexual tourism, or sexual exploitation of another person for economic or other benefit to oneself or another, none of which are included as crimes in the Rome Statute (article 6). It is thus grounded in the recognition that, while the Rome Statute codified the most expansive list of sexual and gender-based crimes in international criminal law at the time, it remains incomplete. Sexual harms committed in conflict settings are broader and more diverse, which is reflected in the Colombian legislation.

A second way in which the Rome Statute was integrated and translated into national law is by incorporating some of the ICC's procedural provisions. Law 1448 incorporates several important protective measures for victims of sexual violence (and other crimes). For instance, it allows testimony to be given behind closed doors or via audio or video link, obliging the judge and prosecutor to take measures to guarantee the truthfulness, security, physical and psychological wellbeing, dignity, and privacy of the witness.[478] It also mandates the judges to take special measures to prevent retraumatisation during testimony, and allows for the presence of a psychologist, social worker, or other expert to support the witness during testimony.[479] Finally, article 38 incorporates *verbatim* rules 70 and 71 of the ICC's RPE regarding principles of evidence in cases of sexual violence. These evidentiary principles are reiterated in article 18 of Law 1719. It holds that consent cannot be inferred from the actions or words, silence or absence of resistance on the part of the victim, and provides that physical evidence is not necessary to prove sexual violence occurred. However, unlike the Law on Victims, which states these principles *shall* be applied by the relevant judicial authority, Law 1719 only includes them as "recommendations" for the preservation, admission, and assessment of evidence. It also does not preclude the introduction of evidence of other sexual conduct, although it does prohibit the admission of evidence "of a

[478] Article 40, *Ley 1448 de 2011* (10 June 2011).

[479] Articles 41-42, *Ley 1448 de 2011* (10 June 2011).

discriminatory nature" (and as such leaves the matter entirely to judicial interpretation and discretion).

Third, and finally, both laws provide for the establishment of specific mechanisms, frameworks and the appointment of expertise on gender and sexual violence issues. For instance, Law 1448 requires the adoption of a zero tolerance policy on sexual violence for all state entities (article 149(h)), and recommends the drafting of a protocol on the investigation of sexual violence, which must include provisions for the training of staff to deal with victims of sexual violence during all stages of legal proceedings (article 38).[480] Law 1719, in turn, provides for the establishment of specialised sexual violence investigation and prosecution teams (article 18). The need for such expertise was already provided for in article 38 of the Law on Victims, but without imposing a specific legal obligation on the public prosecutor. Law 1719, therefore, consolidates this obligation and provides that specialised technical-juridical committees must be created in the office of the prosecutor within three months of its entry into force. These committees must be composed of women's rights and gender analysis experts, as well as experts in psychology. The prosecutor's investigation teams must follow their strategic direction and recommendations (article 18). Finally, investigations must be conducted immediately when the authorities become aware of allegations of sexual violence, and must be completed within a reasonable time (article 17). These are all important measures, many of which resonate with a broader recognition in the international community for the need to harness expertise to deal with sexual and gender-based violence.[481] Further, extending the legal framework to become inclusive of these international standards in terms of legal definitions, evidence assessments, and procedural requirements increases the ability of the system, at least on paper, to conduct the necessary proceedings for these crimes. Legislative internalisation is an important first step towards greater accountability for sexual violence crimes, and can contribute to positive complementarity determinations by the Office of the Prosecutor in this regard.

[480] As described in more detail below, this protocol was adopted (with significant NGO and international assistance during the drafting stages) in June 2016.

[481] In April 2014, the ICC Office of the Prosecutor published a draft Policy Paper on Sexual and Gender-Based Crimes, which was subsequently adopted in June. In the same period, the United Kingdom's Preventing Sexual Violence Initiative had been working on an International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, which was formally launched and adopted also in June 2014, during the Global Summit on Sexual Violence in Conflict, held in London on 10-13 June 2014. See: *Policy Paper on Sexual and Gender-Based Crimes*; *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*.

4.2.3 *In sum*: legislative internalisation of Rome Statute gender justice norms

As this section illustrated, Colombia has integrated various substantive aspects of the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence regarding accountability for sexual violence crimes into its ordinary domestic legal framework. This has given rise to both convergences and divergences between the international and Colombian legal standards. The legislators did not simply copy-paste the Rome Statute, but morphed its provisions into a format applicable to the Colombian context. Furthermore, the process through which the laws were adopted illustrates that a conversation took place within the Colombian legislature (and between the government, civil society actors, and other stakeholders) as to how the norms enshrined in the Rome Statute could apply to the Colombian context. Although it may have given rise to more restrictive standards at times, ultimately it attests to an appreciation for the specific domestic context into which the Rome Statute was being transplanted, and displays a sense of ownership of the norm diffusion and legal transformation process. This also increases possibilities for successful application of these new and improved norms, when they are not seen as imposed from above.

Importantly, as described in this section, the legislative internalisation of the Rome Statute's norms around accountability for sexual violence crimes was done through a series of norm interpretative interactions between civil society, international stakeholders, and Colombian legislators on the substance of the laws. What has been critical in this entire process is the cooperation and interaction between government sponsors – Senator Cristo, President Santos, and Parliamentarians Cepeda and Robledo – and civil society organisations – Victimas Visibles, Parliamentarians for Global Action and women's rights groups. For this legislative internalisation in Colombia, such political support was critical, but civil society organisations constituted important norm entrepreneurs, both in raising the need for legislative amendment in the first place and in continuing the pressure for their adoption and implementation. Notably, while the adoption of legal frameworks to enable the investigation and prosecution of sexual and gender-based violence as international crimes constitutes an important element that can contribute to positive complementarity determinations by the ICC, the role of the ICC in this process has been minimal. The interaction has been on a much more horizontal level. Nonetheless, it is clear that the Rome Statute's normative clout provided an important impetus to these discussions on the adequacy of the Colombian

legislative framework around sexual violence. The ICC's 'watchful eye' was also instrumentalised by various actors to invigorate their calls for law reform.

Importantly, the legislative incorporation has gone beyond the substantive provisions of the Rome Statute; it also covers procedural questions and principles. Doing so allowed Colombian legislators to expand the capture capacity of Colombian criminal law regarding sexual violence crimes, not only in relation to acts of sexual violence when these constitute international crimes, but equally in situations outside the context of war crimes, crimes against humanity or genocide; Law 1719 applies Rome Statute provisions to sexual violence regardless of its status as international crimes. The momentum created by a push for harmonisation with the Rome Statute gave rise to a broader amendment.

SECTION 4.3

PRIORITISING "THOSE MOST RESPONSIBLE" FOR "THE MOST SERIOUS CRIMES"

Colombia's main transitional justice framework, the Justice and Peace Law, very quickly became overwhelmed with ever increasing numbers of former paramilitaries wishing to take advantage of the favourable framework to demobilise and reintegrate into Colombian society without severe penalties (if any) imposed upon them. During its first seven years of operation, only 14 cases had been completed with final decisions handed down by JPL tribunals,[482] when reportedly more than 32,500 paramilitaries had demobilised and more than 417,000 crimes had been registered by the end of 2012.[483] In an attempt to refocus and streamline its accountability efforts, in 2012, the Colombian government adopted a series of prioritisation measures. This section discusses the different stages Colombia's prioritisation efforts went through, and outlines the levels of contestation before the Constitutional Court, within the prosecutor's office, and before the ICC, on the subject of those measures. It subsequently zooms in on efforts to include sexual violence within these prioritisation measures.

4.3.1 Interactions and contestations on prioritisation

The first step towards prioritisation came through executive action with the adoption in July 2012 of Legislative Act 01 (also known as the *Marco Jurídico para la Paz* / Legal Framework for Peace [LFP]). LFP formally incorporated transitional justice into the Colombian constitutional order and extended the general parameters of JPL to other illegal armed groups (i.e. other than paramilitaries) and to those who demobilised after 2005. LFP equally called for prioritisation and selection criteria to be established to focus efforts on those most responsible for crimes against humanity, genocide, and war crimes committed in a systematic manner.[484] In addition, it provided for possibilities of creating extrajudicial truth

[482] Only two of these decisions related to sexual violence. Humanas & Lawyers Without Borders Canada, *Contributions of Justice and Peace decisions to women's rights in Colombia: A case study*, at 57.

[483] Fiscalía General de la Nación, *Plan de acción de casos a priorizar por la unidad nacional de fiscalías para la justicia y paz* (January 2013), at 1.

[484] *Acto Legislativo 01 de 2012 por medio del cual se establicen instrumentos jurídicos de justicia transicional en el marco del artículo 22 de la constitución política y se dictan otras disposiciones*, Colombia (31 July 2012).

and reparations mechanisms, the conditional suspension of sentences for those convicted, and the application of alternative or extrajudicial sentences. The adoption of this legislative framework was widely believed to be an attempt to lay down foundations for peace negotiations with the FARC-EP, the start of which was formally announced a few months later in September 2012.[485] The FARC-EP, however, rejected the Legal Framework for Peace and as discussed at the end of this chapter, an entirely new transitional justice framework was eventually agreed upon to guide the demobilisation and reintegration of FARC-EP members, and the investigation and prosecution of crimes committed by all actors within the context of the conflict with the FARC-EP.

Next, on 4 October 2012, the *Fiscalía General de la Nación* adopted Directive 0001 "by virtue of which it adopts criteria for the prioritisation of situations and cases and creates a new system of investigation and management within the Fiscalía".[486] The Directive, essentially putting LFP into practice, sets two subjective, two objective, and five complementary criteria for prioritisation. It notes that the impact of crimes on victims, as well as any discriminatory intent, will be relevant to the prioritisation of crimes, as is the perpetrator's level of responsibility. The gravity of crimes, which is assessed through the impact of crimes, their method of commission, and the representativeness of criminality are equally of relevance. These factors are identical to the ICC's criteria for case selection and prioritisation. Feasibility of prosecution, and viability of conviction are two further criteria to be applied. Finally, crimes that are the subject of the ICC's preliminary examination are specifically prioritised.[487] In line with the Legal Framework for Peace (*and* mirroring the ICC's own practice), the focus is on "those most responsible" for systematic violations.

Subsequent legislative amendments to JPL introduced in December through the adoption of Law 1592 in turn consolidated these prioritisation criteria for the investigation

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'Marco Jurídico: la paz como finalidad de los instrumentos de justicia transicional', *Ministerio de Justicia y del Derecho* (nd), available at <http://www.justiciatransicional.gov.co/node/24#sthash.nruk0Nh2.dpuf>, accessed 9 April 2016.

[485] Adriaan Alsema, 'Colombia's 2012-2016 peace talks - Fact sheet', *Colombia Reports* (25 September 2016), available at <http://colombiareports.com/colombia-peace-talks-fact-sheet/>, accessed 13 January 2017.

[486] Fiscalía General de la Nación, *Directiva 0001 por medio de la cual se adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y de gestión de aquéllos en la Fiscalía General de la Nación*, Directive 0001/2012 (4 October 2012).

[487] *Directiva 0001 por medio de la cual se adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y de gestión de aquéllos en la Fiscalía General de la Nación*, Directive 0001/2012, at V(3)(c).

and prosecution of (primarily international) crimes.[488] These prioritisation reforms established a focus within the *Fiscalía*'s investigative and prosecutorial efforts on patterns of "macrocriminality" (*el patrón de macrocriminalidad*), concentrating on "those most responsible" (*los máximos responsables*),[489] which clearly mimics the ICC's efforts to focus on those most responsible for the most serious crimes. Indeed, in 2012, Colombia confirmed in its submission to the ASP that the establishment of its prioritisation policy was inspired by the experience of the ICC, and was a response to "the main concerns of the Court in relation to the situation in Colombia".[490]

Importantly, these JPL reforms also included greater incorporation of a differential approach (*enfoque diferencial*), which recognises that certain groups may be especially vulnerable because of their age, gender, race, ethnicity, sexual orientation, or disability, and that the Prosecutor General must take special measures to ensure their participation and protection during its investigations and the judicial process. While this had not been part of the changes originally proposed in the draft legislation, it was subsequently included after the adoption of a gender perspective in the *Fiscalía*'s October 2012 Directive.[491] In other words, the government's executive action led to the adoption of a policy, which then triggered a number of legislative amendments, all of which were clearly modelled on the ICC's practice (i.e. they 'appropriated'[492] the ICC model).

In December 2012, the Colombian Commission of Jurists brought a constitutionality challenge against LFP, arguing that it violated the state's constitutional duty to respect and guarantee the human rights of its citizens and its obligation to investigate and punish *all* human rights violations. In their view, the exclusive focus on "those most responsible" for

[488] *Ley 1592 de 2012 por medio de la cual se introducen modificaciones a la Ley 975 de 2005*, Colombia (3 December 2012). Law 1592 of 2012 also intended to harmonise the justice processes under JPL with the Law 1448/2011 (Law on Victims). See: Observations of Colombia on the Draft Report of the Inter-American Commission on Human Rights, Note S-GAIID-13-048140, 2 December 2013, para 39, cited in: *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc 49/13, at para 41.

[489] Article 13, introducing a new article 16A into Law 975/2005. *Ley 1592 de 2012 por medio de la cual se introducen modificaciones a la Ley 975 de 2005*, Colombia (3 December 2012).

[490] *Response to ICC-ASP/11/SP/PA/12*, ICC-ASP/11/POA/2012/COL-ENG, at 6.

[491] Article 3, *Ley 1592 de 2012 por medio de la cual se introducen modificaciones a la Ley 975 de 2005*, Colombia (3 December 2012). *Orlando Villa Zapata y otros*, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, M.P.: Uldi Teresa Jiménez López, 'Sentencia', Radicación 2008-83612 (24 February 2015), at para 746.

[492] As mentioned in the introduction to this thesis, Sally Engle Merry defines appropriation as: the process through which programmes or frameworks developed by activists in one country are replicated in another. See further, chapter 2, section 4 of this thesis.

genocide, crimes against humanity, and war crimes committed in a systematic manner violated the Colombian Constitution and its international obligations.[493] The submission reiterated that while the ICC focuses on those most responsible for the most serious crimes of international concern, under the principle of complementarity and general international law requirements, it befell national jurisdictions to prosecute *all* crimes. Another contentious issue concerned the proposed suspension of sentences. The Constitutional Court subsequently heard from various government agencies, organisations, and citizens on the matter, and invited a number of international experts to provide observations on the issue of selection and prioritisation in transitional justice (in total it heard an additional 30 submissions, both in writing and during a public hearing). Most experts reiterated Colombia's obligations in international law, and cautioned that the ICC could exercise its jurisdiction if LFP perpetuates a situation of impunity. The government, on the other hand, emphasised that a policy to select and prioritise those most responsible for the most serious crimes (in line with the ICC's practice) fell within its sovereign purview.

The ICC Office of the Prosecutor also closely followed the debates regarding LFP, at times explicitly asserting itself into these discussions. In July 2013, the Prosecutor sent a letter to the President of the Constitutional Court reiterating that the complete suspension of sentences was not compatible with the Rome Statute. The letter reiterated a position her Office had already communicated to the government of Colombia in earlier meetings, after it had specifically requested the ICC's advice on the matter: the suspension of sentences against those most responsible could trigger the Court's exercise of jurisdiction.[494] The Prosecutor sent a second letter to the Constitutional Court in August 2013 after several government representatives referenced the ICC's policy of focusing on those most responsible for the most serious crimes as justification for the Colombian legislative act during a public hearing at the Constitutional Court on 25 July 2013. In this letter, Prosecutor Bensouda clarified that her Office's policy to focus on those most responsible for the most serious crimes was not to

[493] See summary of submissions in Corte Constitucional de Colombia, M.S.: Jorge Ignacio Pretelt Chaljub, Sentencia C-579/13 (28 August 2013), at section 2; Gustavo Gallón Giraldo, *Intervención en la audiencia pública sobre la constitucionalidad del 'marco jurídico para la paz'* (Bogotá: Comisión Colombiana de Juristas, 2013).

[494] Office of the Prosecutor, *Primera Carta de la Fiscal de la CPI al Presidente de la Corte Constitucional acerca del Marco Jurídico para la Paz*, 2013/025/FB/JCCD-evdu (26 July 2013), available at: <http://www.derechos.org/nizkor/colombia/doc/cpicol7.html>, accessed 9 July 2017. The confidential letter was leaked to the Colombian press; La Semana originally published the letter here: http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3. It has since been picked up by other websites.

be construed as precedent in interpreting state obligations regarding the investigation and prosecution of international crimes.[495] The Prosecutor reiterated that the ICC retained jurisdiction over individuals who committed crimes within the Court's jurisdiction in Colombia, even when those individuals are not selected for prosecution at a national level. The two letters stirred "a local controversy";[496] the government even denied that there had been a consultation with the Prosecutor on LFP's compatibility with the Rome Statute.[497]

That both (confidential!) letters were leaked to Colombian media underscores the high level of interest in the scrutiny of the ICC. It also compromised the ICC's position, which was subsequently criticised for denying the interests of peace. At the same time, the controversy it triggered, in particular the disjunctive assertions by the government that on the one hand it was adhering to its obligations under the Rome Statute and on the other distancing itself from the Prosecutor's interpretation of that Statute, are clear illustrations of the types of interactions taking place on interpretation of norms around accountability within this framework of complementarity. The government wants to show it is complying with the Rome Statute to pre-empt the ICC's intervention, yet is not willing to accept the ICC's interpretation of that Statute, particularly when that interpretation does not align with its own views on the matter. More importantly, it underscores that the ICC still holds at least some degree of power to influence national dynamics.

In its decision confirming LFP's constitutionality, the Constitutional Court rehearses in detail the numerous submissions it received, including the two letters from the ICC Prosecutor. While affirming the State's obligation to investigate, prosecute, and repress all violations without distinction, the Constitutional Court also held that international human rights law and IHL allow certain limitations thereto so long as violations are adequately addressed. For the Constitutional Court, the proposed selection and prioritisation policy, including the suspension of sentences, was justified in the interests of preventing further

[495] Office of the Prosecutor, *Segunda Carta de la Fiscal de la CPI al Presidente de la Corte Constitucional acerca del Marco Jurídico para la Paz*, 2013/028/FB/JCCD-pmdu (7 August 2013), available at <http://www.ideaspaz.org/especiales/justicia-transicional/farc/descargas/Documento_354436_20130817.pdf> , accessed 9 July 2017. The confidential letter was leaked to the Colombian press; La Semana originally published the letter here: http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3. It has since been picked up by other websites.

[496] Acosta Arcarazo, Buchan, and Urueña (2015), at 300.

[497] 'Una "carta bomba"', *Semana* (17 August 2013), available at <http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3>, accessed 9 April 2016.

violations and establishing peace.[498] However, relying upon international standards, including the Rome Statute, it held that prosecutions of those most responsible for war crimes, crimes against humanity, or genocide could not be de-selected, and that their sentences could not be suspended in full.[499] In practice, however, this essentially means that cases that are low on the priority list are unlikely ever to be prosecuted for lack of time and resources.[500] In addition, the Constitutional Court set a number of interpretative guidelines, including on transparency of the process, the possibility of challenging decisions on selection and prioritisation, and the rights of victims to truth and integral reparations.[501] The Constitutional Court also required the government to consider the gravity and representativeness of crimes in its selection and prioritisation policy, thereby explicitly mimicking the ICC Prosecutor's policies of case selection.[502]

At times, the Constitutional Court explicitly uses the ICC's findings and reports to reinforce its own. For instance, in delineating criteria to be taken into account in the selection and prioritisation of crimes, it requires the public prosecutor to specifically prioritise extrajudicial killings, torture, forced disappearances, sexual violence, forced displacement, and child recruitment as crimes against humanity, genocide, or war crimes committed in a systematic manner.[503] In doing so, it recalls and reaffirms the ICC's findings in its 2012 Interim Report regarding these same areas of focus, thus reinforcing this message. Finally, the Constitutional Court also reminds the government that any subsequent policy or law adopted under LFP must be consistent with international obligations incorporated into Colombian law through the constitutionality block, which as we have seen, includes various aspects of the Rome Statute. In other words, the normative interaction before the Constitutional Court triggered by civil society on the interpretation of a specific norm (in this case the government's obligations under international law and requirements around prioritisation), gave rise to a revised (judicial) interpretation of that norm following a pronouncement by a norm-interpretative forum. These are exactly the kinds of processes that can lead to the internalisation of international norms at a national level that are constitutive of Koh's transnational legal process.

[498] Sentencia C-579/13, at 9.6.

[499] Sentencia C-579/13, at 9.7, 9.9.8.

[500] Interview with a Colombian prosecutor (Bogotá, September 2016), *on file with author*.

[501] Sentencia C-579/13, at 9.9.

[502] *Policy Paper on Preliminary Examinations*; *Policy Paper on Case Selection and Prioritisation*.

[503] Sentencia C-579/13, at 9.9.4.

4.3.2 Efforts to include sexual violence crimes within prioritisation

In addition to setting out general criteria of prioritisation, in line with the (gender) differential approach (*enfoque differencial*), specific attention was paid to ensuring attention for sexual and gender-based violence. Notably, the October 2012 Directive mandates the creation of a Committee on the Prioritisation and Selection of Situations and Cases, and a National Unit of Analysis and Context (*Unidad Nacional de Análisis y Contextos*, UNAC),[504] which was renamed in 2014 to Directorate of Analysis and Context (DINAC).[505] DINAC is an interdisciplinary team composed of analysts and experts in political matters, defence and security, drug trafficking and financing, and socio-economic matters, criminal investigators, and prosecutors. The unit was created to better systematise efforts between regional and national prosecutor offices,[506] to allow the development of more in-depth contextual analysis, and to focus on organised and widespread criminality. Within DINAC, there are at least seven specific working groups, one of which works specifically on sexual violence.[507]

The *Fiscalía*'s Justice and Peace Unit (which was renamed the Directorate of Transitional Justice in 2013) subsequently adopted a policy in January 2013 selecting five patterns of "macrocriminality" for priority action: forced disappearances, forced displacement, kidnapping, illegal recruitment, and gender-based violence.[508] These priority areas mirror the ICC's 2012 Interim Report, which had highlighted two of these as requiring specific attention. The Unit equally prioritised 16 so-called 'macro-investigations' against those most responsible of the demobilised paramilitary groups for these five sets of crimes.

[504] *Directiva 0001 por medio de la cual se adoptan unos criterios de priorización de situaciones y casos, y se crea un nuevo sistema de investigación penal y de gestión de aquéllos en la Fiscalía General de la Nación*, Directive 0001/2012, at VI. See also: Fiscalía General de la Nación, *Resolución 1810 por medio de la cual se crea la Unidad Naciolal de Análisis y Contexto* (4 October 2012); Fiscalía General de la Nación, *Resolución 1811 por medio de la cual se crea y reglamenta el Comité de Priorización de Situaciones y Cases en la Fiscalía General de la Nación* (4 October 2012).

[505] Fiscalía General de la Nación, *Decreto 016 de 2014 por el cual se modifica y define la estructura orgánica y funcional de la Fiscalía General de la Nación* (9 January 2014). The Decree also renamed the Justice and Peace Unit to Special Direction for Transitional Justice (*Dirección Especializada en Justicia Transicional*).

[506] Better harmonisation between regional and national prosecutor offices is an issue that many of my interviewees indicated as one of the main challenges facing accountability in Colombia. Policies drafted in Bogota often face obstacles in implementation at a local level.

[507] *Report on Preliminary Examination Activities 2013*, at para 143.

[508] *Plan de acción de casos a priorizar por la unidad nacional de fiscalías para la justicia y paz*, at para 2.2.. It adopted continuations of this strategy in 2014 and 2015: Fiscalía General de la Nación, *Continuacion plan de acción priorización unidad nacional de fiscalías para la justicia y paz año 2014* (January 2014); Fiscalía General de la Nación, *Plan de priorización 2015 de la Direccion de Fiscalía General de la Nación especializada de justicia transicional* (January 2015).

Selecting 'gender-based violence' as one type of macrocriminality is important as it may challenge the still prevalent idea that acts of sexual violence are merely isolated incidents unconnected to broader contexts of criminalisation. Further, bringing cases against senior leaders may "force[] legal practitioners to confront the common misconception that only physical perpetrators can be held accountable for sexual violence",[509] and as such contribute (over time) to challenging some of the gendered assumptions that inhibit investigations and prosecutions of sexual violence. In such a way, the legal and political internalisation process could lead to social internalisation.

At the same time, however, there is a risk that many acts of sexual violence, if reported by victims, will not be included within such cases. Prosecutors in Colombia indicated that most instances of sexual violence arrive at their desk as individual crimes, not connected to the broader criminality, and that many prosecutors fail to make the link between such cases.[510] Failure to link similar crimes to this broader context could lead to continued deprioritisation, regardless of their inclusion within prioritisation efforts, thus perpetuating impunity. For instance, in a 2014 case before the Bogotá JPL Tribunal, six prosecutors had been assigned to investigate five patterns of macrocriminality, one of which was gender-based violence, ascribed to various members of the FARC. Only one of the prosecutors, however, brought charges against the accused for sexual violence, despite evidence that other prosecutors in the team had equally identified cases of sexual violence within their investigation.[511] There appeared to be no clear rationale for this difference, given that the prosecutors had no response to the judges upon requests for clarification. In other words, it means a very significant impunity gap remains for any crimes of sexual violence that are not seen to fall within the patterns of macrocriminality. This is particularly problematic given the level of disconnect between policy making in Bogotá and implementation at a local level (where most investigations happen).[512]

Some efforts have been made to counter this potential impunity gap through establishing normative frameworks for ordinary justice (where sexual violence crimes often end up if they are excluded from the transitional process) drawing on these same international

[509] Kravetz (2017), at 751.

[510] Interviews with Colombian prosecutors (Bogotá and Medellín, September 2016), *on file with author*.

[511] Women's Link Worldwide, *Judicialización de la violencia sexual, específicamente del aborto forzado en el marco de jurisdicción de Justicia y Paz en Colombia* (15 February 2015). (Document on file with author)

[512] Interviews with Colombian prosecutors (Bogotá and Medellín, September 2016), *on file with author*; Interviews with Colombian civil society representatives (Bogotá, September 2016), *on file with author*.

standards, notably through constitutional jurisprudence supported by civil society activism. In 2008, the Constitutional Court issued a landmark decision on the rights of women forcibly displaced as a result of the armed conflict.[513] The decision, following up on its earlier declaration of the unconstitutionality of the situation of forced displacement in the country,[514] recognised for the first time the disproportionate impact of forced displacement on women and girls, and the high risks they face because of their gender, including sexual violence. It noted that sexual violence was widespread and systematic, and committed by all armed actors involved in the conflict. The decision highlighted the manifestly insufficient institutional response and criticised the absence of any protection mechanisms. Reiterating the government's constitutional and international legal obligations to combat this situation of generalised sexual violence, the Constitutional Court communicated 183 cases of sexual violence to the *Fiscalía General* for immediate follow-up and investigation.

In January 2015, the Constitutional Court followed up on Auto 092 with another important decision, which specifically addressed the failure of ongoing (transitional *and* ordinary) justice efforts to address sexual violence.[515] In its January 2015 decision, the court noted "with alarm" the continuing commission of acts of sexual violence by armed actors against displaced women, including psychological and physical torture, sexual abuse and harassment, enslavement, sexual exploitation and forced prostitution, forced pregnancy, forced abortion, and forced reproductive planning policies.[516] The court observed that the risk of re-victimisation was extremely high and that sexual violence by non-armed actors, in particular intimate partner violence, had risen because of this situation of generalised gender discrimination. This was further exacerbated by the extreme difficulties faced by women in reporting sexual violence, including distrust in the system and ability of state authorities to protect women and their families, high risks of retaliation, the continued presence of armed actors, and prevalent sociocultural factors such as shame and social stigma.[517] The court condemned the absence of a coherent, consistent, and unified system of information on the phenomenon, as well as the inadequate characterisation of violence rendering sexual violence

[513] Auto 092/2008.

[514] Corte Constitucional de Colombia, M.P.: Dr. Manuel José Cepeda Espinosa, Sentencia T-025/04 (22 January 2004).

[515] Auto 009/2015.

[516] Auto 009/2015, at 7-8.

[517] Auto 009/2015, at 30.

invisible.[518] In addition to the 183 cases of sexual violence from Auto 092/2008, on which it noted very limited progress, the court communicated a further 442 cases to the *Fiscalía General* for immediate follow-up and investigation. It also required better institutional cooperation among various government agencies involved in addressing sexual violence, spelled out in detail the necessary actions to be taken, and required all institutional responses to be in line with international standards (in particular the Rome Statute and subsidiary documents), relevant constitutional jurisprudence, and Law 1719 of 2014.[519] Together, the two decisions are emblematic of the Constitutional Court's commitment and central role in the fight against impunity for sexual violence in Colombia.

In the 2015 decision in particular, the Constitutional Court specifically uses the Rome Statute and its subsidiary documents as relevant normative criteria for assessing actions that have been taken (such as the adoption of Law 1719) and actions that still need to be taken (for instance on the implementation of this law). In assessing the government's due diligence obligation to investigate, prosecute, and punish crimes of sexual violence, the Court relies upon the Rome Statute's Rules of Procedure and Evidence to find the Colombian framework lacking. At the same time, it places this within a broader framework of human rights and international law obligations, such as Colombia's obligations under CEDAW and the Inter-American Convention of Belém do Pará.[520] It notes that, while Law 1719 consolidates many important international standards around the adjudication of sexual violence, there are also areas still to be developed through jurisprudence to make the Colombian framework fully in line with the Rome Statute. While Law 1719 allows for the classification of sexual violence as a crime against humanity through judicial determination ('*verdad judicial*'), it does not provide for specific measures to ensure the investigation or prosecution of these crimes as such. Similarly, relying upon the Rome Statute, the Constitutional Court stresses the need to focus on sexual violence not only when it is clearly committed "as part of the conflict" but equally where it is related to the conflict but not necessarily committed as part of the ongoing hostilities (such as where it is committed using the general situation of instability).[521] It thus

[518] Auto 009/2015, at 36-37.

[519] Auto 009/2015, at 130.

[520] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, or the '*Convencion de Belem do Para*', was adopted on 9 June 1994 in Belém do Pará, Brasil, at the twenty fourth regular session of the General Assembly to the Organization of American States. Organisation of American States, *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)* (9 June 1994).

[521] Auto 009/2015, at 77-78.

relies upon the Rome Statute and its subsidiary RPE and EoC to recommend specific institutional changes, and includes an extensive analysis of its provisions in a complementary annex.[522] In other words, the Colombian Constitutional Court specifically instrumentalises the Rome Statute's normative clout to trigger normative changes at a domestic level. Its decisions have, in turn, also formed an important basis for the ICC's assessment of developments in Colombia.

As mentioned, sexual violence had not been a particular priority area for the Office of the Prosecutor in Colombia until its 2012 Interim Report. While it had been highlighted in its 2011 preliminary examinations report as an issue of general interest, it was not until November 2012 that the Office specifically "encouraged" the Colombian authorities to prioritise sexual violence crimes in its transitional justice efforts.[523] Since this Interim Report, progress on sexual violence investigations and prosecutions has remained part of the Office of the Prosecutor's dialogue with Colombia, and there is some evidence to suggest Colombia has been responsive to these concerns, particularly where the ICC's pronouncements fortify Colombian constitutional jurisprudence. For instance, in February 2015, the Office of the Prosecutor expressed concern during its mission in Colombia over a lack of institutional coordination (thus reiterating the Constitutional Court's concerns expressed in its January 2015 decision). In response, Colombia swiftly announced the adoption of an inter-institutional agreement between seven institutions to improve institutional coordination on the investigation and prosecution of sexual violence.[524] In this instance, the ICC's reiteration of concerns raised by the Constitutional Court (which, in turn, had relied upon the ICC's earlier findings and the Rome Statute's normative standards) triggered an institutional response.

This process has been supported in various ways by national and international civil society organisations. Notably, in Auto 092/2008, the Constitutional Court invited civil society organisations to contribute to the effective implementation of its decision. A Working Group on Implementation was established, which now reports on the implementation of both Auto 092/2008 and Auto 009/2015. This *Mesa de Seguimiento de los Autos 092 de 2008 y*

[522] Auto 009/2015 - anexo complementario.

[523] *Situation in Colombia - Interim Report*, at para 219.

[524] *Report on Preliminary Examination Activities 2015*, at para 155; 'Nueva herramienta para el acceso a la justicia de las víctimas de violencia sexual', *Fiscalía General de la Nación* (27 February 2015), available at <http://www.fiscalia.gov.co/colombia/noticias/nueva-herramienta-para-el-acceso-a-la-justicia-de-las-victimas-de-violencia-sexual/>, accessed 18 April 2016.

009 de 2015 de la Corte Constitucional – Anexos reservados ('Mesa de Seguimiento') consists of thirteen civil society organisations working on victim's rights and women's access to justice, and is supported by UN Women. It is composed of the same organisations that have petitioned the ICC on the lack of accountability for sexual violence crimes in Colombia (see below); in this way, the national legal process provides input into the ICC's complementarity assessments and *vice versa*. Since 2009, the Working Group has submitted six reports to the Constitutional Court on the implementation of Auto 092/2008 and one on the implementation of Auto 009/2015.[525] These reports are a main source of information for the Constitutional Court (and the ICC[526]). In its 2015 decision, the Constitutional Court again requested the continued assistance of the *Mesa de Seguimiento* in providing the court with essential information and in ensuring adequate representation for victims of sexual violence in investigations and prosecutions.[527]

In addition to petitioning the Constitutional Court, civil society actors in Colombia have also actively used the platform of the ICC's preliminary examination to trigger interactions and interpretations specifically on sexual violence. In April 2015, the European Center for Constitutional and Human Rights (ECCHR), Collectivo Abogados Jose Alvear Restrepo (CCAJAR), and Sisma Mujer submitted an article 15 communication to the Office of the Prosecutor on justice for sexual violence, focusing in particular on the failure of the state to investigate sexual violence committed by state actors.[528] In November 2015, in the context of the yearly ICC Assembly of States Parties meeting, Sisma Mujer, together with the other organisations representing the *Mesa de Seguimiento*, submitted an additional report to

[525] Mesa de Seguimiento de Auto 092, *Primer informe de seguimiento al cumplimiento de la orden del Auto 092 referida al anexo reservado de 183 reportes de violencia sexual* (20 January 2009); Mesa de Seguimiento de Auto 092, *Tercer informe de seguimiento al auto 092 de 2008* (June 2010); Mesa de Seguimiento al Auto 092, *Cuarto informe de seguimiento al auto 092 de la Corte Constitucional* (May 2011); Mesa de seguimiento al Auto 092 *Quinto informe de seguimiento al Auto 092 de 2008 de la Corte Constitucional* (October 2013); Mesa de Seguimiento a los Autos 092 de 2008 y 009 de 2015, *Sexto informe de seguimiento al Auto 092 de 2008 y primer informe de seguimiento al Auto 009 de 2015 de la Corte Constitucional* (March 2016). The fourth, fifth and sixth reports have also been translated into English: Mesa de Seguimiento al Auto 092, *Fourth follow-up report to Auto 092 of the Colombian Constitutional Court* (May 2011); Mesa de Seguimiento al Auto 092, *Fifth follow-up report to Auto 092 of the Colombian Constitutional Court* (October 2013); Mesa de Seguimiento a los Autos 092 de 2008 y 009 de 2015, *Sixth Monitoring Report on Auto 092 and the first Monitoring Report on Auto 009 of the Constitutional Court* (March 2016).

[526] Interview with representative of the Office of the Prosecutor (October 2015), *on file with author*. The reports by the Mesa, in addition to the Constitutional Court's decisions, have been referred extensively in the Office of the Prosecutor's annual preliminary examination reports.

[527] Auto 009/2015, at 128.

[528] In addition, the communication aimed to hold the OTP accountable for its commitment regarding sexual and gender-based crimes and complementarity set out in its June 2014 Policy Paper. Interviews with several individuals involved in drafting the communication, November 2015 and January 2016, *on file with author*.

the Office of the Prosecutor highlighting the continuing extremely high levels of impunity for sexual violence in the country (which is discussed in more detail in the next section).[529] These reports, while contributing in some way to the Office of the Prosecutor's reporting on the situation, have not led to any substantial findings in relation to the preliminary examination. Most notably, while impunity rates for the cases sent to the *Fiscalía* by the Constitutional Court through its prioritisation efforts remain at approximately 95%, this has not led to the opening of an investigation by the Office of the Prosecutor, effectively removing the last available avenue of justice for these crimes. I will elaborate on this point in the conclusions of this chapter.

The Colombian Constitutional Court has remained an important actor in pushing further political commitment on accountability for sexual violence crimes. While Law 1448/2011 had ordered the *Fiscalía* to adopt a protocol on the investigation of sexual violence,[530] it was not until the Constitutional Court reiterated this obligation in Auto 009/2015 that any progress was made on this protocol. In its decision, the Court called upon the *Fiscalía* to comply with the principle of due diligence regarding the investigation, prosecution and punishment of sexual violence.[531] A draft of the protocol was first developed in June 2015 by the well-established women's rights organisation Sisma Mujer on behalf of the *Mesa de Seguimiento* of the Constitutional Court. This draft was then submitted to the *Fiscalía* for further development, which was done with the support from a UN women gender expert with extensive knowledge of international criminal law standards, including the Rome Statute.[532] Internalisation of these international standards into Colombian practice was an important objective of the protocol. The final document, adopted in June 2016,[533] is binding upon all officials within the *Fiscalía*. While there was some initial resistance particularly among older (male) members of the *Fiscalía*, a number of key individuals were critical

[529] Mesa de Seguimiento a los Autos 092 de 2008 y 009 de 2015, *La impunidad de la violencia sexual asociada al conflict armado en Colombia - Resumen ejecutivo del informe presentado a la Oficina de la Fiscalía de la Corte Penal Internacional* (November 2015).

[530] Article 38, *Ley 1448 de 2011* (10 June 2011).

[531] Auto 009/2015, at 58-84.

[532] Interview with Colombian prosecutor (Bogotá, September 2016), *on file with author*.

[533] *Resolución 1774 por medio de la cual adopta el Protocolo de investigación de violencia sexual y se establecen medidas para su implementación y evaluación*, Fiscalía General de la Nación de Colombia (14 June 2016); *Protocolo de investigación de violencia sexual - guía de buenas prácticas y lineamientos para la investigación penal y judicialización de delitos de violencia sexual* (14 June 2016).

within the *Fiscalía* to push the work forward.[534] The drafting of the protocol has been "an opportunity to generate and consolidate dialogue and discussion spaces with civil society and organizations representing victims and to define institutional public policies that address the phenomena that affects them".[535]

Due to the involvement of civil society and international experts, the protocol makes extensive reference to and builds upon many of the lessons learned at both an international and national level. For instance, one of the innovations of the protocol, building on IHL norms and interpretations, is the recognition that members of armed groups can also be victims of sexual violence. This had already arisen in a few cases in the context of JPL,[536] and has now been consolidated in the protocol. Similarly, the document has a long section addressing misconceptions around the investigation and prosecution of sexual violence, sets out best practices and lessons learned, integrates a psychosocial perspective within the investigative strategy, and provides guidelines for the prosecution of these crimes. It thus addresses (some of) the difficulties highlighted by the Constitutional Court in relation to Law 1719. With its emphasis on addressing misconceptions and gendered attitudes, the document in many ways aims at social internalisation beyond the legal and political internalisation that already took place through its adoption. The protocol also applies to sexual violence regardless of whether it is classified as an international crime or as an ordinary crime. This is important not only because it transfers some of the important lessons learned around sexual violence as international crimes to the processing and adjudication of ordinary crimes and therefore contributes to closing this gap. It is equally important exactly because most cases enter the system as ordinary cases of sexual violence.[537] An ongoing difficulty, however, will be the implementation of the protocol. It is a very long, detailed document, and in first pilot

[534] Interview with Colombian prosecutor (Bogotá, September 2016), *on file with author*; Interview with Colombian NGO representative (Bogotá, September 2016), *on file with author*.

[535] Fiscalía General de la Nación, quoted in Mesa de Seguimiento a los Autos 092 de 2008 y 009 de 2015, *Sixth Monitoring Report on Auto 092 and the first Monitoring Report on Auto 009 of the Constitutional Court*, at 81.

[536] In the 2015 Olimpo de Jesús Sánchez Caro case, the JPL tribunal held the accused accountable for forced abortions perpetrated upon female members of the armed group. *Olimpo de Jesús Sánchez Caro y otros*, Tribunal Superior de Medellín, Sala de Justicia y Paz, M.P.: María Consuelo Rincón Jaramillo, 'Sentencia', Radicación 110016000253200883621 (16 December 2015), at 1021-1067. Similarly, in the Arroyo Ojeda judgment, the JPL tribunal had indicated that, on the basis of the evidence, the Fiscalía should have charged the rape of a girl soldier by members of her own armed group. *José Higinio Arroyo Ojeda y otros*, Tribunal Superior de Medellín, Sala de Justicia y Paz, M.P.: María Consuelo Rincón Jaramillo, 'Sentencia', Radicación 110016000253200680068 (28 April 2016), at 567. See also: Kravetz (2017), at 743-744; Women's Link Worldwide, *Judicialización de la violencia sexual, específicamente del aborto forzado en el marco de jurisdicción de Justicia y Paz en Colombia*.

[537] Interview with Colombian prosecutor (Bogotá, September 2016), *on file with author*.

trainings on the protocol, it has become clear that it will take a lot of time and effort on the part of the *Fiscalía* to fully integrate the protocol into its practices when it challenges long-held beliefs by many prosecutors and investigators.[538]

4.3.3 *In sum*: Modelling national policies on ICC practice

Beyond the legislative internalisation described in the previous section, as this section has illustrated, another way in which the Rome Statute has become internalised or domesticated in Colombia has been through the adoption of policies and strategies. These policies sometimes responded directly to concerns expressed by the ICC, other times engaged with those (and other) concerns more indirectly. Again, women's rights and other civil society organisations played an important role as norm entrepreneurs, for instance in drafting proposals for the prioritisation policy and litigating before the Constitutional Court on the validity of certain strategic decisions made by the *Fiscalía* and the government. The specific focus on sexual violence by the ICC's Office of the Prosecutor also exerted at least some normative pressure on the national authorities to prioritise crimes of sexual violence and to put in place specific mechanisms and frameworks. This pressure has been fortified by important Constitutional Court jurisprudence, and strengthened a cross-institutional dialogue between different judicial institutions. As with the law reform and harmonisation efforts described earlier, we see the importance of norm interpretative interactions before different legal fora to trigger processes of internalisation. The Rome Statute has often been perceived both as a normative strength, and as an essential tool in reinforcing and facilitating this cross-institutional dialogue on accountability and justice for sexual violence crimes.

Interestingly, the developments described in this section show a high degree of mirroring or mimicking the ICC's practice. Beyond the Rome Statute as a normative guideline or standard to work with, the ICC's own policies and strategies were taken as examples to be replicated in national practices. This is most notable in the adoption of an almost identical focus of the revised JPL framework on "those most responsible" for "the most serious crimes", and the prioritisation of forced disappearances (including *falsos positivos*) and crimes of sexual and gender-based violence. Nonetheless, whereas the reliance upon the Rome Statute in legislative harmonisation efforts served to expand and broaden the capture capacity of Colombian criminal law, here we witness a restriction, and therefore a

[538] Interview with Colombian prosecutor (Bogotá, September 2016), *on file with author*.

potential complementarity gap. Individuals or acts that are deemed outside the scope of this prioritisation policy, while not officially deselected, are unlikely to ever be brought before a judge. In other words, while the reliance on international legal standards is important, the examples described here also call for a degree of caution. Indeed, as the next section will show, despite increasing efforts to include sexual violence crimes within these prioritisation efforts, impunity for these crimes continues to be widespread. Only few cases have been brought before the transitional justice framework, with even fewer chances of accountability for these crimes before the ordinary courts.

SECTION 4.4

USING INTERNATIONAL LEGAL NORMS TO EXPAND SEXUAL VIOLENCE ACCOUNTABILITY

Despite encouragements from the ICC and from the Colombian Constitutional Court, in addition to extensive lobbying by civil society, both JPL and the ordinary justice system have paid extremely limited attention to sexual violence. While some small progressive steps have been taken in a number of cases in recent years, in particularly within JPL, impunity remains a problem. Although to a more limited extent than in the DRC (discussed in the next chapter of this thesis), the Rome Statute has proved an important normative strength in several of these jurisprudential developments, suggesting a degree of judicial or jurisprudential internalisation. However as important as these developments are, they have not translated into an effective reduction of the impunity and accountability gaps for these crimes, which continue to be high. They constitute important first steps, but have left an impunity gap unaddressed by the Rome Statute's complementarity system.

4.4.1 Limited accountability for sexual violence within Justice and Peace Law

A JPL process involves two phases: an administrative and a judicial phase.[539] The administrative phase concentrates on the paramilitaries' demobilisation and the evaluation of basic qualifying criteria such as disarmament, renouncing criminal activities, surrendering proceeds from those activities, and cooperation with the investigative authorities. A list of so-called "postulated" persons (i.e. those that satisfy the basic eligibility criteria) is forwarded to the *Fiscalía* for preliminary investigation. Next, the demobilised paramilitaries must confirm their intention to submit to the JPL procedure, after which the prosecutor will receive their "*versión libre*" (free version). In this statement, paramilitaries must provide a "true and complete account" regarding "the circumstances of time, manner, and place in which they have participated in the criminal acts committed on occasion of their membership in these

[539] For a detailed description and schematic overview of the JPL process (in English), see Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court - An Inductive, Situation-based Approach* (Springer, 2010), at 11-24 & annex 14. See also Humanas & Lawyers Without Borders Canada, *Contributions of Justice and Peace decisions to women's rights in Colombia: A case study*, at 54-57.

[irregular armed] groups" (article 17(2)). These statements are not open to the public, but recognised victims may attend and through their legal representative participate in the hearing.

Following the free version, the prosecutor will evaluate the information received and conduct further investigations if necessary to verify the beneficiary's account. This will lead to the determination of charges (and possibly the addition of further charges if the additional investigations uncover these). During another hearing, the defendant is confronted with these charges, and following his or her "free, voluntary and spontaneous" confession, a Justice and Peace Chamber of the Higher Tribunals (*Sala de Justicia y Paz de los Tribunales Superiores de Distrito Judicial*) will determine the legality of those charges. Once confirmed, a reparations hearing may be held within 5 days, and a sentencing hearing within 10 days. In its decision, the JPL Chamber will first pronounce a sentence for the crimes charged under ordinary law, before applying the JPL framework and issuing a reduced sentence. Upon the completion of this sentence, the demobilised paramilitary remains on parole for half the time of the reduced sentence.

JPL has been heavily criticised for various reasons and has been dubbed a "pseudo-amnesty".[540] It has been particularly difficult to include sexual violence within its ambit. By September 2015, only 135 of 57,883 confessed crimes were for sexual violence (representing only 0.23%).[541] One particular difficulty in including sexual violence within the scope of proceedings under JPL has been the fact that investigations and prosecutions of demobilised paramilitaries start from the *versiones libres* they give at the time of their confession. With the stigma associated with sexual violence, it remains shameful to admit to such crimes. In addition, the (gendered) assumption that sexual violence crimes are not strategic but incidental remains pervasive. This means that they are both excluded from paramilitaries' confessions, who do not see sexual violence as an integral part of their group's combat strategy for which they are subjected to the JPL process, and are deprioritised by prosecutors who fail to recognise the nature of sexual violence and its links to the conflict.[542]

Nonetheless, some important decisions have recently been issued under JPL that address sexual violence and pave the way for greater incorporation of such crimes within the

[540] Easterday (2015), at 75-76.

[541] Dirección de Fiscalía Nacional Especializada de Justicia Transicional, *Estadisticas* (September 2015).

[542] Humanas & Lawyers Without Borders Canada, *Contributions of Justice and Peace decisions to women's rights in Colombia: A case study*, at 56.

Colombian transitional justice process. The decisions illustrate the important role played by the courts (i.e. jurisprudential internalisation) in triggering some degree of social internalisation. Notably, in 2014, the Supreme Court confirmed that failure to admit to sexual violence crimes could exclude a person from JPL's benefits, thus setting an important precedent reinforcing accountability for these crimes.[543] During his free version in 2011, Marco Tulio Pérez Guzmán, alias 'El Oso', having been presented by the prosecution with nine cases of sexual and gender-based violence, denied responsibility for these acts. His case thus proceeded under JPL on the other charges, with the sexual violence charges remanded to the ordinary courts for prosecution. However, he subsequently accepted responsibility for eight of the nine charges of sexual violence during a hearing in 2013. Rather than reincorporate the charges into the case before the JPL tribunal, the prosecution proceeded to request the termination of the JPL proceedings in full and his exclusion from its benefits for his failure to provide a full and complete confession, which the court approved both in first[544] and second instance.[545] He thus faces trial before the ordinary courts, with a maximum sentence of 20 years, as opposed to the reduced sentence under JPL. The ordinary courts, however, generally struggle even more than the JPL tribunals to advance cases within a reasonable amount of time, and his case has not yet been completed at the time of writing.

Similarly, in the case against Edison Giraldo Paniagua (2012), the *Fiscalía* had not included alleged sexual harms within the scope of the charges regarding a female victim, even though there was evidence that she had been sexually abused. The chamber noted that the deceased victim was found with her clothes removed, and that her underwear and bra had been cut open.[546] For the chamber, this indicated that the woman might have been sexually

[543] Kravetz (2017), at 728.

[544] *Marcos Tulio Pérez Guzmán alias 'El Oso'*, Tribunal Superior del Districto Judicial de Barranquilla, Sala de Conocimiento de Justicia y Paz, M.P.: Dr. Gustavo Aurelio Roa Avendaño, 'Sentencia', Radicación 82905 (9 September 2014).

[545] *Marcos Tulio Pérez Guzmán alias 'El Oso'*, Corte Suprema de Justicia, Sala de Casación Penal, M.P.: Luis Guillermo Salaszar Otero, 'Decisión Segunda Instancia', Radicación 44692 (4 March 2015).

[546] A 2008 statement in the case described that the body of Alba Lucy Alzate Ceballos as follows: "*la ropa interior de la victima se encontraba superpuesta, los interiors presentaban corte lateral y sobre vagina, mientras que el brasier tenia corte frontal*". *Edison Giraldo Paniagua*, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, M.P.: Uldi Teresa Jiménez López, 'Sentencia', Radicación 2006-82222 (30 July 2012), at para 148.

abused before being killed. The chamber ordered the *Fiscalía* to fully investigate the matter and bring additional charges.[547]

Further, the cases against Arnibio Triana and others (2014)[548] and against Orlando Villa Zapata and others (2015)[549] advance the understanding in Colombian law around sexual violence, and do so relying upon the recent Law 1719 of 2014 (and therefore indirectly on the Rome Statute and other international norms). Notably, both decisions treat sexual violence as part of a broader context of gender-based violence, committed primarily against women, but also against men and boys. In fact, the 2014 decision specifically directs the *Unidad de Justicia Transicional* (Transitional Justice Unit, formerly JPL Unit) of the *Fiscalía* to conduct further research and investigations into the latter.[550] The decisions also include a detailed evaluation of the applicable legal framework regarding sexual violence, noting that while Colombia is party to many international conventions and treaties in this regard, it was not until the entry into force of Law 1719 that those international standards became harmonised and directly applicable in national law.[551] As mentioned earlier, these judicial references and incorporations have been consolidated into practical guidelines through the adoption of the June 2016 protocol on the investigation and prosecution of sexual violence.

4.4.2 The Rome Statute broadens scope of accountability

In its 2016 report on preliminary examinations, the Office of the Prosecutor indicates that it has identified at least five potential cases involving responsibility of a number of specific senior leaders for *falsos positivos*, suggesting that it is particularly interested to see results at a national level in relation to these *specific* cases from a complementarity perspective. This also suggests that interactions with Colombian authorities may be particularly directed at encouraging national processes to continue in these specific cases. No similar effort was, however, made, at least not publicly in these reports, regarding sexual violence cases beyond

[547] *Edison Giraldo Paniagua*, Radicación 2006-82222, at 148-151. In October 2012, this was confirmed upon appeal. *Edison Giraldo Paniagua*, Corte Suprema de Justicia, Sala de Casación Penal, M.P.: José Luis Barceló Camacho, 'Decisión Segunda Instancia', Radicación 39957 (24 October 2012).

[548] *Arnubio Triana Machecha y otros*, Tribunal Superior de Bogotá, Sala de Justicia y Paz, M.P.: Eduardo Castellanos Roso, 'Sentencia', Radicación 2014-00058 (16 December 2014).

[549] *Orlando Villa Zapata y otros*, Radicación 2008-83612.

[550] *Arnubio Triana Machecha y otros*, Radicación 2014-00058, at paras 980, 983, 988-991.

[551] *Orlando Villa Zapata y otros*, Radicación 2008-83612, at paras 718-742; *Arnubio Triana Machecha y otros*, Radicación 2014-00058, at paras 962, 975, 980-985.

general references to difficulties of securing accountability for these crimes at a national level.[552] Nonetheless, as already referred to earlier, the Rome Statute - and to a limited extent the ICC's preliminary examination - has been an important tool at a national level, particularly in relation to sexual violence crimes. It has been a tool of advocacy, a tool of law reform, and a tool of security, particularly for the judiciary in warding off political interference in judicial processes.

At the same time, Colombian courts have also referred to the ICC to demonstrate their own capacity to deliver justice. For instance, the Criminal Cassation Chamber of the Supreme Court, issuing its decision in the Salvador Arana Sus case in 2009 (one of the *parapolítica* cases), under the header 'Intervention by the ICC', noted: "This decision demonstrates the possibilities of the Colombian justice system to investigate and punish crimes that offend humanity".[553] The decision, convicting Arana Sus of forced displacement, aggravated homicide, and illegal involvement with armed groups, also directed the prosecutor to conduct new investigations regarding his responsibility for crimes against humanity committed by the armed group with which he was associated. At the same time, the Court included a warning to the Colombian authorities to avoid trying to influence its findings. It noted that a copy of the decision would be sent to the ICC so that "in the event any authority seeks impunity for the crimes tried in the present case", the ICC "can proceed to investigate them, as that would show that there are institutions in Colombia that obstruct the effective administration of justice".[554] Furthermore, since August 2009, the Supreme Court has declined to extradite paramilitary leaders for drug trafficking charges to the US if they are subject to ongoing procedures under JPL, as this would violate victims' rights to truth, justice, and reparations, and would frustrate transitional justice efforts under JPL.[555] The court noted that:

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[552] Office of the Prosecutor, *Report on Preliminary Examination Activities 2016* (14 November 2016), at para 242.

[553] *Salvador Arana Sus*, Corte Supreme de Justicia, Sala de Casacion Penal, 'Sentencia', Proceso No. 32672 (3 December 2009), at 112. See also the case of Rito Alejo del Río Rojas (2009), where the court stated that the internal legal order must "avoid at all costs impunity for the crimes allegedly committed and, thereby, to demonstrate to the international community that intervention by the international criminal justice system is not necessary since Colombia is capable of trying those responsible for such crimes and imposing the criminal sanctions determined by national criminal law for such crimes". *Rito Alejo del Río Rojas*, Corte Supreme de Justicia, Sala de Casacion Penal, M.P.: Yesid Ramírez Bastidas, 'Sentencia', Revisión No. 30510 (11 March 2009), at 35-36. Translation in: Reed-Hurtado (2015), at 186-187.

[554] *Salvador Arana Sus*, Proceso No. 32672, at 112. See also: Alejandro Chehtman, 'Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia', 49 *Stanford Journal of International Law* (2013), at 325; Reed-Hurtado (2015), at 186-187.

[555] Chehtman (2011), at 23.

> "*... to give prevalence to the national criminal justice system in these matters shields the Colombian State from the possibility of intervention by the International Criminal Court. Or, put differently: allowing the extradition of a Colombian national ... for the crime of drug trafficking, with full knowledge that this same person must also account for the most serious crimes against humanity constitutes a form of impunity which the [ICC] repudiates and which authorises it to intervene ...*"[556]

In a political climate sometimes hostile to accountability, particularly in the *parapolítica* cases, the existence of the ICC – and the threat of its possible intervention – acts as a backstop for the courts in insisting on investigations and prosecutions.[557]

The ICC and the Rome Statute have also featured in JPL jurisprudence in the general discussions on the state's obligations in the fight against impunity, and the development of international criminal law. For instance, in the 2011 decision against Edgar Ignacio Fierro Flores alias 'Don Antonio', the Chamber determined that Colombia has a primary obligation to punish international crimes, in particular war crimes, crimes against humanity, and genocide.[558] Other chambers have similarly reiterated the principle of complementarity in this respect.[559] Similarly, in its *amicus curiae* filing in a case before the Medellín JPL Tribunal, Women's Link Worldwide strongly reiterated the importance of the Tribunal exercising its jurisdiction over acts of forced abortion committed within armed groups *as war crimes* by recalling that otherwise the ICC would retain jurisdiction under the principle of complementarity.[560]

JPL chambers have also relied upon the Rome Statute to address *lacunae* in Colombian law. For instance, as already mentioned, it has been used to address the fact that Colombian law does not include a definition of crimes against humanity, with some

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[556] *Luis Édgar Medina Flórez*, Corte Suprema de Justicia, Sala de Casación Penal, M.P.: Yesid Ramírez Bastidas, 'Concepto de Extradición', Proceso No. 30451 (19 August 2009), at 34. See also: Chehtman (2011), at 23.

[557] Lyons and Reed-Hurtado (2010), at 5; Saxon (2015), at 139, 143-145.

[558] *Edgar Ignacio Fierro Flores*, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, M.P.: Léster María González Romero, 'Sentencia', Radicación 200681366 (7 December 2011), at paras 60, 71.

[559] *José Ruben Peña Tobón, Wilmer Morelo Castro, y José Manuel Hernández Calderas*, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, M.P.: Léster María González Romero, 'Sentencia', Radicaciónes 2008-83194 & 2007-83070 (1 December 2011), at para 113.

[560] *Elda Neyis Mosequra García María alias 'Karina' y otros*, Tribunal Superior de Medellín, Sala de Justicia y Paz, M.P.: Juan Guillermo Cárdenas Gómez, 'Escrito de intervención (amicus curiae) de Women's Link Worldwide respecto del patrón de violencia basada en género', Radicado 11-001-60-00253-2008-83435 (22 February 2016), at 27-28.

chambers recalling the full list of crimes as in the Rome Statute.[561] In such instances, the Rome Statute is used as a way of clarifying the specific context within which crimes against humanity or war crimes are committed, and bringing national criminal law in line with those standards.[562] However, chambers equally reiterated the Constitutional Court's decision on Law 742 that nothing in the Rome Statute changes domestic legislation.[563] The emphasis has remained on the quality of domestic legislation, using the Rome Statute merely as confirmation of the adoption of certain amendments or the codification in national law of specific crimes, such as that of child recruitment,[564] or to confirm that acts of sexual violence can be charged as both war crimes and crimes against humanity jointly.[565] As the chamber recognised in Orlando Villa Zapata and others (2015): "[The Rome Statute] has also become *a reference* for internal law in many countries, including Colombia, which recognises the Statute by virtue of Law 742 of 2002".[566] This reliance on the Rome Statute has not, however, led to the same type of expansive synergies in case law as it has in the DRC (discussed in the next chapter of this thesis). Generally, as we would perhaps expect, courts have relied upon domestic case law, and domestic legislation, and use international jurisprudence as support, rather than primary legal authority for their rulings.

In delineating the sexual violence crimes charged, the chamber in the case against Arnubio Triana and others (2014) provides a definition of rape (thus going beyond Law

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[561] *Edgar Ignacio Fierro Flores*, Radicación 200681366, at para 65; *José Ruben Peña Tobón, Wilmer Morelo Castro, y José Manuel Hernández Calderas*, Radicaciónes 2008-83194 & 2007-83070, at para 71; *Arnubio Triana Machecha y otros*, Radicación 2014-00058, at para 869-870, 874; *Luís Eduardo Cifuentes Galindo y otros*, Tribunal Superior de Bogotá, Sala de Justicia y Paz, M.P.: Eduardo Castellanos Roso, 'Sentencia', Radicación 2014-00019 (1 September 2014), at para 1057-1058; *Orlando Villa Zapata y otros*, Radicación 2008-83612, at 394-396.

[562] In Gutierrez (2009), the chamber held: "… to clarify the atrocity crimes committed against the civilian population by illegal armed groups, in the context of crimes against humanity … legal practitioners must have recourse to the Rome Statute of the ICC to determine their proper context, concretely, to article 7, in accordance with those national norms in the Penal Code that prohibit such acts" (Author's translation). *Gian Carlo Gutiérrez Suárez*, Corte Supreme de Justicia, Sala de Casación Penal, M.P.: Sigifredo Espinosa Pérez, 'Sentencia', Proceso No. 32022 (21 September 2009), at 213.

[563] See, *e.g.*, *Arnubio Triana Machecha y otros*, Radicación 2014-00058, at 875.

[564] *Edgar Ignacio Fierro Flores*, Radicación 200681366, at para 236, 671; *Salvatore Mancuso Gómez y otros*, 11 011 22 52 000 2014 00027, at para 1251; *Ramón María Isaza Arango y otros*, Tribunal Superior de Bogotá, Sala de Justicia y Paz, M.P.: Eduardo Castellanos Roso, 'Sentencia', Radicación 2007-82855 (29 May 2014), at para 908; *Ramiro Vanoy Murillo alias 'Cuco Vanoy'*, Tribunal Superior de Medellín, Sala de Justicia y Paz, M.P.: María Consuelo Rincón Jaramillo, 'Sentencia', Radicacion 2006-80018 (2 February 2015), at p 109, 370, 1341, 1344-1345.

[565] *Edgar Ignacio Fierro Flores*, Radicación 200681366, at para 70; *Ramiro Vanoy Murillo alias 'Cuco Vanoy'*, Radicacion 2006-80018, at 1273; *Orlando Villa Zapata y otros*, Radicación 2008-83612, at paras 569-574, 704-705.

[566] *Orlando Villa Zapata y otros*, Radicación 2008-83612, at para 707. (translation by author)

1719) using international legal standards: "The rapes resulted in the invasion of the bodies of the women, by the penetration with sexual organs or other parts of the body of the perpetrator. The invasion, in all cases of 'acceso carnal', was perpetrated by force, threat of murder and/or detention."[567] The 2015 decision in Zapata and others is also the only decision (at least of those analysed) in which the chamber specifically notes that the issue of sexual violence in Colombia is under consideration by the ICC.[568] In both, the chambers considered the contextual elements of crimes, such as the generalised situation of gender discrimination and systematic gender inequality in Colombia, and the violent (armed) context in which these crimes are committed, as determinative for the categorisation of these crimes not only as war crimes and crimes against humanity, but specifically as acts of feminicide/femicide.

In December 2015, the Medellín Justice and Peace Tribunal issued an important decision determining forced abortions committed against female members of the ERG (another, smaller, guerrilla group) either as the crime of "abortion without consent" (*aborto sin consentimiento*) or "forced abortion against protected persons" within the scope of IHL (*aborto forzado en persona protegida*).[569] The difference between the two charges for the Tribunal rested on the victim's age – minors, who in the Tribunal's eyes did not voluntary become members of the group, remained protected persons under IHL. Somewhat strangely, however, the Tribunal also determined that these same minors, upon becoming of age, lost those protections because at that point they voluntary decided to remain part of the group. The decision relies largely upon international norms and standards, and makes direct reference to the Rome Statute's Rules of Procedure and Evidence around sexual violence (Rule 70 and 71). It was also one of the first decisions in which the Tribunal used the 2014 Sexual Violence Law (Ley 1719), discussed earlier in this chapter. In this instance, the Rome Statute was used as normative reference for a crime going beyond those included in the Rome Statute.

The move towards addressing *lacunae* through international legal documents may be in part explained by the direction given in this regard by the Constitutional Court, as discussed in the previous section. However, in contrast to the detailed analysis on the Rome

[567] *Arnubio Triana Machecha y otros*, Radicación 2014-00058, at para 975.

[568] *Orlando Villa Zapata y otros*, Radicación 2008-83612, at paras 775, 777, 780.

[569] *Olimpo de Jesús Sánchez Caro y otros*, Tribunal Superior de Medellín, Sala de Justicia y Paz, M.P.: María Consuelo Rincón Jaramillo, 'Sentencia', Radicación 11001600025320088362l (16 December 2015). See also, more generally: Women's Link Worldwide, *Judicialización de la violencia sexual, específicamente del aborto forzado en el marco de jurisdicción de Justicia y Paz en Colombia*.

Statute's provisions by the Constitutional Court, where the JPL chambers refer to provisions in the Rome Statute, particularly in earlier decisions, often they cite not to the Statute itself, but to the (limited) academic work on the ICC (and on ICL more broadly) currently available in Spanish.[570] For instance, while relying on the confirmation of charges decision in the Lubanga case regarding the definition of a non-international armed conflict, the Supreme Court's Criminal Cassation Chamber in the case of Gian Carlo Gutierrez does not cite the ICC's decision, but footnotes a book by Héctor Olásolo and Ana Isabel Pérez Cepeda.[571] While Reed-Hurtado speaks of a "bombastic use of ICL with very little legal purpose",[572] such instances demonstrate a willingness and openness among the courts to advance Colombian law using international standards. Little by little, this may contribute to the creation of a body of case law through which Colombian standards are modified and adapted, ultimately leading to more transformative judicial interpretations. The reliance on academic works as opposed to Rome Statute documents in and of itself is not necessarily a problem, but suggests more training may be needed on international jurisprudence, and underlines the need for the ICC to make available in Spanish not only its key documents, but also its case law, policies, and strategies.

Nonetheless, in the past 2-3 years, Colombian courts are increasingly using international jurisprudence in sexual violence cases, with detailed references to and evaluations of the case law.[573] This reliance on international jurisprudence has at times set important precedents by tackling underlying gendered assumptions. For instance, in the case of *Niño Balaguera and another* (2014), a case before the ordinary justice system, the first instance court had determined that acts of sexual violence against one victim were not part of the general context of the armed conflict, and were committed out of personal motivations of the accused. The victim had previously had a relationship with one of the accused. On appeal

[570] According to one of my interviewees, the difference between the Constitutional Court's extensive reference to and knowledge of international legal norms compared to other judges is, in part, because the Constitutional Court is a very strong court *in general*; it has a highly competitive selection process, and only the best lawyers are selected, many of whom have experience studying abroad and/or have had prior exposure to international legal standards. Interview with Colombian civil society representative (Bogotá, September 2016), *on file with author*.

[571] *Gian Carlo Gutiérrez Suárez*, Proceso No. 32022, at 185.

[572] Reed-Hurtado (2015), at 196.

[573] Global Study on the Implementation of United Nations Security Council resolution 1325, *Preventing Conflict, Transforming Justice, Securing the Peace* (October 2015), at 105; Daniela Kravetz, 'Recent developments in Colombian jurisprudence on conflict-related sexual violence', *IntlLawGrrls* (15 April 2015), available at <http://ilg2.org/2015/04/15/recent-developments-in-colombian-jurisprudence-on-conflict-related-sexual-violence/>, accessed 8 November 2015.

of the civil parties, alleging a misapplication of the Colombian penal code on the basis of the ICC's Rules of Procedure and Evidence, the appeals court agreed that the acts were committed against a protected person under IHL (i.e. as a war crime), and increased the two accused persons' sentences to 24 and 20 years imprisonment, respectively.[574] The decision includes a detailed examination of the irrelevance of consent and the prohibition to introduce evidence of prior sexual conduct into evidence at the ICTY, ICTR, and the ICC.[575] It finds that those same rules are applicable in the context of Colombia's armed conflict, particularly in light of Law 1719. Accordingly, it annulled the order from the first instance court to the *Fiscalía* to charge the acts as ordinary crimes.[576]

Other decisions have also made explicit reference to the Rome Statute's procedural regulations, often at the recommendation of either the lawyers for the civil parties or civil society organisations. For instance, in the case against Orlando Villa Zapata and others (2015), the court held that the Rome Statute opened possibilities of incorporating international guidelines regarding rules of procedure and evidence in relation to sexual violence, regarding the protection of victims and witnesses, regarding reparations, and in relation to the incorporation of a non-discrimination perspective.[577] These regulations and standards were transplanted into the Colombian legal framework through Law 1719 of 2014. In accordance with those standards, the chamber found that the context in which the acts of sexual violence were committed (e.g. accompanied by the threat of force or torture) rendered any question of consent on the part of the victims irrelevant and impossible.[578] The legislative internalisation of the Rome Statute led to judicial internalisation. Nonetheless, the number of cases addressing sexual violence remains limited. There is some hope this may be remedied through the new transitional justice mechanism to be established following peace negotiations with the FARC-EP, an issue to which this chapter turns next.

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[574] *César Niño Balaguera y otro*, Corte Suprema de Justicia, Sala de Casación Penal, M.P.: Fernando Alberto Castro Caballero, Radicación No. 39392 (12 November 2014), at 73.

[575] *César Niño Balaguera y otro*, Radicación No. 39392, at 10, 42-44, 57.

[576] *César Niño Balaguera y otro*, Radicación No. 39392, at 74.

[577] *Orlando Villa Zapata y otros*, Radicación 2008-83612, at para 708.

[578] *Orlando Villa Zapata y otros*, Radicación 2008-83612, at para 897, 934-935.

4.4.3 Greater accountability in peace negotiations with the FARC-EP[579]

Following several failed attempts over the past 20 years, in November 2012, the government of Colombia renewed the peace negotiations with the FARC-EP. The peace negotiations progressed with a six point agenda: rural reforms, political participation, illicit drugs, victims, ending the conflict, and the implementation of the agreement.[580] Having announced separate draft agreements on each of these items over the next four years, on 26 September 2016, to great fanfare, the FARC-EP and the Colombian government formally signed a peace agreement during a widely televised signing ceremony in Cartagena.[581] Barely one week later, however, on 2 October 2016, the Colombian people narrowly rejected the deal in a referendum with 50.21% of the people voting against (however, with a 63% abstention rate, most Colombians did not vote).[582] Some of the concerns raised included dissatisfaction with leniency for FARC-EP members (e.g. allowing for their political participation and very low prison sentences, if at all), concerns around the direct effect of IHL implying a back-door substitution of the Constitution, and what conservatives and Evangelical churches saw as a dangerous "gender theory" attacking traditional values.[583]

The FARC-EP and the government went back to the negotiating table, and in a "broad national dialogue" sought input from a range of political, religious, and social leaders, victims' organisations, women's groups, and others to address concerns of no voters and still ensure an end to the conflict.[584] A revised peace agreement, amending 56 of the 57 themes

[579] Following four years of intense negotiations, a peace agreement between the FARC-EP and the Colombian government was signed in 2016, ending the conflict and putting in place a number of transitional justice mechanisms. The situation in Colombia regarding the implementation of this peace agreement evidently still changes every day. Developments have been taken into account up to and including 4 April 2017, when Colombia adopted a comprehensive piece of legislation activating the peace agreement.

[580] Alsema 'Colombia's 2012-2016 peace talks - Fact sheet' (2016).

[581] *Acuerdo Final para la terminación del conflicto y la construcción de una paz estable y duradera*, República de Colombia (24 August 2016).

[582] 'Boletín Nacional 53 - Preconteo Plebiscito', *Registraduria de Colombia* (2 October 2016), available at <http://plebiscito.registraduria.gov.co/99PL/DPLZZZZZZZZZZZZZZZZZ_L1.htm>, accessed 18 January 2016; Huneeus and Urueña (2016), at 161.

[583] Huneeus and Urueña (2016), at 161. For more on the alleged "gender theory" and its impact on the failure of the initial agreement see Lina M. Céspedes-Báez, 'Gender Panic and the Failure of a Peace Agreement', 110 *AJIL Unbound* (2016).

[584] Virginia M. Bouvier, 'Revised Colombian Peace Accord Released Today, Available Here', *Colombia Calls* (14 November 2016), available at <https://vbouvier.wordpress.com/2016/11/14/revised-colombian-peace-accord-released-today-available-here/>, accessed 18 January 2017.

addressed by the two parties,[585] was published a mere two months later; this time, no referendum but merely a vote in Congress was used to legitimise the agreement. The new agreement was signed in a much more sober ceremony in Bogotá on 24 November 2016.[586] While a lot can and should be said about this peace negotiation and the peace agreement (indeed an entire thesis could be written just on that process), this section will only canvass the surface. It seeks to highlight a number of important issues in both the dynamics of the negotiations and the substance of negotiated agreements with a particular focus on accountability for sexual violence and the normative relevance of the ICC and its Rome Statute.

One of the main criticisms against JPL had been that it focused almost entirely on crimes committed by paramilitaries, excluded crimes committed by state actors, and granted the Colombian Congress powers to intervene in the Attorney General's investigations and prosecutions. In the negotiations between the government and the FARC-EP, this premise changed, and accountability of all potential perpetrators, including state actors, gradually assumed a more central focus. Further, in an interview with CNN in 2012, President Santos confirmed that the negotiations were taking place "in the shadow of the ICC", and noted that he could not give amnesties to members of the FARC-EP because of Colombia's obligations under the Rome Statute.[587] Significantly, whereas Santos' first address to the UN General Assembly on the negotiations with the FARC-EP in 2013 did not once mention accountability,[588] his 2015 address prominently features references to the fight against impunity and accountability.[589] Several actors, including the ICC, had also expressed concern about the diminishing importance that appeared to be given to criminal (and punitive) justice, thus firmly placing the question of accountability back at the heart of the debate. For instance, in a speech in May 2015, Deputy Prosecutor James Stewart reiterated the Office's views on the non-compatibility of suspension of sentences with Colombia's obligations in the

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[585] Juan Manuel Santos, 'Alocución del Presidente Juan Manuel Santos sobre nuevo acuerdo de paz', *Presidencia de la República* (12 November 2016), available at <http://es.presidencia.gov.co/discursos/161112-Alocucion-del-Presidente-Juan-Manuel-Santos-sobre-nuevo-acuerdo-de-paz>, accessed 18 January 2017.

[586] *Acuerdo Final para la terminación del conflicto y la construcción de una paz estable y duradera [revised]*, República de Colombia (24 November 2016).

[587] Kastner (2015), at 82-83. (Referencing an Amanpour interview with Santos, 28 September 2012)

[588] Government of Colombia, *Statement by the President of the Republic of Colombia, Juan Manuel Santos, before the General Assembly of the United Nations in its 68th session* (24 September 2013).

[589] Government of Colombia, *Palabras del Presidente de la República de Colombia, Juan Manuel Santos, ante la Asamblea General de la Organización de la Naciones Unidad en el 70 periodo de sesiones ordinarias* (29 September 2015).

Rome Statute.[590] His speech was widely distributed in both English and Spanish. The Inter-American Commission's report similarly noted the importance for any peace agreement with the FARC-EP to deal adequately with human rights violations, including through the prosecution and punishment of those responsible and according reparations to victims.[591]

Because of this central place given to accountability within the peace negotiations, an important part of the peace agreement addresses how to deal with the responsibility of armed actors, including both FARC-EP and state actors, for crimes committed in the context of the conflict. Chapter 5 of the peace deal – the Agreement on Victims – provides for the establishment of a Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, referred to here by its Spanish acronym 'JEP'),[592] which accords criminal justice and accountability a central place within the transitional justice framework to be established.[593] Notably, the Agreement on Victims provides that crimes against humanity, acts of genocide, and war crimes committed "in a systematic manner" must be investigated and prosecuted, and as such are not eligible for amnesties or pardons (which only apply to a limited number of "political crimes").[594] War crimes that are *not* categorised as "fundamental violations of IHL", however, are eligible for less stringent legal treatment,[595] thus leaving the door ajar to a restrictive interpretation of which acts are considered "fundamental violations". As discussed below, however, sexual violence crimes have been specifically designated as not eligible for amnesties.

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[590] James Stewart, *Transitional Justice in Colombia and the Role of the International Criminal Court, speech by Deputy Prosecutor James Stewart* (Office of the Prosecutor, 2015).

[591] *Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia*, OEA/Ser.L/V/II. Doc 49/13.

[592] In September 2015, the government and the FARC-EP first announced an initial Agreement on Victims, which included a range of provisions on the establishment of JEP and its role within the integral system of truth, justice, reparations and no-repetition. The draft agreement was subsequently published in December 2015. Alto Comisionado para la Paz de Colombia, *Acuerdo sobre las Víctimas del Conflicto: Sistema Integral de Verdad, Justicia, Reparación y No Repetición, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos* (15 December 2015). Several adjustments were made to this agreement following the rejection of the peace deal in October 2016. *Nuevo Acuerdo Final* (24 November 2016).

[593] The FARC-EP, as a guerrilla group fighting for the overthrow the Colombian state, refused to be adjudicated before existing Colombian courts, which they perceived as "the enemy's courts". They were equally weary of being sent to The Hague to be prosecuted by the ICC. A compromise was thus reached whereby an entirely new justice system, embodied by JEP, would be established in which both the FARC-EP and the Colombian government through the adoption of this agreement and subsequent frameworks would have a say in its configuration.

[594] *Nuevo Acuerdo Final* (24 November 2016), paras 25, 39-40.

[595] Nelson Camilo Sanchez Leon, 'Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?', 110 *AJIL Unbound* (2016), at 173.

This new justice system created by the Agreement on Victims and administered through JEP essentially revolves around the granting of amnesty. It involves an extensive process and a number of special divisions and chambers.[596] Only those crimes for which no amnesty or pardon can be granted will be investigated and prosecuted in full. As mentioned, international crimes, which are defined specifically in accordance with the relevant provisions of the Rome Statute, are not eligible for amnesties. Special attention will be paid to a number of particularly serious crimes such as grave deprivations of liberty, extrajudicial killings, forced disappearance, rape and other forms of sexual violence, abductions of minors, forced displacement and the conscription of children into armed groups.[597] Several of these are equally priorities for the ICC. On 30 December 2016, the Colombian congress took the first step towards the establishment of this extensive new justice system by adopting a new Amnesty Law, which further specifies the list of crimes eligible for amnesties and pardons.[598] Subsequently, in April 2017, it adopted Legislative Act 01 establishing the Integral System of Truth, Justice, Reparation, and Non-Repetition (hereinafter, 'El Systemo Law').[599]

This special justice process administered through JEP can essentially result in one of three scenarios. First, those who did not contribute to the truth and reconciliation process (i.e. did not confess) and are convicted by JEP would face prison sentences of between 15 and 20 years. Second, those who accept their responsibility but do so belatedly (e.g. after they are confronted with additional crimes that were not part of their confessions) would receive between five and eight years imprisonment. Third, those who confess their crimes in full and contribute to truth and reconciliation processes would receive specific benefits, such as being able to serve their sentence in alternative locations (known as *Zonas Veredal Transitoria de*

[596] The system involves creating a Truth Chamber (*Sala de reconocimiento de verdad, de responsabilidad y de determinación de los hechos y conductas*), a Tribunal for Peace (*El Tribunala Para la Paz*), an Amnesty Chamber (*Sala de Amnestía y indulto*), a Judicial Chamber (*Sala de definición de situaciones jurídicas, para los casos differentes a los literales anteriores o en otros supuestos no previstos)*, and an Investigation and Accusation Unit (*Unided de Investigación y Acusación*). The latter is in charge of the investigations into alleged crimes where there is no collective or individual acceptance of responsibility. *Nuevo Acuerdo Final* (24 November 2016), para 46.

[597] *Ley 1820 de 30 Diciembre 2016 por medio de la cual se dictan disposiciones sobre amnestía, indulto y tratamientos penales especiales y otras disposiciones*, República de Colombia (30 December 2016), para 40.

[598] *Ley 1820 de 30 Diciembre 2016 por medio de la cual se dictan disposiciones sobre amnestía, indulto y tratamientos penales especiales y otras disposiciones* (30 December 2016).

[599] *Acto Legislativo 01 de 2017 por medio de la cual se crean un título de disposiciones transitorias de la constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones*, Colombia (4 April 2017).

Normalización).[600] They must also contribute to a range of reparative measures.[601] Notably, this system applies to ex-combatants, state actors, and civilians that significantly contributed to the armed struggle. Existing investigative files started during the *Fiscalía*'s work within JPL would be forwarded to JEP. A special division of JEP will also have to evaluate how to deal with cases in which FARC-EP members have been prosecuted and sentenced *in absentia*. In other words, JEP will become the only justice avenue available for crimes committed within the conflict in Colombia. Nonetheless, in an attempt to better integrate it within the existing judicial structure of Colombia, the revised agreement specifies that JEP will operate for a maximum of 10 years.[602]

Another important development within the peace negotiations with the FARC-EP concerned the attention paid to sexual violence. Whereas the negotiations with the AUC were markedly silent on the issue of sexual violence,[603] the issue received significantly more attention during the negotiations with the FARC-EP. Following "elbowing" by women's rights organisations, a series of important precedents were set, which contributed to this.[604] In September 2014, a Gender Sub-Commission was established, which was mandated "to review and guarantee, with the support of national and international experts, that the agreements reached and an eventual final agreement will have an appropriate gender approach".[605] Furthermore, with the support of UN Women and a number of women's rights organisations, in the second half of 2014, five delegations of victims – 60% of whom were women – travelled to Havana to address the negotiating table, including a number of victims of sexual violence, which gave voice to a thus far unaddressed issue.[606] Subsequently, between December 2014 and March 2015, the Gender Sub-Commission called a number of

[600] The revised peace agreement puts stricter limitations on how sentences served in alternative locations are administered. Santos (2016).

[601] Sanchez Leon (2016), at 174-175.

[602] Santos (2016).

[603] For instance, a detailed report on the negotiations with the AUC published in 2005 does not even mention the issue once: Cynthia J. Arnson, *The Peace Process in Colombia with the Autodefensas Unidad de Colombia-AUC* (Woodrow Wilson International Center for Scholars, 2005).

[604] Gimena Sánchez, 'Colombian Needs to Take a Gendered Approach to Make Peace Last', *PassBlue* (18 January 2016), available at <http://passblue.com/2016/01/18/colombia-needs-to-take-a-gendered-approach-to-make-peace-last/>, accessed 13 April 2016; 'Colombia: UN envoy welcomes parties' agreement on no amnesty for sexual violence', *UN News Centre* (2 October 2015), available at <https://www.hrw.org/news/2016/03/28/colombia-prosecution-false-positive-cases-under-special-jurisdiction-peace>, accessed 13 April 2016.

[605] Mesa de Conversaciones para la terminación del conficto y la construcción de una paz estable y duradera en Colombia, *Joint Communiqué: Statement of Principles for the Discussion of Item 5 of the Agenda 'Victims'* (7 June 2014), at para 3.

[606] Bouvier (2016), at 22.

women's groups to address the negotiators as special delegations.[607] All of these initiatives – very clear examples of the types of interactions that constitute TLP – helped articulate and consolidate the importance of addressing the conflict in gender sensitive ways, which included accountability for sexual violence. In many ways, they also contributed to a degree of social internalisation of the importance of accountability among the negotiators. Members of the negotiating team reportedly called the survivors' testimonies "transformative" for their discussions.[608] Equally, the direct participation of women's groups "drove home the gendered dimensions of the war, offered new engagement opportunities, and exposed the negotiators to gender-sensitive perspectives and proposals".[609]

As a result of the space given to women's rights advocates during and around the negotiations, the Agreement on Victims specifically excludes sexual violence from amnesties, and provides that they *must* be investigated and prosecuted by the Special Jurisdiction for Peace.[610] Furthermore, JEP's investigations unit must create a dedicated team to investigate sexual violence, which shall apply specifically the principles, procedures, and evidentiary requirements of the Rome Statute and its Rules of Procedure and Evidence.[611] This had been a specific demand articulated by women's rights organisations in the Women's Peace Summit held in Bogotá in October 2013.[612] The Women's Peace Summit was equally instrumental in pushing for the creation of the Gender Sub-Commission, which proved so important in incorporating a gender perspective within the negotiations and the peace agreement.

However, at the same time as pushing for such progressive developments, the peace agreement's provisions around command responsibility, in particular as applied to the state's armed forces, raise concern regarding JEP's ability to effectively prosecute sexual violence crimes. As mentioned earlier, the responsibility of state actors for sexual violence is an issue

[607] Bouvier (2016), at 22.

[608] Bouvier (2016), at 22.

[609] Bouvier (2016), at 22.

[610] *Nuevo Acuerdo Final* (24 November 2016), para 40. Interviews with Colombia civil society representatives (Bogotá, September 2016), *on file with author*.

[611] *Nuevo Acuerdo Final* (24 November 2016), para 67.

[612] Bouvier 'Revised Colombian Peace Accord Released Today, Available Here' (2016). Interview with Colombian NGO representative (September 2016), *on file with author*. Shortly before the signing of the peace agreement, a second Women's Peace Summit (*Segundo Cumbre Nacional Mujeres y Paz*) was held in Bogotá on 19-21 September 2016. 'La II Cumbre Nacional Mujeres y Paz en Bogotá destaca la participación de las mujeres colombianas en la construcción de la paz', *UN Women* (20 September 2016), available at <http://www.unwomen.org/es/news/stories/2016/9/announcement-second-national-summit-of-women-and-peace-in-bogota>, accessed 19 January 2017.

civil society organisations have been particularly concerned about; while there are some cases against paramilitaries or guerrilla fighters (as discussed earlier), the Colombian transitional justice system has to date virtually not had any cases against state perpetrators. The peace agreement's incorporation of a stringent test of command responsibility – which has been the subject of intense contestations between different actors including the ICC – renders this possibility even less likely.

The September 2016 peace agreement provided that (both state and FARC-EP) commanders could be held responsible under the theory of command responsibility if they held "effective control" over the specific conduct and *actual* knowledge of the commission of crimes. This stands in stark contrast to the Rome Statute's theory of command responsibility, pursuant to which a commander can be held liable if either they knew or *should have known* that forces under their command were committing or about to commit crimes and failed to take reasonable measures to prevent their occurrence. The much higher standard in the Colombian proposed peace agreement was highly contested by human rights organisations in the country.[613] Although a number of complicated reasons related to the domestic political landscape underpin the no-vote in the October 2016 referendum, it was also based, at least in part, on a perceived lack of accountability arising from this restrictive interpretation of command responsibility.

There initially appeared to be a willingness on the part of the Colombian government to incorporate specifically the Rome Statute's theory of command responsibility into the revised peace agreement following the no-vote during the October referendum. For instance, President Santos specifically cited to concerns by the ICC about the restrictive interpretation as justification for a proposed change in this respect; the revised November peace agreement specifically incorporated a reference to the Rome Statute to guide interpretation in relation to command responsibility.[614] However, following an open letter by army representatives opposing this direct incorporation of Rome Statute article 28,[615] only hours before the revised

[613] See, *e.g.*, José Miguel Vivanco, 'Colombia's Peace Deal's Promise and Flaws', *Human Rights Watch* (27 September 2016), available at <https://www.hrw.org/news/2016/09/27/colombia-peace-deals-promise-and-flaws>, accessed 8 May 2017.

[614] Juan Manuel Santos, 'Palabras del Presidente Juan Manuel Santos en la posesión de Jaime Rodríguez Navas como Consejero de Estado', *Presidencia de la República* (15 November 2016), available at <http://es.presidencia.gov.co/discursos/161115-Palabras-del-Presidente-Juan-Manuel-Santos-en-la-posesion-de-Jaime-Rodriguez-Navas-como-Consejero-de-Estado>, accessed 8 May 2017.

[615] 'La carta con la que militares en retiro cuestionan justicia transicional', *W Radio* (22 November 2016), available at <http://www.wradio.com.co/noticias/actualidad/la-carta-con-la-que-militares-en-retiro-cuestionan-justicia-transicional/20161122/nota/3311095.aspx>, accessed 8 May 2017.

agreement was signed, it was removed from the peace agreement, with the government thus back-tracking towards the earlier restrictive interpretation.[616] Interestingly, the change only affected command responsibility of members of the army; the FARC-EP noted that it had refused to make the change in relation to their own commanders *because* the issue was of particular concern to the ICC (the FARC-EP wants to prevent extradition to the ICC at all costs).[617]

After draft legislation was introduced before Congress in December 2016 that incorporated this confusing dual system of command responsibility,[618] ICC Prosecutor Fatou Bensouda intervened, this time through a public op-ed in *La Semana*. She indicated that the proposed language "could be interpreted as limiting the Rome Statute's definition of command responsibility", and called upon Colombian legislators to revise the draft legislation to bring its national framework in line with the Rome Statute.[619] Human rights organisations had raised similar issues.[620] No changes were made, however, and the law (as promulgated in April 2017) contains the dual system of command responsibility, with the restrictive standard applicable to the state armed forces.

This situation raises serious concerns about JEP's ability to effectively address sexual violence crimes (in particular where committed by the state armed forces). As discussed in chapters 1 and 2, sexual violence crimes often tend to be seen as opportunistic or incidental, not linked to the broader context of criminality; requiring actual knowledge, rather than constructive or presumed knowledge, and requiring specific control over the acts means it is

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[616] For a longer analysis of the issue, see, *e.g.*: Juan Pappier, 'The 'Command Responsibility' Controversy in Colombia', *EJIL: Talk!* (15 March 2017), available at <https://www.ejiltalk.org/the-command-responsibility-controversy-in-colombia/>, accessed 8 May 2017.

[617] 'Constancia de las FARC respecto a las definiciones y responsabilidades de los Agentes del Estado en la JEP', *FARC-EP* (26 November 2016), available at <http://www.farc-ep.co/comunicado/constancia-de-las-farc-respecto-a-las-definiciones-y-responsabilidades-de-los-agentes-del-estado-en-la-jep.html>, accessed 8 May 2017.

[618] Congreso de Colombia, *Proyecto de Acto Legislativo por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones* (19 December 2016); Congreso de Colombia, *Proyecto de Acto Legislativo por medio del cual se crea un título de disposiciones transitorias de la Constitución aplicables a los agentes del Estado para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones* (19 December 2016).

[619] Fatou Bensouda, 'El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad', *SEMANA* (21 January 2017), available at <http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820>, accessed 24 January 2017.

[620] See, *e.g.*, the statement by Human Rights Watch: 'Letter to President Santos on the new peace agreement with the FARC', *Human Rights Watch* (23 November 2016), available at <https://www.hrw.org/news/2016/11/23/letter-president-santos-new-peace-agreement-farc>, accessed 8 May 2017.

likely these crimes will be left out of command responsibility cases against the state armed forces. Even though in Colombia there appears to be (growing) awareness that it was an integral part of the conflict, there remains a risk that prosecutors or judges will find it too difficult to put sexual violence crimes within this restrictive category of command responsibility. Hardly ever is there a context where commanders specifically *order* their subordinates to use rape as a strategy (unlike, for instance, forced displacement or pillaging); rather, the crimes take place in the ordinary circumstances of the conflict rendering them 'reasonably foreseeable'. Commanders should be held liable for their failure to denounce or take measures to prevent, but the revised Colombian legislation does not appear to consider these factors sufficient to prove command responsibility. Given JEP's specific focus on "those most responsible", there is a risk that sexual violence crimes will entirely escape prosecutions under this stringent interpretation of command responsibility, despite efforts made during the peace negotiations to accord specific attention to these crimes. This would leave a substantial impunity gap in place. Nonetheless, the Colombian Constitutional Court still has to rule on the constitutionality of the *Acto Legislativo* (at the time of writing, the issue is under review). Given its favourable interpretations in the past relying upon the Rome Statute, as well as its ability to test national legislation specifically against the Rome Statute through the *bloque de constitucionalidad*, there is hope the restriction may be subject to important changes in the near future.

4.4.4 *In sum*: Some accountability for sexual violence but gaps remain

In the last 2-3 years, the Justice and Peace Law Chambers of the High Courts have issued a number of important decisions regarding sexual violence crimes committed in the context of the Colombian armed conflict. These decisions represent important first steps in addressing the significant gap between the lived experience of conflict and the crimes that have been committed, and those that are addressed through the justice system. Importantly, increasingly, Colombian courts are relying upon international jurisprudence in addressing sexual violence, thus harmonising their practices with these standards through judicial interpretation and internalisation. The Rome Statute is perceived as one concrete standard to comply with and apply, but this is situated in a broader discussion on Colombia's obligations under international humanitarian and human rights law. Relying on international norms equally resolved a number of difficulties with the prosecution and investigation of sexual violence.

For instance, it challenged the supposition that when there are only a few acts of sexual violence, these cannot fit within patterns of macrocriminality, or that there has to be a written policy for these acts to be considered crimes against humanity.[621] The interactions before the courts trigger the reinterpretation of gendered norms and assumptions and the reconfiguration of standards and practices. In such a way, legal internalisation (through judicial interpretation) may eventually contribute to necessary processes of social internalisation.

At the same time, to some extent these processes of judicial internalisation are also contingent upon a degree of social internalisation. Notably, the involvement of women's rights groups and other civil society organisations has been critical for the Colombian transitional justice framework to better address sexual violence crimes. As with the adoption of policies, litigation and interactions before different national courts by civil society organisations and victims' representatives were important to challenge ingrained practices and perceptions. For these organisations, the Rome Statute often provided an important normative framework and tool of advocacy.

These decisions, however, do not represent a broader trend, and as such it remains questionable to what extent such social internalisation processes have really taken root beyond the work of civil society organisations. The number of JPL cases that deal with sexual violence, while increased in recent years, remains low. By December 2012, 14 final decisions had been delivered within JPL, only two of which related to crimes of sexual violence.[622] By August 2015, this had increased to five judgements for crimes of sexual violence.[623] Demobilised paramilitaries felt constrained by social stigma attached to sexual violence to include these crimes within their confessions, and were not asked any questions in court about sexual violence in the absence of a clear prosecutorial and investigative strategy on the part of the *Fiscalía.* Furthermore, there is no effective way of transferring responsibility to deliver justice for sexual violence crimes from the JPL process to the ordinary justice system. While there have been a number of important JPL decisions reaffirming accountability for sexual violence crimes, the ordinary justice system is even more hampered by obstacles and difficulties. Of the more than 600 cases that were

[621] Women's Link Worldwide, *Judicialización de la violencia sexual, específicamente del aborto forzado en el marco de jurisdicción de Justicia y Paz en Colombia*, at 6.

[622] Humanas & Lawyers Without Borders Canada, *Contributions of Justice and Peace decisions to women's rights in Colombia: A case study*, at 57-58.

[623] Humanas & Lawyers Without Borders Canada, *Contributions of Justice and Peace decisions to women's rights in Colombia: A case study*, at 17.

specifically prioritised by the Constitutional Court in its Auto 092/2008 and Auto 009/2015, the impunity rate currently stands at around 98%.[624] Most of the cases have either been archived or remain in preliminary stages without progressing any further. In other words, while important inroads have gradually been made through normative developments, the cycle of impunity for sexual violence has been difficult to break.

While additional important inroads were made in relation to accountability for sexual violence during the peace negotiations with the FARC-EP, it is too early to tell whether the implementation of the peace agreement will bring an increase in accountability. Notably, the process will still be contingent upon confessions by ex-combatants or state actors – sexual violence crimes are thus likely to be raised only during the second stage of proceedings following separate investigations conducted by the investigations unit.[625] The concerns around command responsibility may make it difficult to convict members of the state's armed forces for crimes of sexual violence. Continued difficulties for victims around reporting crimes of sexual violence will likely hamper these crimes even coming out during investigations. In addition, while cases against those most responsible are important for challenging assumptions around the incidental nature of sexual violence, it remains to be seen whether sufficient attention will be paid to challenging gendered assumptions and stereotypes among the judicial and investigative personnel conducting the proceedings. Traditional ideas that testimony alone is insufficient to prove sexual violence, or that there must be a written policy for these crimes to be conceived as crimes against humanity remain pervasive.[626] While the 2016 protocol on the investigation and prosecution of sexual violence is a first (small) step towards changing these dynamics, it remains unclear whether greater accountability for sexual violence can or will be achieved at a national level, particularly given the difficulties around the theory of command responsibility enshrined in the newly designed transitional justice mechanism. In the absence of an ICC investigation for sexual violence crimes, this situation may thus leave significant gender justice impunity gaps in place.

[624] The Constitutional Court's Monitoring Working Group notes that of the 634 cases communicated with urgency to the Fiscalía in Auto 092 and Auto 009, only 14 have thus far concluded with convictions for sexual violence crimes (representing 2.2% of the total number of cases). Mesa de Seguimiento a los Autos 092 de 2008 y 009 de 2015, *Sixth Monitoring Report on Auto 092 and the first Monitoring Report on Auto 009 of the Constitutional Court*, at 15-16.

[625] Interview with Colombian civil society representative (Bogotá, September 2016), *on file with author*.

[626] Interview with Colombian NGO representative (Bogotá, September 2016), *on file with author*; Interview with Colombian prosecutor (Medellín, September 2016), *on file with author*.

SECTION 4.5

CONCLUSIONS

Almost everyone I spoke with in Colombia agreed on the relevance of the ICC's ongoing preliminary examination in providing a stimulus to accountability discussions in the country, including in relation to sexual violence crimes. As we have seen in this chapter, different actors have, to varying degrees, instrumentalised the ICC and/or the Rome Statute to pursue certain goals; they have done so within a framework of complementarity, whereby the emphasis is on a national system's accountability responsibilities within the Rome Statute system. For instance, civil society have used the Rome Statute as a standard against which to hold the government accountable and have used this to strengthen their domestic advocacy efforts to increase accountability for sexual violence; the Constitutional Court has similarly used the ICC's watchful eye as a tool against political interference. During peace negotiations, the threat of ICC intervention triggered an increasing emphasis on criminal accountability; the government has equally used the ICC's practice to inform its own policies. In other words, there is openness in Colombia to engaging with the Office of the Prosecutor (and international criminal law more generally); the government is eager to show that it is unnecessary for the ICC to intervene, and it has attempted to do so through various means. However, the ICC's influence is only one of many factors contributing to the legislative, jurisprudential and policy changes described in this chapter. In fact, its greatest influence stems not from its own direct interactions with Colombian actors, but can be found at a symbolic or normative level, tied to the existence of the ICC *as an institution* and the international norms embodied by its Rome Statute. Such influence is particularly strong where promoted or championed by other actors such as civil society organisations, politicians, or national judicial institutions. These actors operate externally to the interactions between the ICC and national authorities yet provide critical links in triggering normative interactions. In other words, positive complementarity manifests itself primarily through the ICC's *indirect* encouragement or facilitation of national accountability.

There is a high degree of interaction between the Rome Statute and the Colombian legal system, ranging from harmonisation and law reform, to the adoption of new policies, from using the ICC's practice to determine the focus of national investigations, to using the Rome Statute as interpretative guidance in national court proceedings. In other words, the

institutional presence of the ICC has provided an important normative framework around which norm-entrepreneurial actors have rallied to (attempt to) increase accountability for sexual violence in the country. Indeed, as this chapter has illustrated, through consistent lobbying by civil society organisations and women's rights groups acting as norm entrepreneurs at both a national and international level, thus triggering norm interpretations by the ICC and Colombian judicial and prosecutorial actors, accountability for sexual and gender-based violence has gradually gained more attention and focus in Colombia. Although to varying degrees, each of the developments described in this chapter has benefited from repeated norm-interpretive interactions between civil society (in particular women's groups), the Colombian Constitutional Court, Colombian legislators, international supporters, *and* the ICC. In other words, a distinct transnational legal process underpins many activities at a national level concerning sexual violence accountability within a framework of positive complementarity.

In this concluding section, I will aim to answer the questions raised in the beginning of this chapter: how, why and in what way have the Rome Statute's standards around accountability for sexual violence become active and effective in Colombia, and to what extent has this contributed to an increase in accountability for these crimes? This section will provide conclusions regarding the norm internalisation processes identified, zooming in on the relevant actors involved in these processes and the substance of the internalised norms. It will also discuss its relevance for positive complementarity, focusing on its gender justice prospects and limitations. It concludes that, while the legal internalisation processes identified have been instrumental in moving the Colombian accountability conversation on sexual violence forward, they have equally complicated the ICC's complementarity assessment. It argues that, the continuing lack of accountability for sexual violence crimes in a country that has been under preliminary examination for more than 12 years ultimately risks bringing the ICC into disrepute, and exposes complementarity's gender justice limitations in practice.

4.5.1 Norm internalisation and instrumentalisation of the Rome Statute

A primary way in which the Rome Statute's standards around accountability for sexual violence crimes have been internalised in Colombia is through the amendment of domestic criminal law. Aspects of the Rome Statute first became part of the Colombian constitutional order upon its entry into force through the *bloque de constitucionalidad*; the subsequent adoption of the Law on Victims in 2011 and Law 1719 in 2014 rendered the Rome Statute's definitions of crimes and procedural and evidentiary requirements *directly* applicable in Colombia. These two pieces of legislation together amend key provisions of the Colombian penal code and penal procedure code, and enshrine important obligations in Colombian law regarding the investigation and prosecution of sexual violence, and on victims' rights to protection, medical assistance, reparations and guarantees of non-repetition. The laws are not exact copies of the relevant provisions of the Rome Statute; they harmonise Colombian legal standards with the international framework while adapting the international norms to the idiosyncrasies of its national framework. Importantly, the momentum created by a push for harmonisation with the Rome Statute gave rise to a broader amendment, rendering the international legal norms applicable to sexual violence regardless of their classification as international crimes. The adoptions of these laws are clear examples of legislative internalisation within Koh's transnational legal process. Indeed, the laws were adopted following a series of contestations between civil society organisations, national political actors, and judicial institutions on the substance of the laws as well as on the interpretation and applicability of international norms. Such legislative internalisation is a first step towards increasing accountability for sexual violence by providing a framework for their recognition within a domestic legal system, broadening Colombian criminal law's capture capacity around sexual violence crimes.

Second, a number of policies and strategic choices were made to ensure a more sustained focus on sexual violence crimes within domestic investigation and prosecution efforts, both before the ordinary courts and within Colombia's transitional justice framework. In many ways, these policies and strategies have mimicked selection and prioritisation policies of the ICC; domestic accountability processes now focus (almost exclusively) on "those most responsible" for "the most serious crimes", and on forced disappearances and sexual and gender-based violence. Whereas the ICC has only had a passive role in the legislative internalisation processes, in relation to these policies and strategies, it has tried to

influence domestic decision-making more directly by engaging domestic actors through op-eds, letters, and in private discussions on the interpretation of the Rome Statute around prioritisation. These policies have sometimes responded directly to the ICC's concerns, and other times engage these more indirectly. As with the legislative internalisation process, women's rights and other civil society organisations acted as catalysers or norm entrepreneurs, for instance in challenging prioritisation before the Constitutional Court, thus triggering an interaction before a norm-interpretative forum. The jurisprudence resulting from these interactions again uses the Rome Statute as normative framework in pushing greater recognition and attention for sexual violence within investigations and prosecutions. Furthermore, beyond the Rome Statute as a normative reference, the ICC's own policies and strategies have been used as examples to be replicated at a national level. These developments culminated into the adoption of a protocol on the investigation and prosecution of sexual violence crimes in June 2016. As with the harmonisation of laws, women's rights organisations were critical in the adoption of this protocol. While largely drawing upon lessons learned at an international level around the investigation and prosecution of sexual violence *as international crimes*, the protocol applies more broadly to crimes of sexual violence regardless of their status as international or ordinary crimes. As with the legislative internalisation, here again, the harmonisation process gave rise to broader applicability of the Rome Statute.

Finally, international legal standards, including the Rome Statute, have also been important vehicles through which the Constitutional Court and civil society organisations have worked to expand the capture capacity of the Colombian transitional justice framework, and underscore the limits of a framework based on confessions to extrapolate the truth about sexual violence crimes. Various JPL tribunals have equally used the Rome Statute to expand accountability for sexual violence crimes, for instance in rendering irrelevant evidence of prior sexual conduct of victims. These are very clear examples of judicial internalisation within Harold Koh's framework. Importantly, as this chapter illustrated, civil society and the national courts have been critical actors in advancing the discussions on justice and accountability for sexual violence crimes, and in garnering the necessary political engagement. They have done so by triggering judicial interpretations before the Constitutional Court, and by challenging strategic choices and prosecution records directly with the ICC.

In other words, a distinct transnational legal process can be identified that contextualises the ICC's presence (in a broad sense) and positive complementarity in Colombia whereby actors formally external to the complementarity framework trigger a series of norm-interpretative interactions before national and international courts, and within domestic political discussions, on accountability for sexual violence. This has led to a number of important incorporations and expansions of the Colombian legal framework around accountability for sexual violence crimes. In other words, positive complementarity for sexual violence crimes has manifested itself primarily through encouragement, facilitation, and assistance that utilises the ICC, without being directly linked to the Court itself.

However, this normative progress must be offset against the reality that implementation remains extremely low in terms of numbers of cases successfully brought before the courts. Both the transitional justice framework and the ordinary justice system have so far paid extremely limited attention to sexual violence crimes. These difficulties, obstacles, and nuances appear not to have been picked up sufficiently in the ICC's complementarity assessment, an issue I will turn to next. While amending criminal legislation and adopting relevant prioritisation frameworks is important as a first step towards ensuring a more inclusive legal framework, the risk is that you may end up in a situation where if it is theoretically possible to investigate and prosecute sexual violence crimes, this may be enough to satisfy the complementarity assessment.

4.5.2 Admissibility, the ICC, and accountability for sexual violence

Having determined that crimes within the ICC's jurisdiction have been committed, the ICC has been monitoring the development of national accountability processes in Colombia for more than 12 years. It continues this assessment to this day. Over time, the ICC has started paying closer attention specifically to issues affecting the investigation and prosecution of sexual violence crimes within this complementarity framework, but despite the relative absence of accountability for these crimes, it has not (yet) decided to open an investigation. Given the ongoing difficulties the national justice system continues to face regarding accountability for sexual violence crimes, this begs the question whether the ICC's admissibility assessment in this instance perpetuates impunity for these crimes.

As I mentioned at the beginning of this chapter, the ICC's admissibility assessment is particularly complex in the Colombian situation because the country is not *necessarily* unable or unwilling as per the interpretation given to these terms through the ICC's admissibility jurisprudence (outlined in chapter 2 above). Indeed, as the three previous sections of this chapter have illustrated, on paper Colombia appears to have ticked all the relevant boxes: it is undertaking relevant investigations and prosecutions (including more recently against higher level perpetrators), these do not suffer from unjustifiable delays as defined in article 17, they are not generally intended to shield persons from justice, and the judicial system has not collapsed. The steps Colombia has taken in terms of legislative, political, and judicial internalisation of the Rome Statute complicate an easy determination within the admissibility framework. It makes it difficult to conclusively find a *general* unwillingness or inability on the part of the Colombian authorities for the types of cases that would be of interest to the ICC,[627] even though the result of the ongoing difficulties means impunity specifically for sexual violence crimes (although one could argue the admissibility test *has* failed specifically in relation to these crimes).

It is clear that the Office of the Prosecutor recognises these deficiencies in implementation around accountability for sexual violence crimes in Colombia. Its reports since 2012 highlight the limited progress being made as an area of concern, and it continuous to encourage Colombia to do better. However, the Office does not appear to be willing to take the extraordinary step of opening an investigation to address this situation of impunity for this particular type of crime. Although the Office of the Prosecutor does not make a decision about opening an investigation in the abstract and has to consider a variety of factors, including its own resource limitations, at a minimum the Colombian situation around sexual violence accountability raises questions about the gender justice limitations of the admissibility test discussed in chapter 2. It certainly makes one wonder whether, if not in *this* situation of widespread impunity for sexual violence, crimes of sexual violence will *ever* reach that threshold. Indeed, nothing would stop the ICC from determining *selective* unwillingness or inability[628] in relation to these specific crimes only, thereby justifying opening an investigation.

[627] It must be said, however, that it has also not meant a conclusive assessment that the steps taken *are* indeed sufficient.

[628] Bergsmo and SONG argue that there may be intrastate divergences of 'unwillingness': "For example, the judiciary may be 'willing', whereas the executive is not. Investigators may be willing but an 'unwilling' military may frustrate and hinder investigative efforts. Unwillingness in one branch of government may create 'inability'

The reluctance of the Office of the Prosecutor to open an investigation in Colombia does not necessarily stem from an unwillingness or unease to bring cases only for a specific type of crime (in this case, sexual violence and *falsos positivos* for which accountability in Colombia is most challenging). In fact, it has done so in other situations for other types of crimes, for instance crimes against cultural heritage in Mali. In that investigation, the only case to date relates to *one* type of crime: destruction of cultural heritage, which the Office of the Prosecutor justified based on its "historic" character: it constitutes "a profound attack on the identity, the memory and, therefore, the future of entire populations" and "damages universal values we are bound to protect".[629] In other words, there is precedent at the ICC for bringing a case for what it deems particularly "serious crimes" for which domestic accountability is lacking. Indeed, it would not be very difficult to construct a very similar rationale for bringing a case relating to sexual violence crimes in Colombia, given the historic difficulties these crimes face the world over, and the universal values of equality it offends. This suggests the threshold for sexual violence may subconsciously be higher; the arrest warrant relating to the destruction of cultural property in Mali was justified on the gravity of the offences. Similar reasons have been given in the past around the focus on child soldiers in the early DRC investigations, yet it is not doing the same for a situation of impunity for sexual violence in Colombia.

I would argue its reluctance to open investigations could stem from a degree of unease with laying down the law on unwillingness particularly in a situation where the country involved is generally committed to accountability and a vocal supporter of the project of international criminal justice. It is much easier, at least politically, for the ICC to open investigations in situations where countries have either specifically said themselves they are unable to conduct the relevant proceedings (and as such the ICC's investigations would be welcomed), and/or where it is clear no proceedings are ongoing at all (as such justifying an ICC investigation based on inactivity). Indeed, all current ongoing investigations have been opened for either one of these two reasons. In other words, opening an investigation in Colombia would be one where there are at least *some* genuine national proceedings ongoing at the time of assessment, a call the Office of the Prosecutor appears hesitant or unwilling to

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in another branch attempting sincerely to investigate or prosecute. There is also a possibility of selective 'willingness': authorities may be eager to investigate crimes by rebel groups but be reticent with respect to government forces." Bergsmo and SONG (2017), at 763.

[629] Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Mr Ahmad Al-Faqi Al Mahdi* (22 August 2016).

make in this instance. In fact, it is likely an ICC investigation would not be welcomed in Colombia at all, thus complicating the Office's ability to conduct investigations in the field. Furthermore, several interviewees in Colombia confirmed that an ongoing preliminary examination is also their preferred solution, as it allows them leverage to continue pushing for domestic changes. While an ongoing preliminary examination may therefore be a realistic approach to take because the ICC by nature has to be selective and cannot address *all* crimes within its jurisdiction, in this particular instance it means that sexual violence crimes lose out. In many ways, therefore, the Colombian internalisation process around sexual violence accountability norms epitomises the gender justice limitations of admissibility or legal complementarity.

5

COMPLEMENTARITY, NORM DIFFUSION, AND THE ICC IN THE DRC

The story of the ICC's involvement in the DRC is a complex one, and attitudes in the country towards the Court's involvement have been mixed. On the one hand, with the highest number of cases in any ICC investigation[630] and with four of the ICC's six trials against Congolese individuals,[631] many Congolese feel the ICC unfairly targets their country (this is tied to the broader rhetoric of the ICC's perceived 'African bias'[632]). At the same time, there is also a strong recognition in the country of the need for international assistance and ICC investigations to bring a measure of accountability to the victims of the conflict. Yet, while there was a lot of excitement and hope when the ICC opened its investigations in 2004, the length of its proceedings, the focus on what are perceived to be lower level perpetrators, and the absence (as yet) of reparations has disappointed victims and delegitimised the Court's operations.[633] At the same time, those closely involved in the ICC's work and its relationship with the DRC government, often emphasise the "excellent" cooperation between the two, and praise the DRC as an exemplary situation in this respect.[634] In other words, like in Colombia, complementarity in the DRC is a complicated story, yet for very different reasons.

[630] Six individuals have been charged in the DRC investigation. Although the Office also initially charged six individuals in the Kenya investigation, all of these have since been terminated.

[631] The trials of Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo Chui have been completed; Bosco Ntaganda's trial is ongoing at the time of writing. In addition, it has also charged the former (and still very popular) Congolese Vice-President Jean-Pierre Bemba Gombo in relation to crimes committed by forces under his command in the neighbouring Central African Republic.

[632] See, *e.g.*, the various chapters in part 7 'Bias? The African Issue' in: Richard H. Steinberg, *Contemporary Issues Facing the International Criminal Court* (Leiden: Brill Nijhoff, 2016).

[633] Interviews with Congolese civil society representatives (Kinshasa, June-July 2016), *on file with author*; Interviews with ICC representative (Kinshasa, June 2016), *on file with author*.

[634] Interview with representatives of the Office of the Prosecutor (The Hague, September-October 2015), *on file with author*; Interview with representative of the DRC military (Kinshasa, June 2016), *on file with author*.

Whereas chapter 4 dealt with a situation where the Office of the Prosecutor has not yet opened an investigation, this chapter provides an in-depth analysis of the interactions between the ICC, its Rome Statute and national accountability processes for sexual violence in a country where the ICC has formally opened an investigation. Unlike Colombia, where there have been some direct interactions between the ICC and national authorities in relation to national accountability processes, in the DRC these have almost only been on a normative level. There is very little direct interaction between the ICC and national authorities on substantive or procedural developments to increase accountability for sexual violence before national courts. In addition, whereas the fear of intervention by the ICC in Colombia contributed at least in part to a number of national legislative and policy developments focusing specifically on international (sexual violence) crimes, this fear has obviously fallen away in a context where the ICC has already opened investigations. Instead, there is an emphasis on a consensual division of labour, or on complementing the ICC's cases at a national level (rather than the other way around). Rather than Hansen's 'hand-over' version of complementarity, whereby national proceedings seek to pre-empt ICC jurisdiction, complementarity in the DRC is conceptualised as "burden-sharing", to be achieved through cooperation.

Before examining these different developments, the first part of this chapter puts complementarity in the DRC into context. In subsequent sections, I analyse three examples of legal internalisation of Rome Statute norms around accountability for sexual violence, looking at direct application of the Rome Statute by mobile military courts, the harmonisation of national criminal law with the Rome Statute, and the creation and adoption of special court mechanisms or policies mirrored on the ICC's practices. The chapter ends by looking ahead at possibilities of increasing accountability for sexual violence crimes at a national level in this complex context. As we will see, a commitment to implementing some understanding of complementarity underlies many of these internalisation processes. However, progress has been slow and the ICC has been criticised for not complying with its side of the bargain. Overall, the chapter examines the different actors that have taken an active role in promoting and advocating for the integration of Rome Statute standards at the national level; this analysis illustrates the important and varied role played in particular by civil society and the international community as norm entrepreneurs, and the extremely limited role played by the ICC itself. Crucially, whereas the threat of an ICC investigation is no longer present in the DRC, the legal internalisation process has not stopped.

SECTION 5.1

COMPLEMENTARITY IN CONTEXT

The DRC is a country of extremes. It is one of the biggest countries on the African continent, extremely rich in natural resources, yet deeply rooted corruption and political instability have significantly weakened its economic position. It has suffered one of the longest running conflicts in the world, the deadliest since WWII, and has seen the rise and fall of countless militia groups, particularly in the east of the country. The conflict has been termed "Africa's World War" due to the high level of international involvement,[635] and in 2010, the country gained the notorious reputation as "the rape capital of the world".[636] Although estimates are difficult to give, a 2011 study revealed that about 48 women were raped every hour in the DRC,[637] a situation exacerbated by continuing impunity, prevalent social factors of stigma and shame, the continued presence of armed forces, and resistance among police. Despite significant support from international organisations, including the largest UN peacekeeping mission to date,[638] the country has struggled to achieve peace, stability, and accountability for human rights violations. This section provides a brief overview of some of these factors to contextualise the ICC's involvement, complementarity, and the internalisation processes analysed later in this chapter. It discusses the history of the conflict, the multitude of different actors and armed groups involved, and the complex relationship between the ICC and the DRC, and provides a short overview of the justice framework within which accountability is sought for sexual violence crimes at a national level.

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[635] Stacy Banwell, 'Rape and sexual violence in the Democratic Republic of Congo: a case study of gender-based violence', 23 *Journal of Gender Studies* (2014), at 47; Sophocles Kitharidis, 'Rape as a weapon of war: Combating sexual violence and impunity in the Democratic REpublic of the Congo and the way forward', 15 *African Human Rights Law Journal* (2015), at 451. See also: 'DR Congo: Conflict Profile', *Insight on Conflict* (June 2014), available at <http://www.insightonconflict.org/conflicts/dr-congo/conflict-profile/>, accessed 17 December 2014.

[636] 'Tackling sexual violence must include prevention, ending impunity - UN official', *UN News Centre* (27 April 2010), available at <http://www.un.org/apps/news/story.asp?NewsID=34502#.Vxe2N5N96b8>, accessed 22 April 2016.

[637] Amber Peterman, Tia Palermo, and Caryn Bredenkamp, 'Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo', 101 *American Journal of Public Health* (2011), at 1064-1065.

[638] As of 31 March 2017, MONUSCO was comprised of 22,468 personnel (18,780 uniformed personnel, 3,317 civilian members, and 371 UN volunteers). See: http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml

5.1.1 Conflict dynamics and widespread sexual violence

When Patrice Lumumba, the first Prime Minister of the Republic of the Congo following independence, stated in his Independence Day speech on 30 June 1960 that "our lot was worse than death itself",[639] he spoke only of the cruelties the inhabitants of the Congo suffered under colonial rule. The DRC would change names and rulers several times, but one thing never changed: the cycle of violence and militarisation has remained a constant factor in the lives of the Congolese people until today, particularly in the east of the country. From the moment King Leopold II of Belgium established the Congo Free State in 1885, through Mobutu's military dictatorship following independence in 1960, the Congolese wars in the mid- to late-1990s, and during the ongoing instability in many parts of the country, the DRC has experienced armed struggle between different armed groups, and widespread violence against civilians.

Sexual violence has been an integral part of this history of violence since colonial times. Estimates about the exact number of deaths suffered at the hands of the colonial regime in the Congo vary widely, but the number is vast.[640] Although detailed accounts of sexual violence committed during this period are scarce, it is assumed to have formed an integral part of violence committed against civilians.[641] The DRC gained independence on 30 June 1960, but peace was short-lived and the country quickly descended into civil war. In 1965, Colonel Mobutu seized control in a military coup, using armed force and violence against civilians to maintain control over the country during his rule.[642] Sexual violence and rape were a widespread form of torture used against the civilian population in the then-Republic of Zaïre, perpetrated primarily by the state armed forces, the *Forces armées zaïroises* (FAZ), and in prisons.[643] Wives, sisters, and daughters of political opponents were often kidnapped, raped and tortured by security forces, as were many women picked up at

[639] Patrice Lumumba, 'Speech at the Ceremony of the Proclamation of the Congo's Independence', (30 June 1960), available at <http://www.marxists.org/subject/africa/lumumba/1960/06/independence.htm>, accessed 18 December 2014.

[640] In 1885, King Leopold II, King of the Belgians, established the Congo Free State, a territory inclusive of the current DRC and personally owned by the King. Hochschild (1998) estimates that Congo's population was reduced by half during colonial rule. Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Houghton Mifflin, 1998).

[641] Nancy Hunt, 'An Acoustic Register, Tenacious Images, and Congolese Scenes of Rape and Repetition', 23 *Cultural Anthropology* (2008), at 225, 237-239, 243.

[642] Claude Kabemba, *The Democratic Republic of the Congo: From Independence to Africa's First World War* (2001), at 5.

[643] Kabemba, *The Democratic Republic of the Congo: From Independence to Africa's First World War*, at 7.

FAZ roadblocks. There are reports of sexual exploitation, gang rape, rape with the barrel of a gun and sticks of wood, rape of children, and the mutilation and disembowelment of pregnant women, among other crimes.[644] Most of the perpetrators of these crimes have not faced justice.

Having been forced to re-establish a multiparty system in 1994, supporters and opponents of Mobutu reached an agreement on the appointment of a prime minister and a transitional government. The agreement was, however, ultimately unsuccessful is establishing peace. The influx of Rwandan refugees fleeing the Rwandan genocide into the country in July 1994 further destabilised eastern parts of Zaïre, the region that is now known as North and South Kivu. Human rights violations were widespread and included forced displacement, killing, persecution, torture, inhumane or degrading treatment, intimidation, harassment, rape, pillaging, arbitrary arrest, summary executions, and forced disappearances.[645] When it appeared the Interahamwee were using the refugee camps as a base for their incursions into Rwanda in 1996 (with the acquiescence of Mobutu), Rwanda responded militarily in what would become known as the First Congolese War. The *Alliance des forces démocratiques pour la libération* (AFDL) – composed primarily of fighters from the Rwandan army, the Ugandan army (UPDF) and the *Forces armées burundaises* (FAB) – marched into the DRC in October 1996 and ousted Mobutu in May 1997.[646] Its leader, Laurent-Désiré Kabila, was appointed President.

President Laurent Kabila, however, was unable to establish peace in the DRC and he quickly lost support of his allies Uganda and Rwanda. The Second Congolese War erupted in August 1998 when the *Rassemblement congolais démocratique* (RCD) attempted to oust President Kabila with the support of his former allies. While the group was successful in gaining control of large parts of the east of the country, it was unsuccessful in toppling President Kabila. When the RCD split into two groups – the Uganda-backed RCD-K/ML and the Rwanda-backed RCD-Goma – and with Uganda supporting the creation of a new rebel movement, the *Mouvement pour la libération du congo* (MLC), the situation became even more complex. The conflict was most intense in the east of the country, given the increase in

[644] UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (2010), at paras 556-562.

[645] UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise*, at paras 130-177.

[646] UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise*, at paras 178-180; Kabemba, *The Democratic Republic of the Congo: From Independence to Africa's First World War*, at 14.

presence of foreign troops, and Kabila's support for various smaller militias fighting there as proxies for the government.[647] Despite the agreement of a provisional ceasefire by the main parties in July 1999, known as the Lusaka peace agreement, violence continued.[648] The war of 1998-2002 has been characterised as one of "extreme violence, massive population displacement, and widespread rape".[649] Sexual violence was perpetrated on an unprecedented scale by both government forces and the rebel groups fighting the government, and was fuelled by "almost total impunity".[650]

The assassination of President Laurent-Désiré Kabila in January 2001 and his replacement by his son – incumbent President Joseph Kabila – ushered in a new phase of the conflict, ultimately leading to the signing of a formal peace agreement and a new Constitution.[651] Foreign troops withdrew in September 2002, and in 2006, the first democratic elections were held, which confirmed Joseph Kabila as President. Fighting has continued, however, and has been particularly intense in the provinces of North and South Kivu, North Katanga, Maniema, and in Ituri. The creation of the *Congrès national pour la défense du peuple* (CNDP) by Laurent Nkunda in 2005 led to further instabilities in the region. The CNDP split in 2009 when Nkunda was arrested by Rwanda; the remaining fraction led by Bosco Ntaganda (who currently stands trial at the ICC) was integrated into the Congolese army (FARDC) following the Goma Peace Agreements signed on 23 March 2009.[652] The move has been criticised by civil society for, among other things, its lack of any

[647] These militia groups included the Mayi-Mayi (or Mai-Mai Cheka), the Burundian *Forces pour la défense de la démocratie* (FDD), ex-FAR/Iterahamwee fighters, and 'Hutu armed elements' collectivized in the *Armée de libération du Rwanda* (ALiR). UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise*, at para 310.

[648] As the UN described: "… the conflict became more entrenched, against a background of the pillaging of the country's natural resources and an exacerbation of violence directed at civilians, especially women, in particular in North Kivu, South Kivu, North Katanga and Province Orientale". UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise*, at para 311.

[649] 'The IRC in the Democratic Republic of Congo', *International Rescue Committee*, available at <http://www.rescue.org/where/democratic_republic_congo>, accessed 17 December 2014.

[650] UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise*, at paras 563-598.

[651] The new Constitution, promulgated in 2006, was drafted after the signing of the 'Global and All-Inclusive Agreement on the Transition in the DRC' in Pretoria, South Africa, at the second Inter-Congolese Dialogue in 2002, and three additional documents following another set of negotiations in early 2003. This included a power-sharing agreement between President Kabila and Vice-President Jean-Pierre Bemba Gombo of the MLC, and a peace agreement between the DRC and the other countries involved in the conflict. These agreements together became known as the 'Sun City Accord' of April 2003 when the final act was signed by all parties. Emeric Rogier, 'The Inter-Congolese Dialogue: A Critical Overview', in Mark Malan and João Gomes Porto (eds), *Challenges of Peace Implementation. The UN Mission in the Democratic Republic of the Congo* (Institute for Security Studies, 2003).

[652] *Accord de paix entre le Gouvernement et le Congrés national pour la défense du peuple (CNDP)*, République démocratique du Congo (23 March 2009).

training of militia members before their integration into the army (which has been said to have contributed to the continued commission of acts of violence).[653] Conflict intensified again following mass mutiny in April 2012 and the creation of yet another rebel movement by former CNDP members and led by Ntaganda, the *Mouvement du 23 Mars* (M23).[654] It is estimated that by mid-2014, more than 25 armed groups remained active in the east of the country.[655]

In addition to the complexity of actors involved, the conflict has seen particularly high levels of lethal violence. Most recent estimates indicate that the DRC conflict has led to an estimated 5.4 million conflict-related deaths in the period 2000-2007, more than one third of which occurred after the formal end of the war in December 2002.[656] Rape and other forms of sexual violence continue to be perpetrated in unparalleled levels in the DRC, and both the state armed forces and the various militia groups have systematically used rape and other forms of sexual violence against civilians. Although statistics vary (and remain difficult to come by), the IRC estimates that between 2003 and 2006 at least 40,000 cases of sexual and gender-based violence were committed in DRC;[657] in 2013, the DRC government registered 15,352 incidents of sexual and gender-based violence in eastern DRC that year alone.[658] Sexual violence is used by both the FARDC and militia groups to shame, humiliate, and silence both the victim, and their families and communities, and to punish entire communities

[653] See, *e.g.*, 'DRC: Peace Agreement signed between CNDP and DRC Government - a breach of UN Security Council Resolutions?', *Women's Voices May 2009* (May 2009), available at <http://www.iccwomen.org/news/docs/Womens_Voices_May_2009/WomVoices_May09.html>, accessed 27 January 2015.

[654] The M23 was named in reference to the 23 March 2009 Goma peace agreement, which integrated CNDP militia members into the state armed forces. The majority of those integrated into the FARDC mutinied in April 2012, under the leadership of Bosco Ntaganda, currently on trial before the ICC, claiming the state had failed to adhere to the terms of the Goma Peace Agreement. Despite reports of the involvement of Uganda and Rwanda in supporting the M23, both have denied their involvement. For more information see, UN Group of Experts on the Democratic Republic of the Congo, *Addendum to the interim report of the Group of Experts on the Democratic Republic of the Congo concerning violations of the arms embargo and sanctions regime by the Government of Rwanda* (27 June 2012); UN Group of Experts on the Democratic Republic of the Congo, *Letter dated 12 November 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council* (15 November 2012); UN Group of Experts on the Democratic Republic of the Congo, *Letter dated 26 November 2012 from the Coordinator of the Group of Experts on the DRC addressed to the Chairman* (27 November 2012).

[655] 'DR Congo: Conflict Profile' (2014).

[656] International Rescue Committee, *Mortality in the Democratic Republic of Congo: An Ongoing Crisis* (2007), at 16.

[657] Banwell (2014), at 48.

[658] Stuart Casey-Maslen, *The War Report: Armed Conflict in 2013* (Oxford: Oxford University Press, 2014), at 138.

for their perceived support for a particular armed group or the state armed forces.[659] Further, while many acts of sexual violence are militarised and closely linked to the conflict, research suggests that this situation of pervasive sexual violence has resulted in a dramatic increase in sexual violence committed by civilians, including intimate partner violence, suggesting a normalisation or trivialisation of rape.[660] Given the extremely high levels of sexual violence, it was a surprise to many that the first case arising from the ICC's investigations, officially opened in 2004, did not include charges for sexual violence. Equally, at a domestic level, the cycle of impunity for sexual violence (and other crimes) has been difficult to break where the justice sector is significantly underfunded and compromised by widespread corruption.

5.1.2 An accountability framework grounded in international law

While the DRC has engaged in various peace processes, unlike other countries, such as Uganda or Colombia, the question of how to resolve alleged tensions between justice and peace has not been very prominent in the DRC: since the late 1990s, the Congolese response to conflict has largely been conceptualised through the prism of justice.[661] The peace agreements that were entered into with various armed groups emphasised accountability and justice, and, while including amnesty provisions, since 2002, have explicitly excluded amnesties for war crimes, crimes against humanity, and genocide.[662] The emphasis has also primarily been on *international* justice. A programme for the reconstruction of the justice apparatus in Ituri, an initiative jointly supported by the European Commission and the French

[659] Thomas Turner, *Congo* (Cambridge: Polity Press, 2013), at 128.

[660] Harvard Humanitarian Initiative, *'Now, The World Is Without Me': An Investigation of Sexual Violence in Eastern Democratic Republic of Congo* (2010), at 2. ("From 2004 to 2008, the number of civilian rapes increased by an astounding 1733% or 17-fold, while the number of rapes by armed combatants decreased by 77%. These findings imply a normalization of rape among the civilian population, suggesting the erosion of all constructive social mechanisms that ought to protect civilians from sexual violence.") See also: IMAGES, *Gender Relations, Sexual and Gender-Based Violence and the Effects of Conflict on Women and Men in North Kivu, Eastern Democratic Republic of the Congo* (2014); Avocats Sans Frontières, *La justice face à la banalisation du viol en République démocratique du Congo. Etude de jurisprudence en matière des violences sexuelles de droit commun* (2012); Peterman, Palermo, and Bredenkamp (2011).

[661] Pascal Kambale, 'A story of missed opportunities: the role of the International Criminal Court in the Democratic Republic of Congo', in Christian De Vos, Sarah Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015); Pascal Kambale, 'The ICC and Lubanga: Missed Opportunities', *African Futures* (16 March 2012), available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/>, accessed 19 April 2016.

[662] Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC* (International Center for Transitional Justice, 2009), at 15.

government focused on restoring the justice system's ability to deal with international crimes, received widespread popular support, and NGOs mobilised widely in support of an accountability agenda.[663] The 2002 Sun City accord even called for a UN-sponsored international criminal court for the DRC (a request the government never submitted to the UN, as it instead referred the situation to the ICC).[664] Furthermore, the 2006 Constitution designates the fight against impunity *in accordance with international obligations* one of the primary objectives of all organs of the state. Similarly, pursuant to Article 215, international treaties and agreements are of a higher status than domestic laws; in case of a conflict between domestic legal rules and international standards, courts must apply international law. Article 153 likewise directs courts to apply international treaties, laws, and regulatory acts. In other words, the DRC's legal system (since the early/mid 2000s) has by nature been very open to the integration of international legal standards.

Ongoing and widespread problems of corruption, lack of resources, and high-levels of insecurity have, however, complicated Congolese national accountability efforts. In fact, until the ICC opened investigations in 2004, hardly any formal attempts were made to initiate investigations or prosecutions at a national level.[665] Some measure of accountability has, however, been brought through the military court system since the mid-2000s. The distinction between military and ordinary/civilian justice is important. Until 2013, most of the crimes committed in the context of the ongoing armed conflict have fallen within the remit of the military penal code, as the military justice system exercised sole jurisdiction over war crimes, crimes against humanity, and genocide committed by all persons regardless of their military status.[666] Therefore, most trials of interest for this study have been heard by military courts. However, since the promulgation in April 2013 of the *Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*, and the entry into force of comprehensive Rome Statute implementing legislaton in early 2016, the civilian/ordinary *cours d'appel* now have jurisdiction *au premier*

[663] Kambale (2015), at 174-175; Human Rights Watch, *Making justice work: Restoration of the legal system in Ituri, DRC* (June 2004); Davis and Hayner (2009), at 36-37.

[664] Resolution ICD/CPR/05 (March 2002) related to the establishment of an International Criminal Court. An informal translation of the document is available in: Institute for Security Studies, *The Peace Process in the DRC: A Reader* (2004), at 235.

[665] Labuda (2016), at 284.

[666] Article 161, *Loi 023/2002 du 18 novembre 2002 portant code judiciaire militaire*, République démocratique du Congo (18 November 2002).

degree (first instance) over genocide, war crimes, and crimes against humanity.[667] In addition, there have been several proposals to create specialised mixed chambers within the appeals courts of the DRC to deal exclusively with crimes within the ICC's jurisdiction. However, these chambers have not yet been established, and the appellate courts are slow to exercise the jurisdiction that was granted to them in 2013. Both of these developments are described in more detail later in this chapter.

Interestingly, the 2006 Constitution places particular emphasis on the prevention and punishment of sexual violence: article 15 contains a constitutional obligation on all state organs to eliminate sexual violence. The same article also establishes that all forms of sexual violence committed against any person with the intent to destabilise families and destroy communities constitute crimes against humanity.[668] The singling out of sexual violence as a specific crime within the Constitution is perhaps reflective of the deeply ingrained nature of such violence within the Congolese wars, and of the degree of attention being paid to the issue in the last two decades on an international level. Several interviewees suggested that sexual violence is "big business" in the DRC: focusing on sexual violence means receiving money from international donors to support whatever work any organisation or state agency is doing.[669] Indeed, the limited accountability measures that have been implemented have focused primarily on crimes of sexual violence.

Victims of these crimes continue to face obstacles in accessing justice, however. Stigma and fear of rejection by families and communities still prevent many victims from seeking medical help or reporting sexual violence, and when they do report the crimes, they face numerous obstacles, including threats from perpetrators and resistance among police officers to deal with sexual violence.[670] Impunity remains the norm.[671] In 2005, only 1% of

[667] Article 91 states, in relevant part: "Les Cours d'appel connaissent […], au premier degrè: 1) du crime de genocide, des crimes de guerre et des crimes contre l'humanité commis par les personnes relevant de leur compétence et de celle des tribunaux de grande instance; […]". *Loi organique 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*, République démocratique du Congo (11 April 2013).

[668] "Sans préjudice des traités et accords internationaux, toute violence sexuelle faite sur toute personne, dans l'intention de déstabiliser, de disloquer une famille et de faire disparaître tout un peuple est érigée en crime contre l'humanité puni par la loi." Article 15, *Constitution de la République Démocratique du Congo*, République démocratique du Congo.

[669] Interview with ICC representative (The Hague, January 2016), *on file with author*; Interview with UN representative (Kinshasa, June 2016), *on file with author*; Interview with civil society representative (Kinshasa, June 2016), *on file with author*.

[670] For more information about the obstacles and challenges to combatting impunity for sexual violence in the DRC, see, *e.g.*: UN Office of the High Commissioner for Human Rights, *Progress and Obstacles in the Fight Against Impunity for Sexual Violence in the Democratic Republic of the Congo* (2014).

14,200 reported cases of sexual violence in South Kivu were heard in court.[672] While the number of cases brought before the courts has since increased, between July 2011 and December 2013, only 3 out of 187 convictions handed down by military courts for sexual violence crimes were against senior members of the military.[673] The capacity of the justice system in the DRC to investigate and prosecute remains limited due to the lack of necessary training and insufficient financial, human, and logistical resources. Corruption remains widespread, further compromising the independence of the judiciary.

Nonetheless, a small shimmer of hope shines through the institutionalisation and use of so-called *audiences foraines* ('mobile courts' in English) within the military court system. Such mobile courts are essentially travelling courts – they hold public sessions for periods of one to two weeks in remote locations, to which large parts of the communities from the surrounding areas come to listen: it's about bringing courts to the people, rather than people to the courts.[674] In many instances, this has significantly advanced the ability of individuals to access justice, or see justice being done, and has "extend[ed] the reach and effectiveness of the judicial system".[675] In addition, these courts "help[ed] break down the stigma that has encouraged impunity and educate[d] locals on the rule of law and how victims should be treated".[676] Similarly, for victims who were too afraid to participate as witnesses in the trials themselves, such as victims of sexual violence, seeing the accused person in the dock answering to charges relating to similar crimes they suffered was immensely cathartic.[677]

These courts, provided for within the Congolese penal codes and formally operating within the Congolese justice system, are staffed entirely by Congolese judicial officials but receive significant operational and technical support from the international community.

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[671] Turner (2013), at 132; Open Society Justice Initiative, *Fact Sheet: DRC Mobile Gender Courts* (2011); Mattioli and van Woudenberg (2008), at 55.

[672] Lily Porter, 'Mobile Gender Courts: Delivering Justice in the DRC', *Think Africa Press* (30 July 2012), available at <http://thinkafricapress.com/drc/tackling-impunity-democratic-republic-congo-rape-gender-court-open-society>, accessed 26 January 2015.

[673] Anneke van Woudenberg, 'First Congolese General Convicted of Rape', *Human Rights Watch* (10 November 2014), available at <http://www.hrw.org/news/2014/11/10/dispatches-first-congolese-general-convicted-rape>, accessed 31 January 2015.

[674] See, *e.g.*, Tessa Khan and Jim Wormington, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice', *Oxford Transitional Justice Research Working Paper Series* (2011).

[675] Lara Deramaix, 'Mobile Courts' Missing Ingredient: An SSR Perspective?', (17 December 2014), available at <http://issat.dcaf.ch/Share/Blogs/ISSAT-Blog/Mobile-Courts-Missing-Ingredient-An-SSR-Perspective>, accessed 9 January 2016.

[676] Porter (2012).

[677] Interview with NGO representative (Brussels, September 2015), *on file with author*.

Notably, in 2009, the Open Society Justice Initiative (OSJI), and the Open Society Institute for Southern Africa (OSISA), together with the American Bar Association's Rule of Law Initiative (ABA ROLI) supported the establishment of specific 'mobile *gender* courts' to combat the widespread impunity for sexual violence particularly in the east of the country. The courts, designated to deal with sexual violence as international crimes, were specifically created to generate complementarity.[678]

This increased attention to sexual violence has opened up a space to talk about sexual violence that did not exist before. The trainings on international legal standards applicable to sexual violence provided to judges presiding over these trials and legal professionals appearing before them on behalf of victims has triggered a sensitisation process on justice and accountability not just within the judicial system, but equally among the victims and communities watching the trials. Kelly Askin describes it as follows:

> "*I saw young boys and elderly men shake their heads in disapproval when an accused contradicted himself repeatedly. I saw young girls and women nod with approval when a lawyer insisted that rape is an exceptionally grave offense. I watched one boy, who appeared to be about eleven, stand barefoot for hours on end, paying rapt attention as the defendant, victim, attorneys, and judges debated a case. He was enthralled, entertained, and appalled. And very likely educated. […] After hearing these trials in their own communities, those who would have otherwise never seen a real trial before will assuredly have a better understanding of what justice means, of what a trial involves, and of what the law stands for.*" [679]

In the first 36 months of operation between October 2009 and October 2012, the mobile gender courts reportedly heard 382 cases, with 204 convictions for rape, 82 convictions for other offenses, and 67 acquittals (with 29 cases pending).[680] These mobile courts have been instrumental in expanding the capture capacity of Congolese criminal law in relation to sexual violence crimes, in which the use of international norms has been a prominent feature. The direct application of the Rome Statute by these mobile courts, and its subsequent impact on the legal recognition of sexual violence crimes within Congolese law, is discussed in more detail in sections 5.2 and 5.3 of this chapter.

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[678] Kelly Dawn Askin, 'Justice From the Ground Up', *Open Society Foundations* (20 April 2011), available at <https://www.opensocietyfoundations.org/voices/justice-ground>, accessed 12 May 2017.

[679] Askin (2011).

[680] Open Society Foundations, *Justice in the DRC: Mobile courts combat rape and impunity in Eastern Congo* (2013), at 7.

5.1.3 The ICC and the DRC: complementarity through cooperation

The DRC signed the Rome Statute on 8 September 2000, and deposited its instrument of ratification on 11 April 2002; it was one of the first 66 countries to do so, thus triggering the Statute's entry into force. A little over two years later, the situation in the DRC became the ICC's first investigation in June 2004. Unlike in Colombia, there was never a very long process of preliminary examination in relation to the DRC investigation. Although a preliminary analysis has always been part of the Office of the Prosecutor's work before opening an investigation, the formalised preliminary examinations process was really born in 2009, with it gradually becoming more public (and transparent) since the adoption of a policy on preliminary examinations in 2013.[681] In other words, unlike in Colombia, in the DRC, the Office of the Prosecutor never really engaged in a very long complementarity analysis. This was also due to the fact that, following active encouragement by the then-newly elected Prosecutor to do so, the DRC referred itself to the Court citing its inability to provide justice for Rome Statute crimes itself. When one of the accused challenged the admissibility of the case against him before the ICC because he had already been in detention in the DRC, the DRC government indicated that it had specifically closed the case for which he was in detention at the time the ICC's arrest warrant was issued in 2007 "in order to facilitate the joinder of the proceedings before the ICC".[682] This simplified the complementarity assessment.

In his first statement to the ASP in September 2003, then-Prosecutor Luis Moreno-Ocampo explicitly encouraged the DRC government to refer the situation to the Court, recalling the principle of complementarity, and referring to a "consensual division of labour" whereby the ICC would investigate and prosecute those most responsible for the violence in the country, with the DRC authorities focusing on other individuals.[683] President Kabila subsequently sent a letter to the Office of the Prosecutor in March 2004 asking it "to

[681] Field notes, *on file with author*. See also: Stone (2015), at 291.

[682] *The Prosecutor v. Germain Katanga*, ICC, Government of the Democratic Republic of Congo, 'Annex to 'Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga' entitled 'Décision no. 001/2007', ICC-01/04-01/07-40-Anx3.6 (20 October 2007).

[683] Office of the Prosecutor, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC* (8 September 2003), at 4. ("Our role could be facilitated by a referral or active support from the DRC.") Prosecutor Ocampo reiterated these views in a letter sent to President Kabila, appealing to the DRC's sense of commitment to justice. Letter from Prosecutor Luis Moreno-Ocampo to H.E. Joseph Kabila, President of the Democratic Republic of Congo, 25 September 2003, quoted in Kambale (2015), at 177.

investigate in order to determine if one or more persons should be charged with such crimes", because "the competent national authorities are not in a position to launch investigations or start the necessary prosecutions without the ICC's participation".[684] In subsequently announcing the opening of an investigation, then-Prosecutor Ocampo emphasised that the decision had been taken "with the cooperation of the DRC".[685] Cooperation has remained a central feature of the ICC's relationship with the DRC.

Pending the adoption of specific Rome Statute implementing legislation on cooperation, in October 2004, shortly after the opening of the investigation, the DRC Government signed a cooperation agreement with the Office of the Prosecutor.[686] The agreement lists the various ways in which the DRC undertakes to cooperate with the ICC, such as: providing uninhibited access to its territory to conduct investigations; assisting with the identification, localisation and contact with potential witnesses; assisting with the collection and preservation of evidence; and guaranteeing the protection of witnesses, including protecting them from threats or retaliation attacks. Further, under chapter 7 of this agreement, the DRC shall inform the Office of the Prosecutor as soon as possible when it undertakes investigations and/or prosecutions into crimes within the jurisdiction of the ICC in its national courts. In addition, early in its operations, the ICC established two field offices, one in Kinshasa and one in Bunia, to maintain a permanent presence in the DRC and assist with the ICC's field activities, including investigations and prosecutions, outreach to communities, and liaising with victim participants.[687]

Generally, cooperation from the DRC authorities with the ICC has been forthcoming; it is an issue that came up repeatedly in my interviews with both ICC representatives and

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[684] *Lettre de Joseph Kabila, President de la RDC, a Luis Moreno Ocampo, Procureur près la CPI*, ICC-01/04-01/06-32-US-Exp-AnxA1 (3 March 2004). The DRC Government's letter is dated 3 March 2004, but the referral was only made public in April. Office of the Prosecutor, *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, Press Release # ICC-OTP-20040419-50 (19 April 2004); *The Situation in the Democratic Republic of the Congo*, ICC, Presidency, 'Decision assigning the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I', ICC-01/04-1 (5 July 2004).

[685] Office of the Prosecutor, *The Office of the Prosecutor of the International Criminal Court opens its first investigation*, Press Release # ICC-OTP-20040623-59 (23 June 2004).

[686] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Government of the Democratic Republic of the Congo, 'Observations of the Democratic Republic of the Congo on the challenge to the admissibility made by the Defence for Germain Katanga in the case of the Proscutor versus Germain Katanga and Mathieu Ngudjolo Chui', ICC-01/04-01/07-1189-Anx-tENG (1 June 2009), at 3; *Accord de coopération judiciaire entre la Répubique démocratique du Congo et le Bureau du Procureur de la Cour Pénale Internationale, ICC-01/04-01/06-39-AnxB9* (18 March 2006). See also: Sigall Horovitz, 'DR Congo: Interaction Between International and National Judicial Responses to the Mass Atrocities', 14 *DOMAC* (2012), at 39.

[687] Interview with ICC representative (Kinshasa, June 2016), *on file with author*.

Congolese officials. In fact, several interviewees equated the principle of complementarity in the DRC specifically with cooperation.[688] However, this close relationship of cooperation has also led to some criticism. Notably, all prosecutions at the ICC (with the support of the DRC authorities who surrendered the accused persons to the ICC) have been against members of militia groups, not state actors; sending them to the ICC was politically convenient and relatively pain-free for the Congolese government as the charges related only to crimes committed by rebel soldiers.[689]

In addition to a judicial focal point, to whom the Office of the Prosecutor sends its cooperation requests, a few years ago, the DRC also appointed a political focal point. This was done in recognition of the fact that in order to secure judicial cooperation, it is often necessary to also secure political willingness and cooperation, such as in the arrest of individuals.[690] The DRC has processed cooperation requests from the ICC regarding arrest and surrender of individuals to the Court, the transportation of witnesses, requests for disclosure of files before national courts, and request for identification, localisation and freezing of assets.[691] The Office regularly receives information from both the judicial and political focal points, and DRC officials have participated in various cooperation seminars organised by the ICC. Nonetheless, their good record of cooperation must be contrasted with the fact that the DRC government consistently refused to arrest and surrender Ntaganda since the issuance of his arrest warrant in 2006. Ntaganda, having been integrated as senior commander into the Congolese army in 2009, was deemed too important for the peace process in eastern DRC.[692] He now stands trial at the ICC following his voluntary surrender to the US embassy in Rwanda in March 2013, after he led the M23 mutiny in 2012.

One particularly thorny issue in the cooperation between the OTP and the DRC is that it has been rather one-sided: despite assurances in the cooperation agreement (and in the Prosecutor's statements at the time of the opening of the investigation) that the OTP could assist the DRC with its national investigations and prosecutions, this has been difficult to put into practice. As we saw in chapter 2, under article 93(10) of the Rome Statute, national

[688] Interview with Congolese military court representative (Kinshasa, June 2016), *on file with author*; Interview with ICC representative (Kinshasa, June 2016), *on file with author*.

[689] Labuda (2016), at 280, fn 222. See also: Clark (2011).

[690] Field notes, *on file with author*.

[691] Field notes, *on file with author*.

[692] International Center for Transitional Justice, *Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court* (2010), at 4; Women's Initiatives for Gender Justice, *Gender Report Card 2011*, at 149-150.

authorities may request the ICC's assistance. This was reiterated in the cooperation agreement: it provides that the Office "can lend its assistance to national investigations, prosecutions, and trials for crimes within the jurisdiction of the ICC" and "facilitate, where possible, such cooperation of third parties".[693] It does not, however, delineate the conditions for this cooperation in as much detail as the obligations that befall on the DRC to cooperate with the ICC. Further, the provision of article 93(10) assistance is discretionary and it is up to the Prosecutor to evaluate whether or not to supply the requested information. When the DRC submitted a formal request for information in January 2007, the OTP rejected this because of "security, confidentiality, and witness protection considerations" but offered to provide the DRC with summaries "subject to certain undertakings of confidentiality".[694] It continues to refuse to provide information to the DRC on this basis, an issue that has been a disappointment to DRC authorities.[695]

The ICC's investigations in the DRC have been heavily criticised for failing to comply with this stated policy of "burden-sharing". The first individuals indicted by the Court, Thomas Lubanga Dyilo, Mathieu Ngudjolo Chui, and Germain Katanga, were considered only "small fish" and not the main authors of the violence in the country, whom the ICC had promised to focus its investigations on.[696] Notably, both Lubanga and Katanga were in DRC custody for charges they faced before the domestic courts when they were transferred to the ICC.[697] Although the domestic cases had faced several delays and security difficulties, it effectively "enable[d] the ICC to take credit for bringing new cases without

[693] *ICC-01/04-01/06-39-AnxB9* (18 March 2006), para 37.

[694] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1007, at para 35.

[695] Field notes, *on file with author*; Interview with DRC military court representative (Kinshasa, June 2016), *on file with author*. See also: Kambale (2015), at 185-188.

[696] Kambale (2015), at 180; Kambale 'The ICC and Lubanga: Missed Opportunities' (2012). Interviews with Congolese NGO representatives (Kinshasa, June & July 2016), *on file with author*.

[697] In 2005, Lubanga had been arrested in the DRC for charges of genocide, crimes against humanity, and war crimes under the Congolese military penal code. At the time the ICC issued its arrest warrant, he was still in DRC custody. Given the different charges, the case against Lubanga in the DRC, according to the Pre-Trial Chamber, did not satisfy the complementarity test and it ruled the case admissible before the ICC. The DRC did not object and swiftly transferred Lubanga to the ICC's custody. Like Lubanga, Germain Katanga was the subject of a domestic investigation when he was transferred to the ICC. On this basis, the Katanga Defence filed an admissibility challenge before the ICC. In response to the Defence's admissibility challenge, the DRC Government was invited to submit a response. The DRC confirmed that, while Katanga had been the subject of a case before the local courts, this concerned different allegations and had not in fact progressed because of the inability of the judicial system to undertake the investigation and prosecution. According to the DRC, it had thus complied with its obligations under complementarity by referring the situation to the ICC, and indirectly also by surrendering Katanga to the Court. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1189-Anx-tENG.

doing the hard graft of investigation that should have established the basis for charges".[698] It also removed the possibility of these individuals being tried before the national courts (at least at that time[699]). Further, child soldier recruitment, the almost exclusive focus of the first cases, was not perceived as among the most serious crimes committed in Ituri by the affected communities.[700] In short, both the limited scope of the charges and the OTP's initial focus on lower level perpetrators "irreparably damage[d] the effectiveness of the division of labour between the Court and the Congolese justice system",[701] and further complicated the DRC's relationship with the Court.

The ICC investigations in the DRC have also been criticised for its initial exclusion of sexual violence charges. The first case against Lubanga was limited to the enlistment, conscription, and use of child soldiers in Ituri in 2002/2003. While subsequent cases have included limited charges of sexual violence, these cases have faced particular difficulties in seeing these charges through to trial, partially because of a limited prosecution strategy and flawed or haphazard investigations.[702] As of 31 May 2017, the OTP has charged six individuals in the context of the DRC situation, five of whom have been charged with sexual violence crimes: Germain Katanga, Mathieu Ngudjolo, Bosco Ntaganda, Callixte Mbarushimana and Sylvestre Mudacumura. However, the first two were acquitted of these charges, the fourth did not have any charges confirmed against him, and the fifth remains at large. Bosco Ntaganda currently stands trial at the ICC for charges of rape and sexual slavery, including sexual violence committed against girl soldiers within his armed group, the UPC. In other words, if he is convicted, he will be the only person to have been successfully tried by the ICC for crimes of sexual violence committed in the DRC; a mere drop in the ocean.

In short, the relationship between the DRC and the ICC, while often categorised as one of 'burden-sharing', has been primarily geared towards enabling the ICC to carry out its

[698] Kambale (2015), at 188.

[699] As discussed later in this chapter, Germain Katanga, upon having served the remainder of his ICC sentence in a DRC prison, was not released by the DRC authorities. They informed him that he would be tried for the charges for which he had been initially charged in 2005.

[700] Kambale (2015), at 179. See also: Bouwknegt, 'How did the DRC become the ICC's Pandora's Box?', *African Arguments* (5 March 2014), available at <http://africanarguments.org/2014/03/05/how-did-the-drc-become-the-iccs-pandoras-box-by-thijs-b-bouwknegt/>, accessed 12 May 2017.

[701] Kambale (2015), at 179.

[702] For more detailed discussion, see, *e.g.*, Niamh Hayes, 'The Impact of Prosecutorial Strategy on the Investigation and Prosecution of Sexual Violence at International Criminal Tribunals', in Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Beijing: Torkel Opsahl Academic EPublisher, 2012); Hayes (2013); Glassborow (2008).

activities. While the ICC has engaged to a limited extent in domestic capacity building activities, it has done so only when invited by such trainings organised by other actors.[703] Further, it has systematically refused to provide the DRC with any information under its cooperation agreement. That this burden-sharing never in fact materialised, with the ICC focusing on rather low-level individuals, has given rise to a sense of disillusionment and disappointment with the ICC, and has complicated their relationship.[704] In addition, the ICC's proceedings are perceived as too long, and with reparations still unimplemented, many victims have been left without any real sense of justice being done. Many of them continue to live in situations of high insecurity and poverty, while perpetrators remain free or live in relative luxury in the ICC's prison complex in Scheveningen for many years. As one interviewee said: "Even at the ICC the procedures are too long and too slow, and there are no reparations. This is practically the same as the Congolese system. Where is the difference?"[705]

Nonetheless, as we will see in the subsequent examples, the DRC's dual commitment to cooperation and complementarity has triggered a number of important legal developments within the courts and legislative processes. This illustrates that even in the absence of the threat of ICC investigations, the legal internalisation process underpinning complementarity continues to hold sway. The next sections of this chapter analyse three specific examples of legal internalisation of Rome Statute norms around accountability for sexual violence. They examine, respectively, the direct application of the Rome Statute by military courts in sexual violence trials, the adoption of Rome Statute implementing legislation with a focus on sexual violence norms, and the creation of special justice mechanisms and practices mirrored on the ICC's practice. The examples illustrate not only a high degree of mimicking the ICC and the Office of the Prosecutor's policies and practices within a narrative of (cooperative) complementarity, but equally show the importance of norm interpretative interactions among

[703] For example, in 2010, the Office of the Prosecutor sent a representative to a capacity-building workshop organized by UNDP in Goma. Similarly, in April 2017, ICC representatives participated in a seminar organized for the DRC's National Human Rights Commission. See: Open Society Foundations, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya* (2011); International Criminal Court, *The International Criminal Court takes part in a training seminar for investigators from the National Human Rights Commission of the Democratic Republic of Congo*, Press release # ICC-CPI-20170417-PR1296 (18 April 2017).

[704] Several interviewees told me that many people in the DRC are disappointed with the ICC's promised "division of labour". The ICC's first cases focused neither on what the Congolese deem to be "those most responsible" nor on the most serious crimes. Interviews with Congolese NGO representatives (Kinshasa, June & July 2016), *on file with author*.

[705] Interview with Congolese NGO representative (Kinshasa, July 2016), *on file with author*.

different actors to generate internalisation. As in Colombia, it highlights in particular the different and important roles played by civil society organisations and the international community in implementing positive complementarity, given that the ICC's commitment to "burden-sharing" and "cooperation" never materialised. As with the previous chapter, this analysis cautions that while the adoption of these frameworks has been important, fighting impunity for sexual violence crimes remains a challenging and ongoing endeavour. Each of the three sections includes a discussion and analysis of the particular example by looking at both the process and substance of the relevant interactions and changes introduced. Each section ends with a short interim conclusion on what the example tells us about (positive) complementarity and the norm diffusion process in the DRC, and its relevance as a tool for increasing domestic accountability. The fourth section of this chapter provides the chapter's overall conclusions, drawing together the ICC's complementarity framework and the relevance of the legal internalisation processes in that respect.

SECTION 5.2

DIRECT APPLICATION OF THE ROME STATUTE BY MILITARY COURTS IN SEXUAL VIOLENCE TRIALS

As mentioned above, until April 2013, military courts had exclusive jurisdiction over crimes committed within the context of the ongoing armed conflict in the DRC. They have been instrumental in creating a small measure of accountability for sexual violence crimes at a national level through the direct integration of Rome Statute standards into their jurisprudence. These mobile courts have mostly addressed sexual violence as international crimes – crimes against humanity, and war crimes associated with and committed in the context of the ongoing armed conflict in the country. Over time, the Rome Statute has become an integral part of these trials. Notably, these mobile courts have directly invoked various provisions of the Rome Statute in domestic trials for sexual violence as a way of addressing ambiguities or correcting gender biases in the national legal framework in the absence of specific Rome Statute implementing legislation.[706] In doing so, they have directly invoked various provisions of the Rome Statute to fill gaps identified in domestic law,[707] for instance in relation to penalties,[708] or definitions of crimes.[709] Direct application of the Rome

[706] Although the Rome Statute contains no specific obligation to domesticate any of its provisions, many NGOs and international organisations have worked tirelessly around the world to encourage States Parties to adopt what they call "Rome Statute implementing legislation". Such legislation would, at a minimum, domesticate the list of acts criminalised in the Rome Statute to allow national courts to exercise jurisdiction over these acts. Attemps are often also made to expand the scope of such implementing legislation to include definitions of crimes or procedural requirements. The discussions in the DRC have been difficult and lengthy, but in January 2016, President Kabila promulgated three separate laws that together constitute such "Rome Statute Implementing Legislation". The three pieces of legislation respectively amend he penal code, the penal procedure code, and the military penal code. For reasons that as of yet remain unclear, he did not promulgate the amended military penal procedure code. The three amended laws entered into force 30 days after their publication in the Official Journal of the DRC on 29 February 2016. Loi 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal, République démocratique du Congo (31 December 2015); Loi 15/023 du 31 décembre 2015 modifiant la Loi 024/2002 du 18 novembre 2002 portant Code pénale militaire, République démocratique du Congo (31 December 2015); Loi 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août portant Code de procédure pénale, République démocratique du Congo (31 December 2015).

[707] Dunia Zongwe argues that this practice could be equated with the principle of 'subsidiarity' according to which "international law steps in when national law fails". Dunia Zongwe, 'Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo', 46 *Israel Law Review* (2013), at 267.

[708] In several cases, the DRC military courts recalled that the Congolese military penal code in Articles 161 and 175 omits to prescribe specific sentences for war crimes. Under the principle of *nullum poena sine lege*, explicitly included in Article 2 of the Congolese military penal code, this could mean that until the law is amended, defendants convicted of war crimes could not be sentenced. In such a situation, for instance in the *Mutins de Mbandaka* case (2006), the DRC courts have relied upon the Rome Statute, particularly Article 77, to fill this legislative gap. Congolese military judges, therefore, have interpreted Article 77 of the Rome Statute as

Statute underscores "the standard-setting role of the ICC Statute" and "reveal[s] the untapped possibilities of the ICC Statute as a basic tool for the modernisation of the judiciary within a framework of a national security sector reform programme".[710] Indeed, one of the primary reasons for this reliance upon the Rome Statute, rather than national legislation, is what Mpiana calls its "qualitative superiority": most of the time, the choice to directly apply the Rome Statute over domestic legislation in cases of international crimes prosecutions is motived by the quality of the norms around sexual violence enshrined in this Statute.[711] The trainings provided to judges presiding over these trials and legal professionals appearing before them on behalf of victims has triggered an important sensitisation process within the judiciary leading to the domestication of Rome Statute standards around accountability for sexual violence through judicial interpretation. As we will see in the next section of this chapter, this judicial internalisation subsequently contributed to legislative internalisation of the Rome Statute.

In what follows, I analyse the direct application of the Rome Statute in fourteen cases before the military courts that included charges of sexual violence.[712] While the April 2013 law officially transferred jurisdiction over international crimes from military courts to civil courts, this analysis is limited to the use of Rome Statute norms in the military courts as at the time of analysis there had not yet been any relevant sexual violence trials before the civil

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providing guidelines for sentencing. In pronouncing a single sentence, courts have equally relied upon Article 78. In this way, Articles 77 and 78 of the Rome Statute have been used to fill a gap identified by the military courts and is used as a supplement where Congolese law is lacking guidance. However, this practice has not been uniform. For instance, in the *Songo Mboyo* (2006) and *Gédeon* (2009) cases, the courts did not rely upon Article 78 of the Rome Statute, but only upon Article 7 of the military penal code. In contrast, the court in the *Kazungu* case (2011) only relied upon Article 78 of the Rome Statute.

[709] Noting the "insufficiency" of Congolese law, courts have held that the Rome Statute "is more explicit in defining concepts" and therefore must be relied upon. *Kabala Mandumba Mundande, et al.*, Tribunal Militaire de Garnison de Bukavu, 'Jugement', RP 708/12, RMP 1868/TBK/KMC/10-12 (15 October 2012), at 29; *Maniraguha and Sibomana Kabanda*, Tribunal Militaire de Garnison de Bukavu, 'Jugement', RP 275/09 et 5210/10, RMP 581/07 et 1573/KMC/10 (16 August 2011), at 34; *Kabala Mandumba Mundande*, Cour Militaire du Sud Kivu, 'Arrêt', RPA 230, RMP 1868/TBK/KMC/10-12 (21 May 2013), at 19. Similarly, in the case of *Basese Lutula* alias *Colonel Thom's* (2009), the TMG of Kisangani referred to ambiguities in Congolese law to justify the application of the Rome Statute: "in contrast to […] the Military Penal Code, [the Rome Statute] does not contain ambiguities with regards to the definition of certain terms, notably, the widespread or systematic nature of the attack". *Basele Lutula, alias colonel Thom's, et al.*, Tribunal Militaire de Garnison de Kisangani, 'Jugement', RP 167/09, RMP 944/MBM/09 (3 June 2009), at 13. (Author's translation)

[710] Zongwe (2013), at 250.

[711] Joseph Kazadi Mpiana, 'La Cour Pénale Internationale et la République démocratique du Congo: 10 ans après. Étude de l'impact du Statut de Rome dans le droit interne congolais', 25 *Revue québécoise de droit international* (2012), at 73.

[712] I gratefully acknowledge the assistance of *Avocats Sans Frontières* in getting access to the majority of the judgements analysed in this section.

courts in the DRC (as far as publicly known and accessible).[713] This analysis focuses on the effects of using Rome Statute gender justice standards in relation to two aspects: expanding the capture capacity of the domestic legal framework, and putting in place a creative framework of protection. In each of these instances of direct application, there is very little translation and almost complete adoption of the international standard within the domestic court process. These cases thus provide examples of the legal internalisation of the Rome Statute and of accountability for sexual violence crimes as international crimes through *judicial interpretation*.

5.2.1 Expanding the capture capacity of Congolese (military penal) law

In November 2002, the DRC amended its 1972 military penal code, granting military courts exclusive jurisdiction over genocide, crimes against humanity, and war crimes. The 1972 military penal code had not included crimes of sexual violence. The 2002 amendment thus introduced a number of crimes not previously covered, including crimes of sexual violence, but failed to provide definitions for these.[714] To address this lacunae, charges of sexual violence before the military courts have been brought specifically under articles 7 and/or 8 of the Rome Statute, sometimes in conjunction with the relevant provisions of the Congolese (military) penal code. At times, courts have also explicitly (and only) relied upon the modes of liability provided for in the Rome Statute, particularly where the facts of the case gave rise to command responsibility (which was not explicitly provided for under Congolese law).[715] The reliance upon the Rome Statute has allowed the judges to address some of the

[713] In September 2016, the civil appeals court in Lubumbashi used the April 2013 law for the first time, convicting the accused for charges of genocide. *Mukalayi Wa Jumbao Adalbert, Banza Guylain, et al.*, Cour d'Appel de Lubumbashi, 'Arrêt', RP 116/RMP 5005/PG 025/KKN/2015 (30 September 2016). See also: 'DRC: A breach in impunity?', *TRIAL International* (30 November 2016), available at <https://trialinternational.org/latest-post/drc-a-breach-in-impunity/>, accessed 9 January 2016.

[714] Kazadi Mpiana (2012), at 65; *Loi 024/2002 du 18 novembre 2002 portant code penal militaire*, République démocratique du Congo (18 November 2002); *Loi 023/2002* (18 November 2002).

[715] While it did not rely upon Article 25 of the Rome Statute for his three co-accused, Basele Lutula alias Colonel Thom's (2009) was charged explicitly under Article 28 for his responsibility as military commander. In evaluating the facts and evidence, the Court recited Article 28 in full. Accordingly, the Court found that Colonel Thom's was the *de facto* military commander and exercised effective control over his men and was therefore in a position to stop or repress the crimes. As a result, it held him liable under Article 28 for the crime against humanity of rape committed by his troops. *Basele Lutula, alias colonel Thom's, et al.*, RP 167/09, RMP 944/MBM/09, at 16-17. See also: *Kakado Barnaba Yonga Tshopena*, Tribunal Militaire de Garnison de Bunia, 'Jugement', RP 071/09, 009/010 et 074/010, RMP 885/EMA/08, RMP 1141/LZA/010, RMP 1219/LZA/010, RMP 1238/LZA/010 (9 July 2010), at para 133.

inadequacies or gaps in Congolese law in prosecuting sexual violence as an international crime before the military courts.

In the cases analysed, the mobile military courts have particularly relied upon the definitions provided in the Rome Statute's Elements of Crimes (EoC). This illustrates an increase in the awareness among judges of the problems with the absence of a definition of rape under the military penal code and an increased attempt to rectify this using the provisions of the Rome Statute, the EoC, the Rules of Procedure and Evidence (RPE), and the Regulations of the ICC.[716] However, many judgements merely reference the definition, without discussing each element in its evaluation of the evidence. For instance, in the *Bavi* case,[717] the judges, while referencing the Rome Statute definition, "barely mentioned the source of the accounts cited or, at the very least, identify each victim".[718] Nonetheless, a number of courts have included quite detailed discussions of the elements, evidence and circumstances of the alleged sexual violence.

For instance, in the *Songo Mboyo* case, the mobile military court specifically relied upon the definition of rape provided in the Rome Statute's EoC. This case related to an attack on the village of Songo Mboyo in December 2003 by former rebel soldiers (who were waiting to be integrated into the Congolese army) who pillaged and looted the town as retaliation for not having been paid sufficiently by their commanders. They also raped around 119 women. Three years later, in 2006, the case led to an investigation and trial before a military court. The accused faced seven charges only one of which was classified as a crime against humanity: rape. The military judges noted the differences in the definition depending on whether the charge was brought under international or national law. In this case, the court relied only upon the definition provided for by the Rome Statute, emphasising the gender-neutral character of the crime: it can be committed against male and female victims, and by

[716] In 2005, the military court in the *Kalongo Katamasi* case relied upon the ordinary definition of rape. Since the 2006 decisions in *Songo Mboyo* and *Mutins de Mbandaka*, there is a noted increase in the reliance upon the Rome Statute's definition of rape.

[717] This case is not included in my analysis but is analysed by ASF in its reports.

[718] Avocats Sans Frontières, *Case Study: The application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo* (2009), at 61. The *Bozize* appeals court (2007) also cited the definitions of the crimes charged as provided for in the Elements of the Crimes of the Rome Statute but, in confirming the convictions of all ten defendants, only very briefly discussed the crimes and the evidence. In *Balumisa* the court again discusses the Rome Statute definition of rape only at the start of its decision, treating it in a narrative sense, rather than an evidentiary sense.

male or female perpetrators.[719] It made this statement in response to a defence challenge that one of the accused could not be charged with the rape of a male victim, arguing that rape could only be committed against women. The court dismissed the defence's argument, and firmly established the broader gender-neutral definition of rape within Congolese military penal law.[720] Similarly, in *Mutins de Mbandaka* (2006), the court cited, *verbatim*, the definition of rape under the Rome Statute in convicting the accused persons.[721] This expanded the understanding of the crime to include male victims within its scope. This was a much more progressive understanding of rape than existed in Congolese law at the time (which required penile penetration of a woman's vagina and could thus only be committed by men against women).

The court also added important assertions on the necessary evidence in relation to sexual violence, holding: "the material act of rape was committed by force in a manifestly coercive environment. […] the fact that, as soldiers, each of the defendants possessed a weapon of war [...] had pre-empted the possibility of resistance on the part of the vulnerable victims."[722] The appeals court later added: "the rapes charged were committed … during a widespread attack. In such circumstances the resistance of victims is negated."[723] In other words, the reliance upon the Rome Statute allowed the military court judges to understand these acts of violence within their full context, and enabled it to remove the question of resistance or consent (which remained a relevant factor under domestic penal law at the time regardless of the circumstances in which crimes are committed). Relying on the Rome Statute thus allowed the judges to expand the capture capacity of the Congolese legal framework.

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[719] *Eliwo Ngoy, et al.*, Tribunal Militaire de Garnison de Mbandaka, 'Jugement', RMP 154/PEN/SHOF/05, RP 084/2005 (12 April 2006), at 32; see also: *Kahenga Mumbere, et al.*, Tribunal Militaire de Garnison de Mbandaka, 'Judgement', RP 086/005, RP 101/006 (20 June 2006), at 19. ("…the Elements of the Crimes, a complementary and interpretative source of the Rome Statute, contains a broad definition that is inclusive of acts defined in a gender-neutral manner")

[720] Nonetheless, for lack of evidence, the charge was declared unfounded.

[721] The Court held: "In the present case, sexual relations imposed on women and girls, as well as anal penetration of men under the threat of bullets constitutes an example of rape as defined by the Rome Statute of the International Criminal Court." *Kahenga Mumbere, et al.*, RP 086/005, RP 101/006, at 19.

[722] *Eliwo Ngoy, et al.*, RMP 154/PEN/SHOF/05, RP 084/2005, at 34. Translation by Avocats Sans Frontières, *Case Study: The application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo*, at 41.

[723] *Bokila Lolemi, et al.*, Cour Militaire de L'Equateur, 'Arrêt', RMP 154/PEN/SHOF/05, RPA 014/2006 (7 June 2006), at 20.

Other times, courts have only referred to some of the elements of the crime of rape.[724] For instance, in the *Kibibi* case (2011), the military court rehearsed only three of the four elements of the Rome Statute's definition of rape as a crime against humanity. It omits the third element, which provides: "the conduct was committed as part of a widespread or systematic attack directed against a civilian population".[725] Nonetheless, as it does evaluate the requirement that the perpetrator knew the act was committed as part of a widespread or systematic attack against the civilian population, it considers in part also the evidence relevant to establish the missing element. Furthermore, the *Kibibi* judgement stands out among some of the others analysed because it outlines (even if briefly) how the different elements of the crime of rape are satisfied with specific references to the facts of the case at hand.[726] It thus presents a more sophisticated analysis than some of the other cases, where military judges simply took note of the Rome Statute's definitions, and found that they applied to the case at hand without fully explaining how.

Similar reliance on the Rome Statute as a legal framework or normative standard can be found in relation to other sexual violence crimes. For instance, in the *Kakado* (2010) case, the court took note of the definition of sexual slavery as provided in the EoC in relation to sexual slavery charges brought before it.[727] The court noted that there was sufficient evidence to establish that the Ngiti fighters committed sexual slavery against civilian women who lived in the places they attacked, which, for the court, also included domestic work, such as gathering water and preparing food for guests at the accused's house.[728] Similarly, recalling the definition of inhuman treatment under article 8(2)(c)(i)-3 of the Rome Statute and the corresponding text of the EoC, the court found that the injuries sustained by a victim whose genitals had been burnt with hot coal amounted to inhuman or cruel treatment under this article.[729] The references to the Rome Statute and the EoC in this case enabled the court to discuss the facts of the case in such a way that recognised these contextual elements. The

[724] Avocats Sans Frontières, *La mise en œvre judiciaire du Statut de Rome en République démocratique du Congo* (2014), at 36.

[725] *Elements of the Crimes*, International Criminal Court (10 September 2002).

[726] Avocats Sans Frontières, *La mise en œvre judiciaire du Statut de Rome en République démocratique du Congo*, at 36.

[727] *Kakado Barnaba Yonga Tshopena*, RP 071/09, 009/010 et 074/010, RMP 885/EMA/08, RMP 1141/LZA/010, RMP 1219/LZA/010, RMP 1238/LZA/010, at paras 120-121.

[728] *Kakado Barnaba Yonga Tshopena*, RP 071/09, 009/010 et 074/010, RMP 885/EMA/08, RMP 1141/LZA/010, RMP 1219/LZA/010, RMP 1238/LZA/010, at para 124.

[729] *Kakado Barnaba Yonga Tshopena*, RP 071/09, 009/010 et 074/010, RMP 885/EMA/08, RMP 1141/LZA/010, RMP 1219/LZA/010, RMP 1238/LZA/010, at para 129.

court engaged in a relatively sophisticated discussion of the facts and circumstances of the case, and elaborated on its findings.

Furthermore, several judges have held that testimonies of sexual violence do not need to be corroborated by other evidence. For instance, in *Colonel Thom's* (2009), the court explicitly relied upon rule 63(4) of the ICC's RPE[730] to find that corroboration was not necessary to prove the crime of rape.[731] The court therefore held it could rely upon the statements by the victims themselves to evaluate the facts and subsequently enter guilty verdicts. Similarly, in the *Kakado* (2010) case, the court specifically relied upon the testimony of one victim/witness to support the sexual violence charges (and in doing so, justified this by relying upon the relevant provisions of the Rome Statute). The witness had testified that she was abducted together with another girl and detained for at least one year and two months under threat of death if she tried to escape.[732] The court added that it had also heard from another victim/witness about the systematic rape of women by Ngiti fighters. The court relied upon these two testimonies to conclude that rape was carried out as part of the reprisals my militia members against the civilian population in response to the arrest of their commander, the accused Kakado, by the FARDC.[733] In the *Kakwavu* case, one of the few against senior commanders, the court also relied solely on the testimony of two female witnesses to hold the accused responsible for sexual slavery.[734] The use of this norm of non-corroboration and the value of witness testimony without necessarily explicit reliance upon the Rome Statute suggests some degree of domestic resonance (or at least internalisation) of that standard. This is the kind of legal internationalisation through *judicial interpretation* that attests to Koh's transnational legal process.

However, this does not (yet) represent standardised practice across the different cases analysed. For instance, in *Mutins de Mbandaka* (2006), the court made the following

[730] Rule 63(4) provides: "Without prejudice to Article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence."

[731] *Basele Lutula, alias colonel Thom's, et al.*, RP 167/09, RMP 944/MBM/09, at 14-15.

[732] She testified she was given as a wife to one of the Ngiti combatants, someone named 'Papy', one of the fighters under the accused's command. During her time in captivity, she was forced to live with Papy, who raped her repeatedly. *Kakado Barnaba Yonga Tshopena*, RP 071/09, 009/010 et 074/010, RMP 885/EMA/08, RMP 1141/LZA/010, RMP 1219/LZA/010, RMP 1238/LZA/010, at para 118.

[733] *Kakado Barnaba Yonga Tshopena*, RP 071/09, 009/010 et 074/010, RMP 885/EMA/08, RMP 1141/LZA/010, RMP 1219/LZA/010, RMP 1238/LZA/010, at para 119.

[734] 'Jerome Kakwavu', *TRIAL International* (27 September 2016), available at <https://trialinternational.org/latest-post/jerome-kakwavu/>, accessed 10 January 2017.

(sweeping) statement: "with respect to the victims of sexual assault, the declarations of the victims identifying their attackers must be taken with great caution as it has been sufficiently demonstrated that virtually all of them tended to be more wrong than right".[735] The statement was made in response to a defence challenge regarding victims' ability to identify their alleged perpetrators since, the defence argued, the insurgents had entered the village masked and had worn camouflage. Thus broadly brushing aside the value of all testimony of witnesses (of sexual violence) without appreciating the need to evaluate the credibility of each witness individually represents a move away from the incorporation of the norm or standard of non-corroboration, which some other cases attest to. In other words, whereas the reliance upon international legal definitions of crimes was mostly universal in the cases analysed, the reliance on international norms and standards encapsulated in the Rome Statute's evidentiary principles appears somewhat haphazard. This is perhaps exacerbated by the absence of a clear legal basis for the reliance upon the Rome Statute's internal legal documents.[736] This puts into question the degree to which this attests to the domestication of the Rome Statute's gender justice principles in this instance.

It is interesting that these mobile courts have continued to rely upon the Rome Statute also after the formal amendment of the domestic legal framework. In July 2006, the first two cases to directly apply the Rome Statute, the *Songo Mboyo* and *Mutins de Mbandaka* judgments, contributed to the adoption of an amendment to the Congolese penal code to specifically incorporate Rome Statute definitions and procedures around sexual violence into Congolese law (an issue that will be discussed in the next section of this chapter). Although these laws are not necessarily applicable before military courts, article 1 of the military penal code does provide that, subject to the provisions of the military code, the ordinary penal code can also be applied by military jurisdiction.[737] Despite this, however, courts have continued to directly use the Rome Statute and its subsidiary documents. This may be in part due to the emphasis in the international community on accountability for *international* crimes, as well as the availability of trainings for judges on the Rome Statute and other international

[735] *Kahenga Mumbere, et al.*, RP 086/005, RP 101/006, at 22. Translation provided by Avocats Sans Frontières, *Case Study: The application of the Rome Statute of the International Criminal Court by the courts of the Democratic Republic of Congo*, at 42.

[736] On this, e.g., Labuda: "Lost in the enthusiasm surrounding this and other cases is the question of how an international tribunal's internal set of regulations, designed for an entirely different institutional context, can displace binding Congolese criminal law". Labuda (2016), at 285.

[737] With the entry into force of the 2015/2016 *Loi de mis en œuvre*, the ordinary penal code, including the changes to accord with the Rome Statute, has become directly applicable before the military courts. Jurisdiction is now also shared between civil courts and military tribunals.

standards – awareness of international legal frameworks may in fact be more standardised among judges serving on these mobile courts than of the 2006 Sexual Violence Law. Several interviewees also confirmed that prosecuting sexual violence crimes as international crimes is likely to attract attention at an international level from both the ICC and NGOs, which can trigger all sorts of additional capacity building activities, money and praise from the international community (an issue I will discuss further in the final section of this chapter). In this way, complementarity triggers a host of other relevant dynamics for the internalisation of Rome Statute standards.

While DRC military courts have relied upon the definitions provided in the Rome Statute's EoC, this discussion has not (yet) evidenced a very detailed appreciation of these provisions in light of the facts of the case. In the majority of cases, courts simply noted the Rome Statute's definitions in order to conclude that the acts constituted rape under that definition. It is almost as if a box called "use the Rome Statute" had to be ticked. While important, this does not contribute to the development of a significant body of jurisprudence that would help to harmonise the DRC's prosecutions of sexual violence committed in conflict. It suggests an acceptance of the norm without perhaps a real understanding of the substance or relevance of the norm. Nonetheless, most of these prosecutions would not have been possible under Congolese military penal law, and the reference to the Rome Statute proved significant in moving the cases, and therefore national accountability forward. Most importantly, embracing the broader, gender-neutral definition of rape under the Rome Statute has allowed the DRC courts to (start to) capture the broader experience of sexual harm suffered by both women and men in the conflict. Relying on the Rome Statute and incorporating almost *verbatim* the Rome Statute's legal definitions of crimes through judicial interpretation has allowed the military court judges to begin to expand the capture capacity of the Congolese legal framework regarding sexual violence.

5.2.2 Expanding available protective measures for victims/witnesses

On a practical level, the direct reliance upon the Rome Statute has made some differences for victims of sexual violence in relation to the types of protective measures that were ordered by the military courts. Article 74(bis) of the (amended) Congolese civil penal procedure code vests in the public prosecutor and the judges – in cases of sexual violence – the responsibility "to take all necessary measures to guarantee the security, physical and psychological well-being, dignity and respect for the private life of victims and all other persons involved" (the penal procedure code before 2006 contained no such provision).[738] The second paragraph of this article specifies that "in this respect", victims or the public prosecutor may request the use of closed sessions. It does not, however, outline other types of protective measures, and this has led the military courts to refer to the Rome Statute and the practice of the ICC, holding that these latter are more "appropriate" to apply.[739] In many of the cases analysed the courts ordered the use of closed sessions to hear the testimony of victims of sexual violence. Some courts also ordered the use of pseudonyms or codes to refer to those victims who testified before it. In doing so, courts have relied upon article 68 of the Rome Statute, and have explicitly underscored the need for these protective measures given the risk of reprisals by soldiers whose battalions remained in the victims' neighbourhoods.[740] Protective measures have also included psychological assessments of victims.[741] At the same time, however, many of the judgments (often inadvertently) publicly listed the names of the victims of rape effectively undermining the use of these pseudonyms, and putting many of these victims at

[738] *Loi 06/019 du 20 juillet 2006 modifiant et completant le decret du 06 août 1959 portant code de procedure penale congolais*, République démocratique du Congo (20 July 2006). Under Article 129 of the military procedure code, the same procedural requirements apply to the military courts as to the civil courts – subject to any alterations made in the military penal procedure code – hence, the military courts have the same obligation.

[739] In *Kibibi* (2011), the court held that the Rome Statute "is more appropriate with regards to measures for the protection of victims". *Kibibi Mutuare, et al.*, Cour Militaire du Sud Kivu, 'Arrêt', RP 043, RMP 1337/MTL/11 (21 February 2011), at 16.

[740] In *Kibibi* (2011), the Court stated that it ordered the use of pseudonyms for the victims of rape who came forward to testify as these women were at risk of reprisals by the soldiers as their battalion remained in their neighbourhood. In doing so, it explicitly relied upon Article 68 of the Rome Statute. In *Maniraguha* (2011), the court similarly stated that the Rome Statute "is better suited with regards to mechanisms for the rights and protection of victims". The Court added, again relying upon Article 68 of the Rome Statute, that it had decided to use pseudonyms, or "codes", to refer to the civil parties in the case, particularly those who testified before the Court, as they were still at risk of reprisals by the elements of the FDLR who have not been arrested. *Maniraguha and Sibomana Kabanda*, RP 275/09 et 5210/10, RMP 581/07 et 1573/KMC/10, at 34. (Author's translation)

[741] The *Mupoke* appeals court (2013) recalled its interlocutory decision to order a psychological assessment of the civil parties claiming to be victims of sexual violence in addition to the use of special protective measures, including the use of closed sessions, for victims of sexual violence. *Kabala Mandumba Mundande*, RPA 230, RMP 1868/TBK/KMC/10-12.

serious risk. This underscores that while there is recourse to the Rome Statute's norms around protective measures, and therefore a degree of legal internalisation, there remain significant gaps in the consistent application, putting in question the degree of social internalisation of these norms.

An exemplary case in this regard is the *Minova* case (2014). This case relates to mass rape committed by the Congolese armed forces in the town of Minova in November 2012. When the case came to court in 2014, the military court judges used the Rome Statute to expand the available protective measures for victims of sexual violence. In this case, the court recalled that article 74 of the (amended) penal procedure code obliged it, in cases of sexual violence, to take protective measures to safeguard the security, physical and psychological well-being, dignity and the respect for the private life of victims and any other persons concerned. The court observed, however, that article 74 does not provide *which* kind of protective measures it could order at the request of the victim or the public prosecutor, other than the use of closed sessions (when testimony is heard behind closed doors, away from the eyes and ears of the public). For this reason, the court "relied upon article 68 of the Rome Statute to find certain measures to comply with this objective".[742] In addition to the use of closed sessions, the court ordered: the use of a veil to hide protected persons, the use of pseudonyms, it allowed victims to testify behind a curtain to shield them from the accused, and ordered the presence of a psychologist to assist the victims if necessary.[743] The Court underscored that these measures were ordered with the rights of the defence in mind, who had been informed about these in advance and had not made any objections after having been informed confidentially of the identity of those testifying. Some of the victims were also allowed to present unsworn statements.[744]

Hearing the *Minova* case before a mobile gender court (as with many of the other cases analysed) often increased the ability for victims and others to witness the trial, which in and of itself can have a cathartic effect in processes of transitional justice, and can contribute to a degree of social internalisation of justice and accountability among communities.[745] Yet, this also meant that they were holding hearings in locations such as schools, or market places,

[742] *Nzale Nkumu Ngandu, et al.*, Cour Militaire Opérationnelle du Nord Kivu, 'Arrêt', RP 003/2013, RMP 0372/BBM/013 (5 May 2014), at 64.

[743] *Nzale Nkumu Ngandu, et al.*, RP 003/2013, RMP 0372/BBM/013, at 64.

[744] *Nzale Nkumu Ngandu, et al.*, RP 003/2013, RMP 0372/BBM/013, at 64.

[745] See the reflections by Kelly Askin in this respect cited earlier in this chapter (p 206). Askin (2011).

which are fully exposed to the public. These situations required a lot of creative thinking among the judges and lawyers involved in how to make the international standards, such as those of witness protection, active and effective in their national (and local) setting. In all of these cases, recourse to the Rome Statute allowed the courts to order a broader range of protective measures for victims of sexual violence than available within Congolese law. This took root through the interactions and discussions upon how to fit those standards within the restricted national context among the judges, lawyers and prosecutors, supported by international civil society organisations or the UN. For instance, the protective measures in the Minova case were implemented in response to recommendations filed by the lawyers supporting the victims[746] – their litigation before the courts triggered a (re)interpretation of the relevant norms.

In other words, while using the framework of the Rome Statute, the protective measures in the Minova case were adapted to the local context. Notably, while the ICC has sophisticated technological systems available to shield a witness' identity from the public audience, the DRC courts adapted this to the local context by requiring civil parties appearing before the court to be veiled and wear sunglasses.[747] At times, they were also allowed to give testimony remotely through a microphone to avoid having to directly confront the alleged perpetrators.[748] Adapting the international norm to the local context testifies to a great level of creativity among willing judges. This creativity was critical – you need judges and lawyers who are willing to be creative and think through how an international standard could work at a national level. It also creates a sense of local ownership of the process, and makes it easier for such practices to "stick": for such norms to have a transformative effect on legal practices it has to become part of those national practices and not be seen as imposed from above. Indeed, one of the risks of direct application is, as Ni Aoláin argued, the "cold distinction between norms that are viewed as 'international' and parachuted into domestic legal systems, and those viewed as integral and necessary to the completion of domestic criminal law

[746] Interview with NGO representative involved in the trials (Brussels, September 2015), *on file with author*.

[747] In the *Walungu* case, analysed by Lake (2014), the judge also ruled as follows: "in accordance with Article 68 of the Rome Statute of the ICC and Article 74 of the Criminal Procedure Code, civil parties appearing before the court should be identified and referred to by all parties at trial as 'F1' in the case of females and 'M1' in the case of males to protect their identities. All civil parties appearing before the court, and especially rape victims, must be veiled and wear sunglasses." Victims appearing in the *Kazungu*, *Kibibi*, and *Kamanzi* trials "were also dressed head to toe in black, with veils and sunshades to conceal their identities". Lake (2014), at 17 (translation by Lake).

[748] Lake (2014), at 17.

integrity".[749] Direct application by courts says very little about the "domestic efficiency or buy-in".[750] Nonetheless, while the DRC continues to face immense problems in addressing the impunity for and continued commission of sexual violence, particularly in the east of the country, there are signs of change. Small strides have been made through the legal internalisation of the Rome Statute's norms to advance justice for victims of sexual violence crimes, at least with the military courts. With the recent transfer of jurisdiction over international crimes from military courts to the ordinary/civilian courts, efforts must be made to ensure knowledge transfer between the two systems.

5.2.3 Positive complementarity in practice?

This direct application of the Rome Statute in domestic courts has been a critical part in bringing some measure of justice to victims of sexual violence; in fact, these mobile military courts have been the only courts to deliver any justice at all in many remote locations. In the absence of any convictions for sexual violence in its DRC cases to date,[751] the ICC has equally failed victims of these crimes. From a positive complementarity perspective, therefore, these domestic military court trials are important not necessarily because they keep cases that would otherwise have been of interest to the ICC at a national level (in fact, many of the cases dealt with by the mobile courts have been of lower level perpetrators), but because they establish a measure of accountability for these crimes at a national level within the broader Rome Statute system of justice. Similarly, many actors have specifically supported these trials because of a commitment to implementing or developing 'complementarity'.[752] However, besides providing the relevant normative framework that is

[749] Ní Aoláin (2014), at 633.

[750] Ní Aoláin (2014), at 633.

[751] The ICC has charged five individuals in relation to its investigation in the DRC, but it has struggled to address sexual violence crimes within these cases. Thomas Lubanga was not charged with sexual violence crimes. While both Mathieu Ngudjolo and Germain Katanga were charged with rape and sexual slavery, neither of them was convicted for these charges (Ngudjolo was acquitted in full; Katanga was acquitted of the sexual violence charges and charges relating to child soldiers, but was convicted for other charges). Callixte Mbarushimana was charged with a broad range of sexual and gender-based violence charges, but the charges against him were not confirmed and as such he was released before trial. Sylvestre Mudacumura, charged with a number of sexual violence crimes, remains at large. Bosco Ntaganda is currently on trial for a range of sexual violence charges, including rape committed against girl child soldiers forcibly recruited into his armed group.

[752] An OSJI Fact Sheet states: "The mobile court was designed by the Justice Initiative to support the concept of 'complementarity' – the principle that domestic courts have the primary responsibility to investigate and prosecute serious crimes – and hence to complement the work of the International Criminal Court (ICC) in the Hague, which is tasked with prosecuting high level suspects otherwise outside the capacity of the domestic court system." Open Society Justice Initiative, *DRC Mobile Gender Courts - Fact Sheet* (25 July 2011). See also,

incorporated through these trials, the ICC itself has been of very little relevance. In fact, the ICC does not have the resources to closely follow these national proceedings, and faces security and confidentiality restraints in sharing evidence with national accountability processes in the DRC.[753]

The existence of the Court and its founding principle of complementarity, however, have been instrumentalised by many of the international actors and civil society organisations supporting the development of these proceedings. Further, the involvement of the broader international community has been significant and determinative regarding the legal internalisation of the Rome Statute by these mobile courts. Many trials in the military justice system are triggered by and significantly rely upon initial investigations conducted by MONUC/MONUSCO[754] or by international human rights organisations.[755] For instance, the *Balumisa* case (2011) before the military court in Bukavu was conducted with logistical and material support from MONUSCO, the UN Joint Human Rights Office, the Canadian International Development Agency (CIDA), the UN Development Programme (UNDP), and *Avocats Sans Frontières* (ASF).[756] General *Kibibi*, the first senior commander of the FARDC to be convicted for rape, was arrested in January 2011 because of pressure put on the DRC by MONUSCO; his case was subsequently heard before the mobile gender court in Baraka (South Kivu), funded by the Open Society Justice Initiative.[757] The *Songo Mboyo* case (2006), the first to determine rape a crime against humanity, was initiated following

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Open Society Foundations, *Justice in the DRC: Mobile courts combat rape and impunity in Eastern Congo*, at 6. ("The work of these itinerant Congolese judges, lawyers, and investigators provides an essential complement to the work of the International Criminal Court in The Hague, which tends to try only the highest-level defendants.")

[753] Interview with representative of the Office of the Prosecutor (The Hague, September 2015), *on file with author*.

[754] Following the signing of the Lusaka peace agreement in July 1999, the UN Security Council established the *Mission des Nations Unies en République démocratique du Congo* (MONUC) by resolution 1279 of 30 November 1999. The mandate of MONUC was gradually expanded through a series of resolutions adopted in subsequent years. In July 2010, MONUC was renamed the *Mission de l'Organisation des Nations Unies pour la stabilisation en République démocratique du Congo* (MONUSCO). It is one of its longest running missions to the country, which among its many tasks also provides logistical and security support for holding trials in remote areas, including for sexual violence.

[755] Sofia Candeias *et al.*, *The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)* (New York: International Center for Transitional Justice, 2015), at 23.

[756] 'Verdicts in latest DR Congo rape trial show justice is possible - UN envoy', *UN News Centre* (10 March 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=37728#.VK_xdIrF9XY>, accessed 10 April 2015.

[757] 'Mutware Daniel Kibibi', *TRIAL International* (8 June 2016), available at <https://trialinternational.org/latest-post/mutware-daniel-kibibi/>, accessed 10 January 2017. See also: Candeias *et al.* (2015), at 32.

preliminary investigations by MONUC in April 2004.[758] The investigation in the *Minova* case (2014) was fully funded by external partners.[759] General *Kakwavu*, which one of my interviewees deemed to be one of the greatest successes for the DRC,[760] while having initially been arrested in 2005 following pressure from the UN Security Council, was released on bail to continue in his role as general. He was rearrested when then-US Secretary of State Hillary Clinton visited the DRC and put pressure on the government to advance the case.[761] In other words, the normative engagement with Rome Statute standards around accountability for sexual violence is driven by actors formally external to the complementarity or Rome Statute system; it has not in any way involved the ICC beyond providing the relevant normative framework.

Nonetheless, these processes do not rely only upon international support; the mobile (gender) courts were so effective at bringing some measure of justice also because of the high degree of local participation in creating the necessary judicial structures and in administering justice.[762] It was thus the combination of local participation with international support that created a framework that allowed for internalisation. Notably, the integration of protective measures by allowing women to wear wigs or sunglasses and to testify remotely using a microphone happened because a conversation took place among the different actors involved in the trials. Lawyers appearing on behalf of victims in the DRC, who were trained and supported by (international) civil society organisations on international standards around accountability for sexual violence crimes, litigated within the context of ongoing trials to have such international standards explicitly recognised in the jurisprudence of the mobile courts. While this may not immediately have been 100% effective at protecting victims and witnesses, over time, these standards can become normalised practice through such repeated interactions and adaptations. Repeated litigation over time can create a greater sense of awareness of the limitations of the domestic framework, and the ways in which these can be amended and adapted.

Through the training provided to the judges and lawyers involved in these mobile courts, international NGOs have played a significant role in the sensitisation of critical justice

[758] 'Fabien Bokila Lolemi', *TRIAL International* (10 June 2016), available at <https://trialinternational.org/latest-post/fabien-bokila-lolemi/>, accessed 10 January 2017.

[759] Candeias *et al.* (2015), at 32.

[760] Interview with Congolese military court representative (Kinshasa, June 2016), *on file with author*.

[761] 'Jerome Kakwavu' (2016).

[762] Khan and Wormington (2011), at 8-13. See also: Deramaix (2014).

sector actors in incorporating international norms of accountability for sexual violence. Several interviewees suggested judges were very keen to sit on these mobile courts and undergo these trainings, as it meant a significantly higher salary and per diem than they would have received in the normal courts. This equally opened up their willingness to undergo the necessary trainings. All judicial officials were trained specifically to hear cases of sexual violence as an international crime, and on the use and application of the Rome Statute. It is then not surprising that many of the judges hearing these cases, and the lawyers appearing before these courts, have specifically used the Rome Statute. After all, that is what they were trained to do. Explicitly maintaining that link to the Rome Statute through direct reliance on its provisions means that it fits very easily into the complementarity narrative advanced by civil society in their support for these trials (and can also be easily linked back to the 'burden sharing' approach to complementarity whereby national courts focus on cases that fall outside the ICC's purview). Through their work with domestic law enforcement, legislators, and judges, these international and national NGOs constitute key players in the process of diffusion of the Rome Statute domestically through the courts.

5.2.4 *In sum*: Judicial internalisation of the Rome Statute

The direct reliance upon the Rome Statute to expand the capture capacity of DRC criminal law and improve procedural or evidentiary matters is a very clear example of the legal internalisation of international norms around accountability for sexual violence through judicial interpretation. In addition, many of these improved judicial standards were integrated into the courts' practices through interactions among the parties and participants – oftentimes, lawyers appearing on behalf of victims (often supported and/or trained by international NGOs) triggered these expansive interpretations from judges through their filings and pleadings. These developments in some ways also attest to a degree of social internalisation, particularly when judges and lawyers work creatively to make international standards work within the logistical and financial constraints faced by the mobile courts. The measures are no longer seen as imposed from above, but have become an integrated practice at a national level. While it has not led to a harmonised practice across all courts, these processes constitute important ways in which a restrictive national legal framework is amended to better address sexual violence accountability.

Interestingly, DRC courts are increasingly relying upon subsidiary documents of the Rome Statute, such as the EoC and RPE. This suggests a more wholesale integration of Rome Statute norms and standards than a mere reliance upon the substantive provisions of the Statute. It is important to highlight, however, that only very little recourse is made to case law of the ICC dealing with these same three issues. This is primarily due to the relative inaccessibility of ICC jurisprudence to judges in the DRC, in part due to the absence of French translations of most of the ICC's case law, but also because of resource issues at a local level. Ultimately, it is the standard enshrined in the Rome Statute and its subsidiary documents, rather than the ICC's jurisprudence, which have been of influence in the military court jurisprudence in creating space for accountability and justice for crimes of sexual violence. Nonetheless, without the existence of the ICC and its normative framework, which is catalysed by civil society and international actors, it would arguably have been much more difficult to trigger the effects analysed here.

While the mere adoption of the amendments or legal standards through judicial interpretation does not necessarily produce a change in the experience of accountability for victims, they signal a first awakening of the need to challenge restrictive processes from a gender perspective. Perhaps most importantly, these processes of harmonising national legal practices with international standards opened up a space for talking about sexual violence that did not exist before. Several interviewees confirmed that, while difficulties remain, these trials contributed to victims' ability to speak out about the crimes, either in seeking the necessary medical treatment or testifying in public.[763] However, this blanket reliance on the Rome Statute is not necessarily an unmitigated good. Notably, this move to bring the national legal framework in line with international criminal law standards has created a somewhat artificial distinction between sexual violence crimes as international crimes, committed in times of unrest or conflict and to which these new and improved standards apply, and 'normal' sexual violence committed in times of so-called 'peace'. It risks downplaying 'ordinary' gendered and sexual harms. The advancements around protective measures, evidence or definitions of crimes, and generally the high attention being paid to sexual violence as a war crime and crime against humanity in the DRC has not translated into the same kind of attention for sexual violence when it does not constitute a war crime or crime against humanity. Such 'ordinary' rape is not addressed through the military court system,

[763] Interview with NGO representative (Brussels, September 2015), *on file with author*; Interview with Congolese military court representative (Kinshasa, June 2016), *on file with author*.

where all resources have been focused on. Although the recent transfer of jurisdiction to civilian courts may contribute to addressing this gap, there is much work to be done to ensure sufficient knowledge transfer between the two legal systems.[764]

[764] For instance, a case relating to rape of very young children in the village of Kavumu only advanced once it had been transferred to the military court system. Starting in 2013, a number of very young girls were abducted from their homes in the middle of the night, probably drugged, raped and left unconscious in the bush. By September 2014, it had become a widespread crime in the village. Nonetheless, the civil prosecutor failed to connect the dots. The cases were each treated as individual cases, filed under different names. A lack of means, knowledge, willingness, and familiarity with cases involving large-scale crimes in the ordinary prosecutor's office hampered any progress on the investigation. In March 2016, the case was transferred to the military prosecutor, and by mid-June, several arrests were made following a joint investigation treating the cases as connected and as crimes against humanity. The case has not yet led to a prosecution, however. Interview with UN representative (Kinshasa, June 2016), *on file with author*. For more on the Kavumu case, see *e.g.*: Lauren Wolfe, 'The village where dozens of young girls have been raped is still waiting for justice', (3 August 2016), available at <https://www.theguardian.com/world/2016/aug/03/kavumu-village-39-young-girls-raped-justice-drc>, accessed 13 May 2017.

SECTION 5.3

ROME STATUTE IMPLEMENTING LEGISLATION: A FOCUS ON SEXUAL VIOLENCE

Following these decisions from the mobile military courts incorporating international justice norms into national criminal proceedings through direct reliance upon the Rome Statute, efforts were made to consolidate this judicial interpretation: the Rome Statute became embedded in the Congolese national criminal legal framework through legislative action. The Rome Statute's norms around accountability for sexual violence have been incorporated into the Congolese legal framework through a set of legislative reforms, some of which specifically targeted the incorporation of sexual violence related standards, others were more general but indirectly incorporated these same norms. This legislative incorporation of Rome Statute norms and standards (which necessitated a degree of political internalisation) has, however, been a lengthy and complicated process in the DRC. Since the entry into force of the Rome Statute in 2002, international and national NGOs have encouraged the DRC to adopt Rome Statute implementing legislation ("*loi de mise en œuvre*") in order to activate its provisions at a national level, and thus incorporate it into the legal framework underpinning national accountability efforts. Until very recently, however, any progress on the various initiatives was marred by a lack of political commitment and competing legislative proposals from the executive and legislative branches of government.[765] Finally, in late 2015, following years of discussions, consultations, civil society advocacy and sensitisation, and repeated revisions of various drafts, President Kabila promulgated a number of separate pieces of legislation harmonising domestic law with the Rome Statute.[766]

[765] At the same time as various versions of the draft Implementing Legislation were discussed (which were introduced by members of parliament), a simultaneous discussion took place on the government's proposal to establish a special court to deal with international crimes. Whereas the different legislative proposals at times referred to each other, ultimately it gave rise to two disjointed processes that fuelled a sense of rivalry. For a discussion on the legislative proposals and the incorporation of the Rome Statute through the establishment of a special court, see below. See also: Patryk I. Labuda, 'Applying and 'misapplying' the Rome Statute in the Democratic Republic of Congo', in Christian De Vos, Sarah Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

[766] The Rome Statute implementing legislation consists of four separate pieces of legislation, three of which have been promulgated by the President in December 2015 and published in the Official Journal in February 2016. They entered into force 30 days after official publication in March 2016.

Even in the absence of such legislation until 2015, however, aspects of the Rome Statute's gender justice accountability standards have penetrated the Congolese legal order since 2006. At times, explicit reference has been made to the provisions of the Rome Statute; other times this reliance upon Rome Statute norms has been more implicit.[767] Whereas the Rome Statute served as a normative framework in each of these processes (particularly when cultivated by civil society actors involved in the drafting stages of those laws), and while the idea of complementarity was often employed as an underlying rationale, the ICC itself has not engaged with this domestic law reform processes. As this section illustrates, while the process has been protracted, repeated norm interpretative interactions between civil society, domestic lawmakers, and other (international) norm entrepreneurs were essential in (slowly) creating space for legislative reform on international crimes in general and on sexual violence in particular. The first part of this section will describe in more detail those interactions and the contestations that led to the adoption of Sexual Violence legislation and the Rome Statute implementing legislation, respectively in 2006 and 2016. The second part zooms in on the substance of these legislative internalisation processes, illustrating that these have become closer to the international norms over time, ultimately culminating in a full transplantation of the Rome Statute itself.

5.3.1 Process: years of contestation leading to Rome Statute implementing legislation

The first implementation of the Rome Statute in national legislation occurred a mere seven months after the DRC government ratified the Rome Statute. In November 2002, the DRC amended its military penal code, granting military courts exclusive jurisdiction over genocide, crimes against humanity, and war crimes. The amendment was introduced specifically to render the ratification of the Rome Statute by the DRC operative in criminal procedures and included the incorporation of Rome Statute crimes not previously criminalised under DRC law (including crimes of sexual violence), as well as some adaptation of existing definitions of war crimes and crimes against humanity.[768] This also constituted the first time that crimes of sexual violence could be specifically charged against individuals falling within the jurisdiction of the military penal code (which until that point

[767] Kazadi Mpiana (2012), at 89.

[768] Kazadi Mpiana (2012), at 65. *Loi 024/2002* (18 November 2002); *Loi 023/2002* (18 November 2002).

had not covered any sexual violence crimes). The substance of these amendments is discussed in the next part of this section; here I focus on the process that led to its adoption and the adoption of subsequent amendments to both military and ordinary penal law.

In parallel with these initial revisions to the military penal code, discussions on so-called 'Rome Statute Implementing Legislation' took place (this refers to legislation intended to fully incorporate the Rome Statute's provisions into domestic law, to allow the national system to comply with its duties under complementarity and to provide a harmonised framework for cooperation with the ICC). These discussions featured a lot of back-and-forth, and were marred by a high degree of political contestation and opposition. The first draft of the Implementing Legislation was introduced in 2003 (although various versions had circulated as early as 2001/2002) and submitted to the National Assembly in 2005, but stalled after the dissolution of parliament in 2006. Notably, the Parliament at the time was a "Parliament of Belligerents": many parliamentarians had links to or were involved in the various militia groups active in the country and obstructed the adoption of anything to do with the ICC out of fear that they would be arrested themselves.[769] While Implementing Legislation could have allayed their fears of being sent to the ICC, as it would have meant a more adequate national legal framework (an argument subsequently used successfully to change political opinion towards implementation), the inclusion of a cooperation framework with the ICC likely led to their reluctance in approving Rome Statute Implementing Legislation at this stage. During the first elections in 2006, these same parliamentarians were re-elected, and remained a majority in parliament for another 5 years until during the 2011 elections a new political class entered Congolese Parliament, some of whom were members of Parliamentarians for Global Action (PGA). Following continued sensitisation campaigns by civil society organisations, the political climate changed, freeing up space to reopen discussions on Rome Statute Implementing Legislation in the context of an ongoing ICC investigation.[770]

In the mean time, however, discussions *did* progress in 2005-2006 on a piece of legislation known as the 'Sexual Violence Legislation', which specifically incorporated Rome Statute standards around accountability for sexual violence crimes into Congolese (ordinary) criminal law. What allowed this law to advance where the Rome Statute

[769] Interview with Congolese NGO representatives (Kinshasa, June 2016), *on file with author*.

[770] Interview with Congolese NGO representatives (Kinshasa, June 2016), *on file with author*.

implementation bill did not was the focus within the international community on sexual violence in the DRC (it was a 'hot topic') and the fact that this Legislation dealt with a specific kind of crime; it was likely not perceived as threatening to (the Belligerent) parliamentarians as Rome Statute Implementing Legislation.[771] In fact, whereas the Rome Statute Implementing Legislation would have included extensive provisions for cooperation with the ICC, thus enabling arrests and ongoing international investigations, the Sexual Violence Legislation focused only on the national legal framework without any interference from the international level. Reports by civil society organisations advocating for the adoption of the Sexual Violence Legislation therefore carefully reiterated the differences between the two to ensure continued momentum at this time for adopting the Sexual Violence Legislation.[772]

This 2006 Sexual Violence Legislation, in reality the first piece of legislation to introduce substantive provisions of the Rome Statute into the Congolese legal framework, was adopted following an extensive consultation and cooperation process between Congolese civil society organisations, the international community, and the DRC government. A group of NGOs based in the east of the country kick-started the process, with the support of Congolese expert lawyers.[773] Following an initial workshop in 2002 on sexual violence organised by Global Rights, a Washington-based NGO,[774] a group of organisations united and established the *Coalition contre les violences sexuelles* (CCVS). One of its goals was the revision of Congolese law in relation to sexual violence, bringing it in line with its international obligations, in particular the Rome Statute. Following a meeting with the speaker of Parliament in 2003, civil society organisations first drafted proposed legislation on sexual violence (at the time, there were two separate initiatives, one by the CCVS, the other by *Synergie des Femmes contre les violences Sexuelles* (SFVS)). Global Rights united these efforts by organising local consultation meetings in various locations in the east, which culminated in a workshop in Kinshasa in February 2005 where these proposals were harmonised.[775] The UN High Commissioner for Human Rights also held a workshop in early March 2005 bringing together international and national legal experts and civil society

[771] Interview with Congolese NGO representative (Kinshasa, June 2016), *on file with author*.

[772] See, *e.g.*, Global Rights and partners, *Une loi sur la répression des violences sexuelles: De quoi s'agit-il?* (January 2006).

[773] Interview with Congolese NGO representative (Kinshasa, June 2016), *on file with author*.

[774] The organization seized to exist in December 2014 and its website is no longer in operation.

[775] Global Rights and partners, *Une loi sur la répression des violences sexuelles: De quoi s'agit-il?*

organisations, which contributed to further refine the draft.[776] It was subsequently endorsed by a member of Parliament, who formally introduced the draft legislation.[777] In other words, civil society organisations, supported in their endeavour by UN and international actors, thus acted as important norm entrepreneurs or catalysers by first raising the issue, then initiating the drafting process and providing a full draft, and finally by pushing for its adoption.

Unlike the 2006 Sexual Violence Legislation, the process of adopting Rome Statute Implementing Legislation progressed much more slowly, but was again centred on civil society activism and norm entrepreneurship. Having been put on the backburner since it had been initially proposed in 2002/2003, a new proposal for Rome Statute Implementing Legislation was drafted in 2007/2008, this time with some limited support from Parliamentarians for Global Action (PGA).[778] However, again it faced a lot of opposition; the President of the National Assembly, refused to put the bill on the Assembly's agenda and it was not discussed further.[779] It was revived in 2010,[780] and although it made it to the Assembly's agenda this time,[781] at the end of the legislature's 5-year term in 2011, the initiative was dropped. The bill resurfaced in 2012, following the election of new (non-"Belligerent") Parliamentarians, but remained stuck at the Political, Administrative, and Judicial (PAJ) Committee; PGA even had to pay for rental of rooms to allow the PAJ Committee to continue its discussions.[782] There was simply not enough political commitment

[776] Michael Nzani Logro, *Connaitre les nouvelles lois relatives a la repression des violences sexuelles : Mettons fin à l'impunité!* (Action pour la lutte contre la marginalisation des droits du citoyen, nd), at 7-8; Global Rights and partners, *Une loi sur la répression des violences sexuelles: De quoi s'agit-il?*, at 4-5.

[777] It is important to highlight that as an external party to law-making, civil society could only draft an "avant-projet de loi" (a *pre*-draft bill). This had to be presented to a member of parliament, who needed to endorse it and transform it into a "proposition de loi" (legislative proposal). It then needed to be introduced in the National Assembly. Alternatively, it could be submitted to the Ministry of Justice, who would work on the law, and turn it into a "projet de loi" (draft bill) for introduction in Parliament. The Parliament would then examine the proposal for admissibility. Once it is deemed admissible, the projet de loi is sent to a Commission of Parliament to continue working on the law. After that, it is adopted in plenary session, after which it is promulgated by the President and published in the Official Journal.

[778] Interview with NGO representative (*telephone interview*, February 2016), *on file with author*.

[779] Labuda (2015), at 415.

[780] Lake (2014), at 16. See also: Kazadi Mpiana (2012); Labuda (2015).

[781] The bill faced a lot of opposition, including critiques on the involvement of external actors in its drafting, "which was described as a form of neo-colonialism and as a threat to national sovereignty". Labuda (2015), at 415.

[782] Interviews with NGO representatives, The Hague, January 2016, and Kinshasa, June 2016. For a discussion of the legislative process, see also: Labuda (2015); Patryk I. Labuda, 'The Democratic Republic of Congo's Failure to Address Impunity for International Crimes: A View from Inside the Legilsative Process', *International Justice Monitor* (8 November 2011), available at <http://www.ijmonitor.org/2011/11/the-democratic-republic-of-congos-failure-to-address-impunity-for-international-crimes-a-view-from-inside-the-legislative-process-2010-2011-2/>, accessed 17 May 2016.

to make available sufficient time and resources for the development of this law; during the entire process civil society was indispensable to fill these gaps. The fact that a number of new Parliamentarians, who were members of PGA and very knowledgeable about the Rome Statute and the DRC's obligations under complementarity,[783] actively supported these efforts, strengthened the legislative process after the 2011 elections.[784] Gradually, political will started changing, and space was created on a political level to entertain further discussions on the initiative. Similarly, over time, these interactions between civil society and domestic political norm entrepreneurs helped create more awareness about the need to adopt Rome Statute Implementing Legislation to modernise Congolese law.[785]

While the draft Rome Statute Implementing Legislation was finally approved by PAJ, the National Assembly rejected the draft bill in June 2014, who sent it back to PAJ for finessing. During this time, PGA together with local civil society organisation ramped up their activities, including by organising a range of sensitisation activities, conferences, seminars, roundtables, and a guided tour of the ICC for some parliamentarians. This helped ensure greater political understanding and commitment to advancing the implementing legislation.[786] In addition, oftentimes, parliamentarians would rely upon civil society organisations to provide them with the most updated versions of draft laws in preparation for meetings, because documents often inadvertently disappeared.[787] Several of my interviewees confirmed that without the continued pressure and diligent support provided by civil society organisations, including regarding practical matters such as the provision of documents or paying for conference rooms for discussions, the 2015 Implementing Legislation would probably not have been adopted.

The PAJ eventually decided to split the proposed bill into four separate pieces of legislation, respectively amending the military penal code, the military penal procedure code,

[783] In fact, one of the Parliamentarians (a member of PGA) had been a delegate during the negotiations on the Rome Statute representing the DRC. Interview with Congolese NGO representative (Kinshasa, June 2016), *on file with author*.

[784] Interview with Congolese NGO representative (Kinshasa, June 2016), *on file with author*.

[785] Several interviewees told me that, besides a lack of political will, a number of Parliamentarians initially also did not understand why Rome Statute Implementing Legislation was necessary in the DRC. In their view, as a monist country, the Rome Statute was already applicable at a national level, as was already being done in the mobile courts. Interview with NGO representative (*telephone interview*, February 2016), *on file with author*; Interview with UN representative (Kinshasa, June 2016), *on file with author*.

[786] Interview with NGO representative (*telephone interview*, February 2016) *on file with author*; Interview with Congolese NGO representatives (Kinshasa, June 2016), *on file with author*.

[787] Interviews with Congolese NGO representatives (Kinshasa, June 2016), *on file with author*.

the ordinary penal code, and the ordinary penal procedure code. Their adoption by the National Assembly and Senate followed swiftly in 2015, and three of the four pieces of legislation were promulgated by President Kabila at the end of December 2015 and entered into force in March 2016.[788] It remains unclear why the fourth piece of legislation – the revised military penal *procedure* code – was not promulgated. It may stem from the fact that many of the proposed changes, such as the transfer of jurisdiction over international crimes from military to civil courts, had in fact already been done in April 2013 through the adoption of an organic law.[789]

While the ICC has not engaged with this legislative process at all (which would clearly have been outside its mandate), its existence and its ongoing investigation in the DRC provided an important platform for civil society organisations in strengthening their call for the implementation of the legislation. For instance, some civil society actors used the absence of charges for sexual violence in the ICC's first case against Lubanga in their push for amending Congolese legislation to allow for national trials for these crimes.[790] Furthermore, highlighting that adopting Rome Statute Implementing Legislation helped enable their national courts to dispense justice for Rome Statute crimes at a national level, and therefore could *avoid* any further investigations by the ICC in the DRC, proved an effective strategy to convince otherwise reluctant political actors to support the legislative efforts.[791] In the last 3-5 years, when discussions in the DRC on the Rome Statute Implementing Legislation were at its strongest, the rhetoric about the ICC's perceived "African bias" equally become stronger, which culminated in repeated threats by the African Union of a mass-walk-out (which never in fact materialised). Complementarity and the ICC's existence thus helped catalyse these calls for legislative internalisation of the Rome Statute's normative standards, and helped facilitate political willingness in this respect. Civil society activism and norm-entrepreneurship, however, were indispensable.

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[788] 'PGA welcomes the enactment of the implementing legislation of the Rome Statute of the ICC by the Democratic Republic of the Congo', *Parliamentarians for Global Action* (4 January 2016), available at <http://www.pgaction.org/news/pga-welcomes-enactment-drc-implementing.html>, accessed 18 February 2016. *Loi 15/022 du 31 décembre 2015 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal*, République démocratique du Congo (31 December 2015); *Loi 15/023 du 31 décembre 2015 modifiant la Loi 024/2002 du 18 novembre 2002 portant Code pénale militaire*, République démocratique du Congo (31 December 2015); *Loi 15/024 du 31 décembre 2015 modifiant et complétant le Décret du 06 août portant Code de procédure pénale*, République démocratique du Congo (31 December 2015).

[789] *Loi organique 13/011-B* (11 April 2013).

[790] Interview with NGO representative (*telephone interview*, February 2016), *on file with author*.

[791] Interview with NGO representative (*telephone interview*, February 2016), *on file with author*.

5.3.2 Substance: from sexual violence standards to full incorporation

In terms of substance, the different pieces of legislation that internalised Rome Statute norms have moved from partial incorporation towards full *verbatim* internalisation. This has gradually increased the legal systems' capacity to express and capture sexual and gender-based violence, following initial military court jurisprudence relying upon the Rome Statute. In this respect, there has been an important interaction within the Congolese legal system, namely between military penal law and ordinary criminal law, with *ad hoc* changes to military law through judicial interpretation subsequently leading to legislative internalisation in ordinary criminal law, ultimately culminating in wholesale integration in both legal frameworks. With the promulgation and entry into force of the Rome Statute Implementing Legislation in 2016, these were harmonised into a unified body of law applicable before both ordinary and military courts, regardless of the classification of the crime as an international crime (i.e. war crimes, crimes against humanity, or genocide).

As mentioned, the amendment of the military penal code to include jurisdiction over international crimes constituted the first internalisation in the DRC of Rome Statute norms, including around sexual violence. While this first (partial) incorporation of the Rome Statute in 2002 was significant, as it constituted the first time sexual violence acts were codified in military law, the new military penal code did not include all the Rome Statute's definitions and there remained important differences. For instance, the definition of *crimes against humanity* in the 2002 military penal code included acts that in fact constitute *war crimes* in the Rome Statute: article 166 stipulates that grave crimes under the Geneva Conventions are considered crimes against humanity under Congolese law. Indeed, most of the enumerated acts listed in this article as crimes against humanity in fact constitute war crimes under article 8 of the Rome Statute (e.g. intentionally directing an attack against a civilian population, or forcing prisoners of war to serve in the forces of a hostile power).

Further, as Lake argues, while these first revisions to the military penal code to include war crimes and crimes against humanity was a positive incorporation of the Rome Statute, the code does not fully incorporate all standards, particularly those relating to sexual violence remain lacking.[792] For instance, while article 169(7) of the military penal code includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation

[792] Lake (2014), at 14-15.

and other forms of sexual violence as crimes against humanity, it fails to provide definitions of these crimes. This provision has been heavily criticised for fear that "the law leaves the definition of rape vulnerable to a narrow interpretation, thus obstructing the utility of the legislation in the country's courts".[793] The Congolese military penal code fails altogether to include sexual violence as a war crime. In other words, these initial amendments to the Congolese military penal code represented only a selective integration of Rome Statute standards, particularly in relation to sexual violence crimes. It gave rise to some mistranslations, and was generally considered an incomplete internalisation.[794] It was also for this reason that military courts decided to directly apply the Rome Statute instead (as discussed in the previous section of this chapter).

Unlike these mistranslations at the level of military penal law, Congolese ordinary criminal law has seen expansive incorporation of Rome Statute standards, in line with what Fionnuala Ní Aoláin identifies as "an apparent windfall in domestic norm creation for gendered harms" since the entry into force of the Rome Statute.[795] Notably, following the military court decisions in *Songo Mboyo* and *Mutins de Mbandaka* – which as described earlier was the first time the DRC military courts relied upon the Rome Statute's definition of rape – the DRC parliament adopted amendments to the ordinary penal code and the penal procedure code. These amendments incorporated the Rome Statute's definitions as well as other sexual violence provisions into DRC law. In this respect, these two amended legal codes – referred to jointly as "the Sexual Violence Legislation"[796] – address some of the inadequacies of the limited incorporation of the Rome Statute in the military penal code (although as we have seen, in practice, military courts have continued relying upon the Rome Statute rather than this revised legislation).

Before the 2006 amendments, ordinary penal law was limited to two types of sexual violence: rape and indecent assault. Rape required penile penetration of a woman's vagina and could thus only be committed by men against women. Rape of men or rape using sharp objects or weapons, as well as all other types of sexual violence were classified as indecent

[793] Lake (2014), at 15.

[794] Lake (2014), at 14-15; Labuda (2015), at 419-422.

[795] Ní Aoláin (2014), at 630. See also Appendix I.

[796] *Loi 06/018 du 20 juillet 2006 modifiant et completant le decret du 30 janvier 1940 portant code penal congolais*, République démocratique du Congo (20 July 2006); *Loi 06/019* (20 July 2006).

assault, considered less grave than rape.[797] Furthermore, rape was included in the section of Congolese criminal law entitled "crimes against the order of the family", meaning the crime was primarily conceptualised as one against the family, rather than against the personal and physical integrity of the individual victim. The internalisation of the Rome Statute thus also helped articulate a clearer understanding of sexual and gender-based violence as violent crimes against personal integrity rather than offences against a community or family.

The 2006 legislation incorporates indecent assault, rape, and other forms of sexual violence as crimes within its scope, and provides much more detailed definitions than previously available in Congolese law. While it aligns with the Rome Statute as regards many of the other forms of sexual violence covered by the code, such as sexual slavery, enforced prostitution, forced pregnancy or enforced sterilisation, it also adds significantly to the range of crimes covered. In addition to these acts, the Congolese penal code now covers sexual harassment, forced marriage, sexual mutilation, bestiality, trafficking and sexual exploitation of minors, deliberate infection with STDs, pornography using minors and prostitution of minors, among other offences. As in Colombia, while the Rome Statute provided an important impetus for the changes in the Congolese penal code, ultimately, it gave rise to a broader amendment.

Importantly, the definition of rape in the new sexual violence legislation is broadened to include male victims of rape, and provides that women can also be perpetrators. This closely follows the definition of rape in the Rome Statute's Elements of Crimes, which is gender neutral regarding both victim and perpetrator. The definition in Congolese law also acknowledges the irrelevance of consent in situations of force or serious threats or coercion against a person. Like the definition in the EoC, under the 2006 legislation, rape requires penetration "however slight" of any part of the body of the victim (or perpetrator in the case of a female perpetrator), and can also be committed using objects.[798] The definition thus incorporates many of the advancements made by ICTY and ICTR jurisprudence, and consolidated in the Rome Statute, in the international criminal law understanding of the crime of rape. Furthermore, this definition applies to the crime of rape regardless of whether or not

[797] Rape was punishable by 5-20 years imprisonment; in contrast, indecent assault was punishable by six months to maximum five years imprisonment. Articles 167-170, *Décret du 30 janvier 1940 tel que modifié et complété à ce jour 30 novembre 2004 portant code pénal congolais*, République démocratique du Congo (30 November 2004).

[798] This same definition of rape was incorporated in article 171 in the Law on the Protection of the Child. *Loi 09/001 du 10 janvier 2009 portant protection de l'enfant*, République démocratique du Congo (10 January 2009).

it was committed in the context of international crimes. Unlike the Rome Statute definition, however, the Congolese penal code specifically discusses the act of a male perpetrator and that of a female perpetrator, therefore linking closely with the two dimensional understanding of gender still applicable under Congolese law:

> "*A rape will have been committed, whether by using force or serious threats or coercion against a person, directly or through another person, whether committed by surprise, or psychological pressure, whether committed in a coercive environment, whether committed on a person who has been incapacitated because of illness, diminished capacity, or any other accidental reason, or was deprived thereof through the use of other means, by:*
>
> *(a) any man, regardless of age, who inserted, however slightly, his sexual organ into that of a woman, or any woman, regardless of age, who forced a man to insert, however slightly, his sexual organ into hers;*
> *(b) any man who penetrated, however slightly, the anus, mouth or any other part of the body of a woman or a man with a sexual organ, by any other body part or an object;*
> *(c) any person who inserted, however slightly, any other body part or an object into the vagina; or*
> (d) *any person who forced a man or a woman to penetrate, however slightly, his anus, mouth, or any other body part with a sexual organ, any other body part or an object*."[799]

Nonetheless, the expansion to include rape committed by female perpetrators and/or against male victims remains an important advancement in Congolese law. We can find similarly small differences in the definitions of forced prostitution,[800] and that of sexual slavery,[801] both of which remain similar, almost *verbatim* copies of the Rome Statute. The most prominent difference, however, in these instances is the fact that Congolese law omits any reference to the constituting elements of these acts as crimes against humanity or war crimes. For instance, the Rome Statute limits forced pregnancy to the confinement of "one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law". Like in Colombia's Law 1719 on Sexual Violence, the DRC 2006 Sexual Violence Legislation equally omits this requirement of affecting the ethnic composition of any population, holding:

[799] Article 170, *Loi 06/018* (20 July 2006). Translation by author.

[800] The definition in the 2006 sexual violence legislation is an almost verbatim copy of the Rome Statute's elements of crimes, with the exception of specifying that "force, threat of force, or coercion" is inclusive of fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person. Article 174(c), *Loi 06/018* (20 July 2006).

[801] While the order in which the article lists the different elements of sexual slavery is slightly different in the Congolese legislation compared to the Rome Statute, the essence of the definition of the crime (e.g. exercising the right of ownership, and forcing someone to perform acts of a sexual nature) has remained the same. Article 174(e), *Loi 06/018* (20 July 2006).

"Anyone who detains one or more women made forcibly pregnant shall be sentenced to five to ten years imprisonment".[802] Similarly, for none does it require that these acts are committed "as part of a widespread or systematic attack against the civilian population" or "in the context of an armed conflict". It thus expands international criminal law definitions into the domain of 'ordinary' sexual violence, which on paper could contribute to reducing this somewhat artificial distinction. At the same time, however, it continues to conceptualise these harms under the general header of "attacks against morality", an inadequate characterisation of such acts.

In other ways, the DRC legislation is more restrictive than international criminal law standards. While the Rome Statute does not specifically provide for the crime of forced marriage, it has been prosecuted by the Special Court for Sierra Leone, and has recently been brought within a charge of 'other inhuman acts' in the case against Dominic Ongwen before the ICC. Although by specifically criminalising forced marriage, the DRC Sexual Violence Legislation expands the range of crimes covered, its definition is limited to a person who, "exercising parental or guardianship authority" over someone, gives that person in marriage and/or forces them to marry. In other words, this definition does not appear to capture the practice such as that charged by the ICC in the Dominic Ongwen case, where the LRA abducted young girls to be given to commanders as "bush wives" (unless the court very broadly interprets "exercising authority" to include such circumstances).[803]

In relation to procedures, the Congolese penal code also appropriates some of the Rome Statute standards, but again adapts these to the domestic context. For instance, in relation to evidence, article 14(ter) of the amended civil penal procedure code provides that consent cannot be inferred from the words or behaviour of a victim, or their silence or lack of resistance, neither can the victim's credibility, character, or predisposition to sexual activity be inferred from prior sexual conduct.[804] Again, here we find a very close textual adaptation of the corresponding provision in the RPE. While this provision presents a progressive development compared to the penal code before amendment, and appears in fact very much based on the text of rule 70 of the RPE, Congolese law does not explicitly rule out the possibility of introducing a victim's prior sexual conduct into evidence. In fact, it merely

[802] Article 174(k), *Loi 06/018* (20 July 2006).

[803] See also: Centre for International Law Research and Policy, *National Legal Requirements: Prosecution of Sexual and Gender-Based Violence in Democratic Republic of Congo* (February 2017), at 35.

[804] Article 14(ter), *Loi 06/019* (20 July 2006).

states that proof relating to prior sexual conduct cannot exonerate someone. By contrast, under the Rome Statute, "a Chamber *shall not admit* evidence of the prior or subsequent sexual conduct of a victim or witness" (emphasis added).[805] A party may introduce evidence relating to the consent of a victim of sexual violence only in highly exceptional circumstances. In order to do so, that party must submit a detailed request to the Chamber, who shall hear the views of both parties and the victims during an *in camera* hearing before ruling on whether or not to admit such evidence.[806] The Congolese penal procedure code does not provide for such procedures and in fact does not *explicitly* prohibit the introduction of evidence relating to consent and/or prior sexual conduct.[807] However, given the textual closeness of much of the provision, there is a possibility for Congolese judges to interpret the exclusion of such evidence into the penal procedure code.

The amended penal procedure code also mandates the courts, again textually very similar to the equivalent provision of the Rome Statute, to order protective measures "to safeguard the security, physical and psychological well-being, dignity and the respect for the private life of victims and any other persons concerned" including the use of closed sessions.[808] Under article 14(bis), the public prosecutor may request, and the judge may order, a medical and psychological expert to examine victims of sexual violence to determine the required special measures.[809] These measures may significantly improve the experience of justice for victims of sexual violence; their inclusion within the legal framework internalises the *ad hoc* practices engaged in by the military courts described earlier. Further, before the incorporation of Rome Statute standards, none of these existed in Congolese law. In such a way, judicial internalisation has led to legislative internalisation and created a degree of internal interaction in the DRC.

While the 2006 Sexual Violence Legislation may be applicable to military courts, they are not necessarily under an obligation to apply this advanced legal framework. For this

[805] Rule 71 (evidence of other sexual conduct), *Rules of Procedure and Evidence* (10 September 2002).

[806] Rule 72 (In camera procedure to consider relevance or admissibility of evidence), *Rules of Procedure and Evidence* (10 September 2002).

[807] Furthermore, the ICC's Rules of Procedure and Evidence provide that evidence relating to neither *prior* nor *subsequent* sexual conduct may be introduced as evidence. Congolese law omits the reference to 'subsequent' sexual conduct.

[808] Article 74(bis), *Loi 06/019* (20 July 2006).

[809] Original text: "*Conformément aux articles 48 et 49 ci-dessous, l'Officier du Ministère Public ou le juge requiert d'office médecin et un psychologique, afin d'apprécier l'état de la victim des violences sexuelles et de déterminer les soins approriés ainsi que d'évaluer l'importance du prejudice subi par celle-ci et son aggravation ultérieure.*"

reason, many civil society organisations also continued pushing for the adoption of Rome Statute Implementing Legislation to continue advancing the Congolese legal framework around sexual violence specifically (and extend the Rome Statute's norms and standards to other crimes). Over the years, the various proposals for Rome Statute Implementing Legislation have become more precise in their incorporation of Rome Statute norms relating to sexual violence crimes. The first proposal for implementing legislation drafted in 2002 included only a short, somewhat odd, list of crimes. It criminalised: "sexual abuse of a person or rape, forced prostitution, removing someone's capacity to procreate, or the detention of a woman forcibly made pregnant with the intention of effecting the ethnic composition of a population".[810] It contained no reference to other definitions or crimes, nor to any of the procedural innovations in the Rome Statute. It is unclear on which basis it had selected these specific crimes but not others. Neither did it make a distinction between war crimes committed in an international or a non-international armed conflict. The second draft, submitted after two consultations with civil society in October 2002, adds two additional crimes to the list: "subjection to sexual slavery" and "the commission of any other infringement or crime of sexual violence of comparable gravity" (which appears similar to the Rome Statute's catchall category of 'other forms of sexual violence').[811] It also specifically mentions "forced pregnancy", but only as a war crime.[812] For crimes against humanity, it merely describes the act of forced pregnancy rather than explicitly naming or labelling the crime (i.e. "the detention of a woman forcibly made pregnant with the intention of effecting the ethnic composition of a population"). The second 2002 draft also incorporates – to a limited extent – the Rome Statute's obligations concerning the protection of victims and witnesses. Unlike the definitions, here it explicitly requires national judges "*to comply with* the provisions of article 68 of the Rome Statute concerning the protection of victims and witnesses".[813]

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[810] Article 21(4) [crimes against humanity] and article 26(3) [war crimes], *Projet de loi portant mise en œvre du Statut de la Cour Pénale Internationale*, République démocratique du Congo (2002).

[811] Article 20(6) [crimes against humanity], *Projet de loi portant mise en œuvre du Statut de la Cour Pénale Internationale tel que modifié par le plaidoyer organisé par le Ministère de la Justice de la République Démocratique du Congo du 21 au 23 octobre 2002 à Kinshasa et les 24 et 25 octobre 2002 à Lubumbashi*, République démocratique du Congo (2002).

[812] Article 22(2)(v) [war crimes, all other violations of the laws and customs of war applicable to an international armed conflict] and article 22(5)(f) [war crimes, all other violations of the laws and customs of war applicable to armed conflict not of an international character], *Projet de loi portant mise en œuvre du Statut de la Cour Pénale Internationale (v2)* (2002).

[813] Article 30, *Projet de loi portant mise en œuvre du Statut de la Cour Pénale Internationale (v2)* (2002). Emphasis added.

It is not until after the 2006 Sexual Violence Legislation was adopted that the full list of crimes as provided in the Rome Statute is incorporated into the draft legislation on Rome Statute Implementing Legislation. In line with this 2006 Legislation, the 2008 draft (as well as all subsequent drafts and the 2016 law) adds one further crime to the list: that of "sexual harassment", yet only as a war crime committed in the context of a non-international armed conflict.[814] Further, in the 2016 Implementing Legislation there a specific reference to the Rome Statute's legal framework to guide interpretation of its provisions: it integrates in full the Rome Statute's list of war crimes, crimes against humanity, and genocide (articles 221-223), and provides that they "shall be interpreted in accordance with the Elements of the Crimes" (article 224). The Rome Statute Implementing Legislation thus incorporates the entire Rome Statute *verbatim* into the national legal order. This also incorporates, for the first time, a notion of command responsibility into Congolese criminal law. In other words, this implementing legislation not only used the Rome Statute as a tool to enhance Congolese penal legislation; by providing that it shall be the interpretative framework to be applied by national courts, it renders the ICC's Statute and its practices directly applicable in the national legal framework. It thus appears to correct some of the mistranslations of the military penal code around sexual violence, consolidates the approaches taken by military court judges into the national legal framework, and harmonises military and civil penal (procedure) law. This move reinforces the direct application of the Rome Statute by military courts and gives it a solid legal basis; its legal incorporation in the national legal framework thus also opens up greater possibilities for harmonisation across military and civil courts in adjudicating international crimes. It increases the ability of the national legal framework to investigate and prosecute sexual violence crimes at least on paper, and addresses the failures of past legislative internalisation attempts.

[814] Article 223(5)(f), *Proposition de loi modifiant et completant le code pénal, le code de procedure pénale, le code de l'organisation et de la compétence judiciaires, le code judiciaire militaire et le code pénal militaire en vue de la mise en œuvre du Statut de Rome de la Cour Pénale Internationale*, République démocratique du Congo (March 2008). A 2005 version of this draft, while expanding on the 2002 drafts, only codified some of the Rome Statute's crimes. See articles 222(6), 224(2)(v), *Loi modifiant et completant certaines dispositions du code pénal, du code de l'organisation et de la compétence judiciaire, du code pénale militaire et du code judiciaire militaire, en application du Statut de la Cour Pénale Internationale* (September 2005).

5.3.3 *In sum*: From partial incorporations to full transplantation

In conclusion, while some of the standards of the Rome Statute have been incorporated into Congolese legislation (a clear example of legislative internalisation), this process has given rise to slight adaptations, both on a substantive and a procedural level. However, since the latest 2016 Implementing Legislation, which incorporated *verbatim* all provisions of the Rome Statute and its subsidiary documents, harmonisation can now be characterised as 'full transplantation'. While the sexual violence legislation is based upon and draws on the Rome Statute's substantive provisions, the legislation is intended to have a broader application to cover *all* types of sexual violence, not only those that constitute war crimes, crimes against humanity, or acts of genocide. In the discussions and interactions on the various pieces of draft legislation, the Rome Statute provided a powerful tool for civil society to advocate with the government for the amendment of legislation on sexual violence generally, and on the Rome Statute in particular. Furthermore, the Rome Statute was used by civil society to reform Congolese law beyond its immediate application to situations of war crimes, crimes against humanity and genocide. In terms of the substance of the law, there is particular reliance upon the Rome Statute in relation to definitions of crimes of sexual violence, and procedural mechanisms, including standards of evidence and protective measures. Notably, some of the definitions of the different types of sexual violence are directly based on those provided in the EoC. However, there are notable differences and the revisions to the law have stopped short of a full integration of Rome Statute standards at least until the promulgation of the Rome Statute Implementing Legislation in 2016.

Further, these changes must be balanced with the reality that knowledge among lawyers and judges of the 2006 sexual violence legislation (or other international crimes legislation) is low, thus illustrating the need for continued training and knowledge building activities in this regard to activate the legislative internalisation on a social level.[815] Further, as with the focus during mobile trials, while important amendments have been made in relation to sexual violence through the legislative incorporation described in this section, this has unfortunately also contributed to a trivialisation of other forms of sexual violence that do

[815] International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity* (October 2013), at 15.

not constitute a crime against humanity.[816] Nonetheless, the enactment of such laws remains an important development, as "national legal capacity to name, regulate and process gender-based violence builds domestic capacity in ways that support complementarity".[817] It is an important first step towards further internalisation, and in time, may lead to progressive developments in the courts and beyond. It is too early to tell, however, what the implications of the 2016 Implementing Legislation for the practice of justice in the DRC will be, and whether this may give rise to greater internalisation of the terms and standards of the Rome Statute in practice. Nonetheless, the adoption of such comprehensive legislation is an important first step, bringing national criminal law in line with the Rome Statute's norms around accountability for sexual violence.

[816] See: Avocats Sans Frontières, *La justice face à la banalisation du viol en République démocratique du Congo. Etude de jurisprudence en matière des violences sexuelles de droit commun*.

[817] Ní Aoláin (2014), at 630.

SECTION 5.4

COMPLEMENTARITY REVISITED?

The capacity of the Congolese justice system to address crimes committed on its territory has been an important issue since the entry into force of the Rome Statute – as we have seen, it was primarily the lack of domestic capacity (and the ensuing inaction on the part of the Congolese state) that justified the ICC opening its investigation in June 2004. However, an ICC investigation is not a foolproof solution for addressing the lack of impunity and continued commission of crimes in the country; it must in any case be complemented by accountability processes at a national level. As the ICC's investigations in the DRC progressed, over time, there has been a complementary push to increase the capacity of the national justice system to supplement those investigations with cases before the national courts. As we have seen in the previous sections, a number of important legislative and judicial initiatives have been undertaken in this regard at a national level, many of which are supported by and depend upon civil society doing the necessary groundwork. In parallel to these specific initiatives, the entry into force of the Rome Statute also triggered a host of broader capacity building programmes to strengthen the capacity of the Congolese justice sector at a local and national level, many of which have focused specifically on addressing sexual violence crimes within the framework of the Rome Statute.

As Candeais *et al*. illustrate, the support provided by international organisations has extended well beyond the provision of financial support: "Since 2010, partners in the DRC have established working groups that meet regularly to coordinate and support initiatives, discuss pending cases, and identify actions that need to be taken to advance specific judicial processes".[818] These working groups act as oversight mechanisms, and key coordination points for the judicial authorities. Nonetheless, this significant attention within the international community, among donor organisations, and civil society (and more indirectly by the ICC) has equally meant that there is additional pressure on the Congolese government to equally commit to addressing these crimes. Several political commitments (i.e. 'executive action' in the TLP framework) have since been made, including the appointment in July 2014 of a Personal Representative of the DRC President in Charge of the Fight Against Sexual Violence and Child Recruitment. This section looks at two such political commitments (not

[818] Candeias *et al.* (2015), at 26.

all of which have been successful): the establishment of Specialised Chambers within the DRC courts modelled on the ICC, and contestations around admissibility before the ICC related to the ability of the national judicial system to conduct proceedings for Rome Statute crimes.

5.4.1 Complementarity reversed: creating Specialised Chambers in DRC courts

In an effort to complement the ICC's prosecutions, the DRC has engaged in a lengthy (and ultimately unsuccessful) process to establish a Special Court or Specialised Chambers within the DRC legal system specifically mandated to address war crimes, crimes against humanity, and genocide not being addressed by the ICC. This section examines the different proposals made in this regard, and illustrates again the centrality of civil society in pushing the accountability agenda forward within a framework of complementarity. In these efforts, the Rome Statute has been used not only as a normative standard, but also as an exemplary system to be reproduced or replicated in detail at a national level. Through these attempts, the idea of complementarity appears to have been reversed, whereby instead of the ICC giving deference to national processes, the domestic accountability framework is designed in such a way as to complement the ICC's investigations. The Specialised Chambers were specifically designed to address crimes committed *before* the entry into force of the Rome Statute, as well as crimes not being addressed by the ICC.

Pursuant to article 149 of the DRC Constitution, according to which specialised courts may be established within the Congolese legal system, on 30 September 2010, the DRC Minister for Justice and Human Rights first introduced a draft bill for the establishment of a Specialised Mixed Court. This court, with proposed combined civil and military jurisdiction, was to prosecute "crimes under international law", meaning war crimes, crimes against humanity and genocide committed in the DRC since 1990 (the start of the overthrow of Mobutu's regime).[819] Initially proposed as early as 2003 by local civil society and community actors,[820] it was given renewed emphasis after the UN published is Mapping Report, which

[819] Article 38, cited in Victims' Rights Working Group, *Aide-memoire a l'intention des parlementaires sur je projet de loi creant une cour specialisee mixte en prepublique democratique du congo* (August 2011), at 6.

[820] Kambale (2015), at 175-176.

specifically called for an investment in the domestic justice capacity.[821] Furthermore, acknowledging the many difficulties facing the Congolese justice system, such as regarding the independence of the judiciary, several civil society organisations felt it might be easier to address these challenges to streamline efforts by creating a special mechanism to deal with international crimes and the responsibility of high-level perpetrators.[822]

While the initial process of drafting and submitting for comments, supported by civil society organisations, went relatively quickly,[823] progress on passing the law has been slow. At various points in the drafting and consultation process of this law we can see reference being made to the Rome Statute, by both state actors and civil society, both as justification underpinning the establishment of the court, and as an institutional model to be replicated at national level. While there has been no direct interaction between the ICC and the DRC authorities on this law (as this would be outside the ICC's mandate), as this section will illustrate, there are indications that various actors looked to the ICC, or rather the Rome Statute, as normative reference. In other words, the ICC as an institution was of great relevance during these discussions. While these efforts have not (as yet) been successful, the discussions on the various pieces of draft legislation are exactly the kinds of dialogic processes encapsulated by TLP that contribute over time to embedding international norms in national criminal legal systems, and that may facilitate an increase in prosecutions of Rome Statute crimes, including sexual violence, in the future.

Although civil society has been advocating for the creation of special justice measures since the opening of the ICC's investigation, the government first held consultations with civil society on the substance of draft legislation on a Special Court in January 2011. Engagement from the DRC government had been triggered by recommendations made in this respect in the UN Mapping Report.[824] Yet, much to everyone's surprise, in February 2011, the Council of Ministers provisionally adopted an earlier version of the draft law that did not

[821] Interview with Congolese NGO representative (The Hague, November 2015), *on file with author*. See also: Labuda (2015), at 416; UN Office of the High Commissioner for Human Rights, *Report of the Mapping Exercise*, at paras 1035-1055; International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 62.

[822] Interview with NGO representative (*telephone interview*, 20 October 2015), *on file with author*.

[823] Pascal Kambale, 'Plans for a hybrid court in Congo', *Open Society Initiative for Southern Africa* (6 March 2012), available at <http://www.osisa.org/openspace/drc/plans-hybrid-court-congo-pascale-kambale>, accessed 21 November 2014.

[824] Interview with NGO representative (*telephone interview*, 20 October 2015), *on file with author*.

incorporate any of civil society's suggested changes.[825] This February 2011 draft was subsequently sent to the *Commission permanente de réforme du droit congolais* (CPRDC), which again specifically invited submissions from international and national NGOs on the substance of this law. These were submitted jointly following a workshop organised by Human Rights Watch in April 2011.[826] Instead of submitting the CPRDC's amended version of the draft legislation to Parliament, however, the Minister of Justice presented the un-amended February 2011 law, appending the CPRDC's comments merely as subsidiary information. Civil society subsequently lobbied with parliamentarians to examine the newer version of the law; no discussions were held on the admissibility of either draft, and the discussions were postponed.[827] Following further interactions between civil society and the Congolese government, on 11 July 2011, the Minister of Justice submitted a new version of the law to the *Commission gouvernementale des lois*, incorporating the CPRDC and civil society's comments and amendments; this revised draft law was subsequently sent to Parliament for consideration at its August 2011 session.[828] It was, however, heavily criticised by a number of parliamentarians for its reliance upon international assistance, and because it painted the Congolese legal system in a negative light.[829] On 22 August 2011, the Senate's Political, Administrative and Judicial Committee (PAJ) rejected the draft law, and referred the bill back to the government to address a number of issues, in particular their concerns around international judges serving on the court, which they viewed as threatening the DRC's sovereignty.[830] While progress eventually stalled, these are exactly the kinds of interactions

[825] International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 62.

[826] The 34 Congolese and international organisations met in Goma from 6-8 April 2011 and adopted a Common Position which proposed several amendments to the proposed legislation, including in relation to jurisdiction, the nature of the court, the interests of victims, and the rights of the defence. *Establishment of a Specialised Mixed Court for the Prosecution of Serious International Crimes in the Democratic Republic of Congo - Common Position Resulting from the Workshop held in Goma* (2011).

[827] International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 63.

[828] Victims' Rights Working Group, *Aide-memoire août 2011*, at 3-4; International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 62-64.

[829] Labuda (2015), at 418.

[830] James Ellis and Dan Kuwali, 'Correspondents' Reports: Democratic Republic of Congo', 14 *Yearbook of International Humanitarian Law* (2011); International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 64; 'How to Tackle the DRC's Complex Anti-Impunity Agenda', *Hope for Africa* (25 April 2014), available at <http://hopeforafricaonline.com/2014/04/25/how-to-tackle-the-drcs-complex-anti-impunity-agenda/>, accessed 21 November 2014. According to CAD, the government was asked to address the following questions in redrafting the bill: "(i) the immunity granted to some authorities, including members of Parliament; (ii) the status of judges being only granted to Congolese nationals; (iii) the jurisdiction ratione personae of the Court

and (re)interpretations between state and non-state actors that are constitutive of Koh's transnational legal process through which the implementation of complementarity is negotiated. While the law has not yet been adopted, these interactive processes over time contributed to some degree of internalisation on both a legislative and an executive level.

What further complicated the discussions on this proposal was that they took place at the same time as the protracted debates on the Rome Statute implementing legislation, discussed earlier in this chapter. Whereas the implementing legislation proposals were submitted by members of parliament, this proposed legislation of specialised courts came principally from the government (supported therein by civil society). It was equally presented as a means by which the Rome Statute would be activated in national law. The differences and similarities between these separate legislative processes, and the disjointed discussions on these, however, confused the discussions, and ultimately stymied the process.[831] Many civil society organisations, however, continue to pressure for its adoption and the continued development of the Congolese legal system remains an issue of importance for donors.

As is clear from the explanatory memorandum to the August 2011 draft bill, the proposal to establish a specialised court to deal with genocide, war crimes, and crimes against humanity was based primarily upon the Rome Statute, and the DRC's obligations to investigate and prosecute crimes within the Statute's jurisdiction.[832] In particular, the memorandum acknowledges that, while important strides have been made to address impunity by referring the situation in the country to the ICC, the ICC cannot and should not provide justice for all crimes committed in the country. Under the principle of complementarity, this obligation befalls domestic authorities. In fact, it specifies that the draft bill was inspired by the Rome Statute framework: it was seen as one of the ways in which the DRC would domestically implement the Rome Statute and would implement the principle of complementarity.[833] As a result, we can find many textual similarities in this draft bill and the

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over members of the army and of the police; and (iv) the risk of competing jurisdiction between the Specialised Court and the appeal court." Club des Amis du Droit du Congo, *The mixed Specialised Court as a mechanism of repression of international crime in the Democratic Republic of the Congo: Lessons Learned from Cambodia, East Timor, Kosovo, and Bosnia* (2011), at 71. See also: Kambale 'Plans for a hybrid court in Congo' (2012).

[831] Interview with NGO representative (Brussels, September 2015); Interview with Congolese NGO representative (The Hague, November 2015); Interview with NGO representative (*telephone interview*, February 2016).

[832] Several interviewees confirmed to me that the bill was inspired by the Rome Statute and conceptualized as implementing complementarity at a national level.

[833] The memorandum states explicitly: "Le texte su la Cour specialise intègre les éléments de mis en œvre du Statut de Rome et respecte les normes en matière de garantie du process equitable posées par la Constitution et

Rome Statute and its subsidiary documents. This includes many of the innovative provisions in relation to accountability for sexual violence (including the definitions of crimes), and its institutional requirements in relation to gender sensitivity. In other words, it would consolidate the incorporation into national law of "international criminal law and procedure, e.g. the definition of crimes, increased protection for victims participating in proceedings, and a definition of reparations which conforms to international standards".[834]

The 2011 draft bill provides that the proposed Specialised Mixed Court (SMC) would be an independent court within the courts of the DRC, composed of one or more trial chambers and one appeals chamber, and staffed by members of both the civil and military courts in addition to international experts.[835] International judges would sit in the trial chambers (article 3), international experts could be recruited within the prosecution (article 7), and could be appointed to any other post within the court (article 11). Building on the relative success of the military court's *audiences foraines* in bringing justice to the people, while the court would have its headquarters in Kinshasa, it would also have the possibility to sit in such "traveling courts".[836] Furthermore, there would be an equitable representation of male and female members of the court (both prosecution and judges), and the President would have to take into account specifically the need to appoint members with particular expertise, including on sexual violence and violence against children.[837] Like the equivalent provisions of the Rome Statute, this would ensure that the right expertise (which may be international) is present within the court to deal adequately and professionally with victims of sexual violence.

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les engagement internationaux de la RDC. […] Les règles de procédure pénale … sont adaptées au regard de la spécificité du contentieux des crimes internationaux et s'inspirent notamment du règlement de procédure et de prevue de la CPI concernant en particulier le statut et la protection des victimes et témoins, les droits des suspects et des accusés et l'organisation de la défense."

[834] International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 65.

[835] *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité*, République démocratique du Congo (2 August 2011). About the draft law, see generally: Human Rights Watch, *Comments on the second version of the Draft Legislation to Establish Specialised Chambers within the Congolese Judicial System for the prosecution of Grave International Crimes* (2011); Victims' Rights Working Group, *Aide-memoire août 2011*; Club des Amis du Droit du Congo, *The mixed Specialised Court as a mechanism of repression of international crime in the DRC*; FIDH, *République démocratique du Congo - Recommandation pour une Cour spécialisée mixte indépendante et efficace* (August 2011); 'Plans for a hybrid court in Congo' (2012).

[836] Club des Amis du Droit du Congo, *The mixed Specialised Court as a mechanism of repression of international crime in the DRC*, at 66.

[837] Articles 4, 6 and 8, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011).

Whereas until recently the military courts retained sole competence to adjudicate international crimes, with the establishment of the SMC this jurisdiction would be shared. The SMC, however, would have *primary* jurisdiction ('compétence première').[838] Reminiscent of the ICC's jurisdictional provisions, the SMC would focus upon those bearing the greatest responsibility for war crimes, crimes against humanity, and genocide (or the 'big fish'), with the ordinary and military courts prosecuting 'the small fish'. Interestingly, the Victims' Rights Working Group, an important group of civil society organisations working with both the ICC and with justice actors at a national level, suggests that the SMC would specifically complement the work of the ICC, thus establishing a hierarchy of prosecutions with the ICC taking the biggest fish, the slightly smaller fish appearing before the SMC, and the foot soldiers being prosecuted in the ordinary or military courts.[839] If established, this would provide a greater measure of accountability particularly for those commanders who cannot be investigated or prosecuted by military courts due to issues of rank. Given the difficulties in proving direct perpetration in many cases of sexual violence, and the unlikelihood that such cases would end up at the ICC, this would have provided victims of sexual violence with another avenue of justice.

Interestingly, in discussing the applicable laws that the specialised court must apply, the draft bill *first* lists international treaties ratified by the DRC (it specifically singles out the Rome Statute), and continues with international agreements between the UN and the DRC, the DRC Constitution, and finally, the ordinary penal code.[840] The SMC would apply specific criminal procedures, including on witness protection.[841] Importantly, and again reminiscent of the Rome Statute, the draft bill provides that the office of the Registry must create a unit for the assistance of victims and witnesses (*une division ou une section d'aide aux victimes et aux témoins*).[842] Under article 8, the public prosecutor must also create a special investigative

[838] Article 16, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011). The initial legislation proposed by the Government provided that the SMC would have exclusive jurisdiction. This was changed following civil society suggestions. *Common Position Resulting from the Workshop held in Goma*, at 3.

[839] Victims' Rights Working Group, *Aide-memoire août 2011*, at 2.

[840] Article 14, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011).

[841] Human Rights Watch, *Comments on the second version of the Draft Legislation to Establish Specialised Chambers*, at 1; Victims' Rights Working Group, *Aide-memoire août 2011*, at 4.

[842] Article 3, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011).

unit, composed of specialised investigators.[843] These provisions were introduced into the draft bill following suggestions made by the Common Position of Civil Society.[844] While the Common Position does not refer specifically to the Rome Statute explicitly, it is clear that they were pushing the Government to establish a court that incorporates Rome Statute standards of the administration of justice,[845] which has translated into something almost like a "mini"-ICC. The establishment of such a court with the incorporation of many of these international standards may have passed a complementarity assessment, particularly if it indeed were to successfully investigate and prosecute higher-level commanders of militia groups and within the FARDC for Rome Statute crimes. In other words, the establishment of such a court would be an important element in reclaiming the narrative on the ability of the DRC's legal system within complementarity.

The draft legislation also provides for the establishment of a trust fund for victims and witnesses. It remains unclear from the draft legislation, however, what the exact function and institutional set-up of such a fund would be. The explanatory memorandum speaks about a 'fonds d'indemnisation des victimes' (which suggests it envisages a reparations fund for victims), whereas the substantive provisions of the draft law speak about a 'fonds d'aide aux victimes et aux témoins'. Similarly, interviewees involved in various stages of the drafting process also indicated that there was significant ambiguity about whether this referred in fact to the ICC's Trust Fund for Victims, or to a separate national trust fund. The establishment of a fund to assist victims, particularly where it involves reparations beyond monetary compensation awarded by the courts, would be a significant advancement in Congolese law, where many victims, particularly victims of sexual violence, continue to face innumerable obstacles firstly in accessing justice, and secondly in obtaining the (monetary) reparations subsequently ordered upon completion of trials. The revised 2014 draft bill, however, omits this reference and indeed, pending any establishment of a special court or chambers, no progress has been made on the creation of a victims' fund either (if that was the intention of

[843] Civil society has pointed out that the duties described in Article 8 seem to conflate the duties that befall upon the prosecution and those that belong to the domain of the registry. Victims' Rights Working Group, *Aide-memoire août 2011*, at 9.

[844] *Common Position Resulting from the Workshop held in Goma*, at 2.

[845] For instance, throughout its report on the issue, Human Rights Watch refers to provisions in the Rome Statute as a suggestion for the modelling of the Congolese law (e.g. article 3 in relation to the seat of the Court, article 40 in relation to the independence of the judiciary, and in relation to the rights of the defence). An interviewee involved in the drafting of this common position has confirmed this.

the drafters). The issue was also explicitly taken out of the 2016 implementing legislation due to concerns around lack of funding for such reparative mechanisms.[846]

At the suggestion of civil society, the 2011 draft law specifically distinguishes between the court's jurisdiction in relation to crimes committed before and those committed after the entry into force of the Rome Statute. Crimes committed before the entry into force of the Rome Statute are defined by international legal documents that were in force before 2002, including customary international law.[847] For crimes that were committed after 2002, the draft bill copies the Rome Statute's list of crimes.[848] While incorporating in full the list of crimes in articles 5 to 8 of the Rome Statute,[849] it does not include their definitions as provided in the EoC. Nonetheless, given the textual closeness *and* intention of the drafters of this bill to replicate the Rome Statute as the Statute for this specialised court domestically, it can be inferred that also those documents would be applicable to the specialised court (particularly in light of the practice of military courts in this regard described above).

Other important notions have also been transplanted from the Rome Statute. For instance, article 44 incorporates the notion of command responsibility; article 48 provides that amnesty cannot be applicable to international crimes under the SMC's jurisdiction; and pursuant to article 58, "the Court shall adopt any necessary measures to ensure the safety, physical and psychological well-being, dignity and respect of private lives of every witness and victim". In taking such special measures, the court is specifically directed to take into account the nature of the crimes, particularly where this concerns sexual violence or violence against children. This same article also states that "where their interests are affected" the court shall permit the views and concerns of victims to be represented during the proceedings by their legal representative. The SMC draft bill's provisions on the rights of the defence also contain some resemblance to the Rome Statute's provisions.[850] In other words, the

[846] Interviews with Congolese and international NGO representatives (The Hague & Kinshasa, various dates), *on file with author*.

[847] Article 17-19, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011).

[848] Article 20 provides: "Les crimes contre l'humanité, crimes de guerre et genocide, reçoivent les definition adoptees par le Statut de Rome."

[849] Articles 21, 22 and 24, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011).

[850] Club des Amis du Droit du Congo, *The mixed Specialised Court as a mechanism of repression of international crime in the DRC*, at 70. The Congolese legislation, however, makes a distinction between rights accruing to a suspect and those accruing to an accused person. See Articles 53-56, *Projet de loi portant création, organisation et fonctionnement de la Cour spécialisée de la repression des crimes de génocide, crimes de guerre et crimes contre l'humanité* (2 August 2011).

establishment of a new court, specifically mandated to try crimes within the Rome Statute's jurisdiction, and modelled in many ways on that Statute, illustrates that in the DRC domestication of international criminal justice equalled direct transplantation.

After the Senate's rejection of the first draft bill for the establishment of the Special Mixed Court, then Minister for Justice and Human Rights, Wivine Mumba Matipa, eventually prepared a second revised version of the bill in 2014.[851] The revised draft legislation was introduced following the promulgation in April 2013 of the *Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*, which transferred jurisdiction over international crimes to the civil courts.[852] In practice, the proposed legislation would amend the April 2013 law by providing for the creation of Specialised Mixed *Chambers*,[853] to be integrated in the existing courts of appeal of the DRC, rather than establishing a new, separate court. In a speech in October 2013, President Kabila had expressed his support for these specialised chambers.[854] Like the 2011 draft, this new draft bill in many respects appears to have been based upon provisions of the Rome Statute.

[851] *Projet de loi modifiant et completant la loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et competences des juridictions de l'ordre judiciaire en matiere de repression des crimes de genocide, des crimes contre l'humanite et des crimes de guerre*, République démocratique du Congo (April 2014). The law was under consideration in 2014, but as some of the constitutional concerns expressed by the Senate in rejecting the first draft bill in August 2011 had not been addressed, the Parliament declared the bill inadmissible. Parmar (2014); Ligue pour la Paix, les Droits de l'Homme et la Justice, *L'Assemblée Nationale Vient de Rejeter Le Projet de Loi Sur Les Chambres Spécialisées: Remettons Nous Tous A Travail* (8 May 2014).

[852] Under the *Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*, the *cours d'appel* have jurisdiction over genocide, war crimes and crimes against humanity committed by persons within their jurisdiction, or persons within the jurisdiction of the tribunaux de grande instance. Pursuant to article 91, these courts have jurisdiction au premier degré, meaning they exercise first instance jurisdiction over these crimes. Appeals of their judgements would be heard by the *Cour de cassation*. However, it remains unclear to what extent the appellate courts can actually exercise the jurisdiction that was granted to them in 2013. At the time of writing, any investigation or prosecution of international crimes happens before the military courts, even in cases where the perpetrator is not a military person. *Loi organique 13/011-B* (11 April 2013).

[853] The first proposal submitted by the Minister of Justice in November 2010 initially referred to Specialised Chambers, but for constitutional reasons, this was subsequently changed to Specialised Court. Labuda (2015), at 417.

[854] "Au plan interne, il est important de rappeler que depuis quelques décennies, le peuple congolais est victime de la perpétration de nombreux crimes internationaux par les insurgés. Il mérite que justice lui soit rendu. Nonobstant les compétences de la Cour Pénale Internationale, il est judicieux d'instituer, au sein de nos juridictions, des chambres spécialisées dans la répression desdits crimes." 'Cohésion nationale: Discours de "Joseph Kabila" devant le Congrès', *KongoTimes!* (23 October 2013), available at <http://afrique.kongotimes.info/rdc/politique/6768-cohesion-nationale-discours-joseph-kabila-devant-congres.html>, accessed 23 November 2014.

The draft legislation provides for the establishment of three specialised first instance chambers, located within the appeals courts of Goma, Lubumbashi, and Mbandaka,[855] with appeals being handled by a specialised chamber of the *Cour de cassation* in Kinshasa. The chambers would have jurisdiction over war crimes, crimes against humanity, genocide, *and* aggression (note that as of yet aggression has not been defined in the Congolese penal code).[856] The revised draft legislation, similar to the 2011 draft bill, provides for the inclusion of international staff within all organs of the court. The first instance chambers are presided over by a bench of five judges, two of whom may be of foreign nationality, with cases being brought before it by an independent investigation and prosecution office (UNEP, 'Unité d'enquête et de poursuite'). All prosecutors, who may have Congolese or foreign nationality, must have the necessary knowledge and expertise of the prosecution and investigation of international crimes. Similar to Rome Statute requirements of specific expertise among the ICC's staff, the draft legislation for the establishment of specialised chambers calls specifically for expertise among prosecutors in relation to sexual violence and violence against children.[857] A registry office is to deal with administrative matters, including victim and witness protection, legal representation of the accused and the participation of victims in the proceedings. For this purpose, the legislation again calls for the establishment of a victims and witnesses protection unit (UNPROVIT, 'unité de protection des victimes et témoins') and provides for protective measures similar to those provided for under the Rome Statute. The protection of victims of international crimes and their role within prosecutions and investigations is a particularly important feature in the 2014 draft bill, for which it has directly transplanted article 68 of the Rome Statute. Finally, the explanatory note to the draft legislation indicates clearly that the bill is grounded in the realisation that the Rome Statute, due to its complementary nature, the ICC cannot alone tackle the country's impunity problem.[858]

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[855] The Goma chamber would have jurisdiction over crimes committed in North Kivu, South Kivu and Province Orientale; the Lubumbashi chamber over the provinces of Kasaï-Oriental, Kasaï-Occidental, Katanga and Maniema; and the Mbandaka chamber was to hear cases arising in Bandundu, Bas-Congo of Equateur Province and in the city of Kinshasa. Article 91(1).

[856] It is interesting to note that this is the first time the crime of aggression appears in the draft legislation. In a speech during a special session on sexual violence at the Assembly of States Parties meeting in New York in December 2014, the DRC delegate spoke specifically about the harbouring and assisting of international criminals by other countries (presumably a reference to Rwanda's involvement in much of the instability in the east of the country).

[857] Article 65(1).

[858] *Projet de loi modifiant et completant la loi organique n° 13/011-B du 11 avril 2013* (April 2014), Exposé des motifs.

While neither the special court nor the specialised chambers have been established, the discussions within the legislature on the need to create such mechanisms at a minimum illustrates a preliminary willingness to engage with civil society organisations on increasing the capacity of the national justice system, and perhaps even an awareness of its limitations and the fragility of its system. Ultimately, however, there was insufficient political willingness to move forward on establishing these specialised chambers. Furthermore, since the entry into force of Rome Statute Implementing Legislation in 2016, the urgency to establish special justice mechanisms seems to have somewhat dissipated, with the focus being transferred to the internalisation processes described earlier in the military courts, and on how to transfer the knowledge and experience built there to the civil courts. Nonetheless, the establishment of specialised mixed courts with involvement of international staff either directly or indirectly modelled on the ICC would have contributed to an additional shield from political interference and corruption in the court's procedures (an ongoing problem in the justice system). Similarly, uniting expertise to conduct investigations and prosecutions for international crimes – which are much more complex than ordinary crime investigations – into one specific structure would also have streamlined such capacity building and made better use of the limited resources available. As such, it would have fortified the ability of the national legal system to provide justice for Rome Statute crimes. As we will see in the next section, increasingly, the DRC is seeking to reclaim the narrative on the ability of its legal system within a framework of complementarity.

5.4.2 Reclaiming ability and contestations on complementarity

As mentioned, a number of accused persons who were tried by the ICC had been in detention prior to their surrender to the Court. In one of these cases, that against Germain Katanga, complementarity became a hotly contested issue first at the start of his trial at the ICC in 2009, when he challenged the admissibility of the case, and again when he completed his sentence in 2016, when the DRC authorities announced they sought to prosecute him domestically. The case provides an interesting example of the DRC government's attempts to reclaim its ability to conduct proceedings for Rome Statute crimes. Furthermore, it is a rare instance of direct interaction between the ICC and the national authorities in relation to proceedings being carried out at a national level, whereby the national court essentially

depends upon the ICC's 'cooperation' (in broad terms) or endorsement to allow the domestic case to proceed.

The case against Germain Katanga, alleged commander of the *Force de résistance patriotique en Ituri* (FRPI) militia group, was the ICC's second to come to trial. He was tried jointly with Mathieu Ngudjolo Chui, alleged leader of the *Front des nationalistes et intégrationnistes* (FNI) militia group, for an attack carried out by the joint (Ugandan-backed) FPRI/FNI militia on the village of Bogoro in Ituri in February 2003. The two militia groups, of primarily Ngiti and Lendu ethnicity, were engaged in a conflict with Thomas Lubanga's (Rwandan-backed) UPC, linked to the Hema ethnic group. Between January 2002 and December 2003, an estimated 8,000 civilians were deliberately killed, hundreds of women and girls were sexually enslaved, more than 600,000 civilians were forced to flee because of the violence, and thousands of children were forcibly recruited into the different militia groups.[859] On 24 February 2003, the FRPI/FNI attacked the village of Bogoro, a Hema village of strategic value to the UPC, pillaging the village, killing civilians, and sexually enslaving and raping women and girls, for which the ICC indicted Ngudjolo and Katanga.

When the ICC issued its arrest warrant for Katanga on 2 July 2007, he had already been in DRC detention since March 2005 for a domestic case relating to allegations of crimes against humanity, including murder and pillaging, committed by the FPRI between 2002 and 2005 in various locations in Ituri, including Bogoro.[860] In February 2009, therefore, the Defence for Katanga filed an admissibility challenge before the Trial Chamber arguing that the domestic proceedings pre-empted the ICC's case and that the arrest warrant should never have been issued on that basis. During an oral hearing on 1 June 2009, the Defence also relied upon an ASF report on the progress made by military courts to illustrate the ability and willingness of the DRC authorities to carry out the relevant domestic procedures.[861] Because the DRC had indicated, however, that it had not initiated a case against Katanga in relation to

[859] UN Security Council, *Special report on the events in Ituri, January 2002-December 2003*, S/2004/573 (16 July 2004).

[860] *The Prosecutor v. Germain Katanga*, ICC, Registrar, 'Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome - Annex IV', ICC-01/04-01/07-3666-AnxIV (9 March 2016).

[861] The Prosecution subsequently tendered the document into the record of the case. *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Registry, 'Enregistrement au dossier d'une pièce présentée lors de l'audience tenue le 1er juin 2009', ICC-01/04-01/07-1198 (10 June 2009).

Bogoro,[862] and had specifically closed the domestic proceedings against him in relation to other crimes "to facilitate the joinder of the proceedings at the level of the ICC",[863] the Chamber rejected the challenge.[864] It found that admissibility was not overruled by complementarity in this case. His ICC trial commenced on 24 November 2009.

On 7 March 2014, Trial Chamber II convicted Katanga as an accessory to one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging). He was acquitted of the charges relating to the rape and sexual enslavement of women and girls, and of the recruitment and use of child soldiers as the Chamber found there was insufficient evidence to link him to these crimes.[865] He was sentenced to twelve years imprisonment,[866] which was reduced by 3 years and 8 months upon a statutory review of his sentence in November 2015.[867] Having been transferred to a DRC prison to serve the remainder of his sentence in December 2015 after the ICC designated the DRC as the state of enforcement,[868] for which the ICC had entered into an *ad hoc* agreement with the DRC,[869] Katanga finished serving his sentence on 18 January 2016.

However, upon completing his sentence, the DRC authorities refused to release Katanga, and instead notified him that they intended to reopen the domestic case against him

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[862] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Trial Chamber II, 'Transcript of hearing', ICC-01/04-01/07-T-65-ENG (1 June 2009), at p 81 lines 84-87.

[863] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-40-Anx3.6.

[864] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1213-tENG.

[865] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436. His co-accused Mathieu Ngudjolo Chui was acquitted in December 2012 of all charges against him and released.

[866] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3484.

[867] Under Article 110 of the Rome Statute, "When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced". *The Prosecutor v. Germain Katanga*, ICC, Appeals Chamber Sentence Reduction Review Panel, 'Decision on the review concerning reduction of sentence of Mr Germain Katanga', ICC-01/04-01/07-3615 (13 November 2015).

[868] International Criminal Court, *Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment*, ICC Press Release # ICC-CPI-20151219-PR1181 (19 December 2015); *The Prosecutor v. Germain Katanga*, ICC, Presidency, 'Decision designating a State of enforcement', ICC-01/04-01/07-3626 (8 December 2015).

[869] This was the first time the ICC designated a state of enforcement of sentences. It had sought Katanga's views on the designation of a state of enforcement, and he had indicated on numerous occassions his strong desire to be transferred to the DRC, given his family ties there. *The Prosecutor v. Germain Katanga*, ICC, 'Ad hoc agreement between the government of the Democratic Republic of Congo and the International Criminal Court on enforcement of the sentence of the International Criminal Court imposed on Mr Germain Katanga', ICC-01/04-01/07-3626-Anx-tENG (24 November 2015); *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3626.

(and three other accused[870]) for crimes committed in 2002-2003 in the east of the country. While the DRC initially vacated jurisdiction to the ICC explicitly under the principle of complementarity for its inability to conduct investigations, it is now reclaiming its jurisdiction over that same individual, albeit for different crimes, effectively seeking a reversal of that determination of inability under complementarity. This challenges the Rome Statute's complementarity principle in novel ways and raises questions about the ICC's stated policy of "burden sharing" with the DRC. Whereas the burden-sharing approach to complementarity essentially meant that the ICC would prosecute high-level perpetrators, with the DRC focusing on lower level perpetrators (which, as we have seen, has been criticised as well), in this instance, they proceed against the same person, yet for different crimes, thus in a way "sharing the burden" *only* for a specific case. This does not seem like an efficient use of either ICC or DRC resources to jointly close the impunity gap.

Under article 108 of the Rome Statute, a state of enforcement may only proceed with a prosecution against a person who has been sentenced by the ICC after it has sought the ICC's approval to do so.[871] The DRC government first indicated its desire to prosecute Katanga to the ICC a few days before the expiration of his sentence on 13 January 2016, although he had already been charged in late December 2015.[872] In its various communications to the ICC seeking its approval, the government specifically reiterated that the government "seeks to exercise its sovereignty, by the proper application of the principle of complementarity, pursuant to which its domestic courts retain primacy in prosecuting serious crimes committed on its territory".[873] It intended to prosecute Katanga for participating in the establishment of the insurrectional FNI/FPRI militia movement, and for the war crime of conscripting child soldiers, and two counts of murder as crimes against

[870] Katanga is charged jointly with Floribert Ndjabu Ngabu, Pierre Célestin Iribi Mbodina, and Sharif Manda, all three of whom testified in the ICC case against Katanga, and have been waiting in DRC prison to have their cases heard. Following their testimony before the ICC, where they also spoke about President Kabila's support for rebel groups in Ituri at the time, they requested asylum in the Netherlands, which gave rise a host of legal issues. Their aslyum was ultimately denied and they were returend to the DRC in July 2014. See: 'DR Congo: ICC Convict Faces Domestic Charges', *Human Rights Watch* (23 December 2015), available at <https://www.hrw.org/news/2015/12/23/dr-congo-icc-convict-faces-domestic-charges>, accessed 19 May 2017.

[871] The provision ceases to apply "if the sentenced person remains voluntarily for more than 30 days in the territory of the state of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it". Article 108, Rome Statute.

[872] A *decision de renvoi* first charged Katanga with war crimes and crimes against humanity under the Rome Statute on 30 December 2015. *The Prosecutor v. Germain Katanga*, ICC, Democratic Republic of Congo, 'Annex I to the Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga', ICC-01/04-01/07-3631-AnxI (12 January 2016).

[873] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3666-Anx1.

humanity. In line with prior practice of the military courts discussed earlier, the war crimes and crimes against humanity charges against him were brought specifically under articles 7 and 8 of the Rome Statute. Katanga, in turn, contested the jurisdiction of the *Haut Cour Militaire* without the approval by the ICC, and challenged the prosecution on grounds of *ne bis in idem* and because the DRC had indicated it closed all proceedings against him when he was transferred to the ICC in 2007.[874] The Office of the Prosecutor has remained external to these contestations, and has not made any observations.[875]

The Presidency had expressed its concern at various points since January 2016 that the case against Katanga appeared to be progressing at a national level without the prior approval from the Court, but in April 2016 it approved the domestic prosecution.[876] It stressed, however, that normally such approval must be sought *prior* to undertaking any proceedings against a sentenced person. Complementarity played a big part in the Presidency's decision. It noted that the Rome Statute's legal documents do not provide much clarity on the relevant criteria to be applied to a review of an Article 108 request. As such, it deemed the request must be reviewed in light of the Rome Statute's object and purpose, and that the relevant provisions must be assessed "in context". Referring to the fundamental nature of the principle of complementarity in the Rome Statute, the Presidency held that "its approval should only be denied when the prosecution […] may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court".[877] In other words, the threshold for states in satisfying this test is relatively low. Any other result, in the Presidency's view, "would be inconsistent with the notion of complementarity and the objective of ensuring accountability for crimes".[878] Noting that the domestic case does not relate to the Bogoro incident for which the ICC convicted Katanga, it approved the domestic prosecution.

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[874] *The Prosecutor v. Germain Katanga*, ICC, Defence, 'Annex V to the Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome', ICC-01/04-01/07-3666-AnxV (6 February 2016).

[875] Pursuant to Rule 214(5) of the Rules of Procedure and Evidence, any documentation on a request for prosecution under Article 108 shall be submitted also to the Prosecutor who "may" comment. *The Prosecutor v. Germain Katanga*, ICC, Presidency, 'Decision pursuant to article 108(1) of the Rome Statute', ICC-01/04-01/07-3679 (7 April 2016), at para 19.

[876] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3679.

[877] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3679, at para 20.

[878] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3679, at para 23.

In other words, it engaged in a *reversed* complementarity test. Whereas the admissibility test demands an assessment of whether the case concerns substantially *the same* conduct (as discussed in chapter 2), in approving a subsequent prosecution, the key is whether it concerns *different* conduct. Unlike the admissibility test, where specific incidents are only indicative to find substantially the same conduct, in the approval test, the relevant incident forms a *critical* component of the assessment. Notably, Katanga has been tried by the ICC for almost identical charges as those for which he is to be tried domestically, but for a different incident (and with the exception of the sexual violence charges). Whereas such a case may have satisfied the admissibility test and thus pre-empted the ICC's jurisdiction at the time (subject to an assessment of genuine ability and willingness), it does not bar a subsequent prosecution at a national level.

While the Chamber's decision is understandable for not wanting to be overly restrictive or seen to be interfering in what it perceives to be genuine domestic accountability efforts, the domestic case against Katanga has been heavily criticised. Human rights organisations have raised concerns about his fair trial rights,[879] and others have criticised the case for violating the principle of *ne bis in idem*.[880] His ICC Defence counsel also raised concern about possible political motivations underlying the prosecution.[881] Katanga's three co-accused all testified for the Defence in the case against him before the ICC, where they spoke about President Kabila's support for rebel groups in Ituri at the time. The Chamber, however, dismissed these concerns as unsubstantiated.[882] Furthermore, given the entry into force of the Rome Statute Implementing Legislation in March 2016, it is likely the military court in this case will apply these "new and improved" standards of justice that fully incorporate international legal and procedural standards of justice.[883] The case may ultimately

[879] Elsa Buchanan, 'DRC: Congolese warlord Katanga on trial again at ICC [sic] over new war-crime charges', *International Business Times* (4 February 2016), available at <http://www.ibtimes.co.uk/drc-congolese-warlord-katanga-trial-again-icc-over-new-war-crime-charges-1541867>, accessed 19 May 2017.

[880] Patryk I. Labuda, 'A Tug of War for Justice - Confusion over Complementarity and Cooperation in the Congo', *Justice in Conflict* (13 January 2016), available at <https://justiceinconflict.org/2016/01/13/a-tug-of-war-for-justice-confusion-over-complementarity-and-cooperation-in-the-congo/>, accessed 19 May 2017.

[881] "The defence is concerned that the authorities may, fearing that Mr Katanga's release could be received negatively in Ituri and thus affect President Kabila's popularity, cause him to be detained at least until the Presidential elections in October 2016, or even beyond. In other words, there is a possibility that, for some ulterior, political motive, Mr Katanga may be subjected to arbitrary and unlawful detention through manipulation of the criminal justice system by or on behalf of the DRC executive." *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3635, at para 61.

[882] *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3679, at para 29.

[883] Labuda 'A Tug of War for Justice - Confusion over Complementarity and Cooperation in the Congo' (2016).

become the first to test the ability of the Congolese courts to administer justice in accordance with this new legislation.

Nonetheless, the issue highlights problems that may arise from the ICC Prosecutor's very narrow charging in its initial cases, and raises questions about its stated policy of 'burden-sharing' with the ICC and domestic authorities going after *different* and not identical perpetrators. Rather than charging Katanga with a range of incidents, the ICC Office of the Prosecutor pursued a case limited to one specific attack. A similar issue may arise in relation to Thomas Lubanga, who currently serves his ICC sentence in a DRC prison until 2020, and was also the subject of a domestic prosecution at the time of his surrender to the ICC. Like Katanga, his domestic case included a broader set of charges than the limited case relating to child soldiers brought before the ICC. The dual prosecution of these individuals before both forums is not an effective use of either the ICC's or the DRC's resources, and may ultimately discredit the principle of complementarity. In fact, for the catalyst impact of complementarity to work as arguably intended, it should be triggering *other* cases, not the same ones. As Labuda rightly asked: "what is the point of international trials if people tried in The Hague then face domestic prosecutions for conduct closely related (though not identical) to the crimes pursued by the ICC?"[884]

Although it is laudable that the DRC is reclaiming its ability to conduct domestic prosecutions for international crimes, an initiative that should indeed be welcomed and strengthened by investing in increasing its capacity to comply with international standards, its resources would have been better spent on addressing types of crimes not addressed in the ICC's proceedings (such as sexual violence) or for pursuing individuals who have not been held accountable before the ICC. Surely such an approach would be much more productive from a complementarity perspective. Ongoing resource and other challenges also remain difficult to resolve and the case has progressed very slowly before the DRC court. Following the ICC's approval in April 2016, the case against Katanga and his co-accused finally resumed in February 2017, after having been on hold since May 2016 following a challenge by the Defence of the legal basis for the trial given that approval by the ICC was only sought *ex post facto* when the proceedings had already been initiated against him.[885] However,

[884] Labuda 'A Tug of War for Justice - Confusion over Complementarity and Cooperation in the Congo' (2016).

[885] 'War crimes trial resumes for ex-warlord Katanga in DRC', *News 24* (10 February 2017), available at <http://www.news24.com/Africa/News/war-crimes-trial-resumes-for-ex-warlord-katanga-in-drc-20170210>, accessed 19 May 2017.

following another half-day hearing in March 2017, the case was put on hold again, with no indication of when it would resume.[886] The case has not been dealt with substantively yet, and it remains unclear when, if at all, the case will proceed.

A number of other important cases have recently progressed before the DRC military courts, including against high-level perpetrators, but they have equally faced difficulties regarding resources and witness security. In November 2014, General Kakwavu was convicted of rape, murder, and torture and sentenced to 10 years imprisonment.[887] It was the first time a military court convicted a Congolese general for war crimes. The trial, which started in 2011, had relied upon significant technical and logistical support provided by MONUSCO.[888] Subsequently, in December 2014, a military court in Bukavu convicted Lieutenant Colonel Bedi Mobuli Engangela (alias 'Colonel 106') of the crimes against humanity of murder, rape, sexual slavery, abduction, and imprisonment and other forms of grave deprivation of liberty committed in South Kivu between 2005 and 2007; he was sentenced to life imprisonment.[889] He was convicted both for his responsibility as commander and as a direct perpetrator. Like for the other trials discussed in the first section of this chapter, his trial benefitted significantly from operational and financial support provided by civil society organisations. *Avocats Sans Frontières*, for instance, represented the 753 victims classified as civil parties, and assisted the 83 who testified with their transport, temporary housing, and other assistance.[890]

For victims, Colonel 106's arrest and conviction, as well as their participation in the trial, were important moments of both security and satisfaction.[891] At the same time, however, the court suffered significant challenges regarding witness security. The identity of victims participating as civil parties had been leaked to the accused, and during the trial, the accused personally identified two of the witnesses who were testifying against him. With one

[886] Email communication with NGO representative (May 2017), *on file with author*.

[887] Anneke van Woudenberg, 'Dispatches: First Congolese General Convicted of Rape', *Human Rights Watch* (10 November 2014), available at <https://www.hrw.org/news/2014/11/10/dispatches-first-congolese-general-convicted-rape>, accessed 19 May 2017.

[888] 'DR Congo: UN provides logistical support for rape trial of army general', *UN News Centre* (30 March 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=37943#.WR79JRN97ow>, accessed 19 May 2017.

[889] He was sentenced to 20 years imprisonment for rape, 15 years for sexual slavery, 15 years for inhumane acts, 10 years for grave deprivation of liberty, and life imprisonment for murder.

[890] 'DR Congo: conviction of Colonel '106' and risk of reprisals', *Avocats Sans Frontières* (15 December 2014), available at <http://www.asf.be/blog/2014/12/15/dr-congo-the-conviction-of-colonel-106-and-risk-of-reprisals/>, accessed 19 May 2017.

[891] Interview with Congolese NGO representative (Kinshasa, July 2016), *on file with author*.

witness, who had been raped by Colonel 106 and had born a son as a result, he interrupted her testimony and said: "I will recognise your child as my child now". Another witness (who owned a pharmacy) had been testifying using a microphone and from another room, yet was still identified by Colonel 106 because of his intimate knowledge of the territory and different businesses in the area.[892] Identification of victims and witnesses in a situation of ongoing instability, particularly where many perpetrators or members of the armed group of accused persons remain free, drastically increases risks of retaliation.[893]

In July 2014, President Kabila appointed Ms Jeanine Mabunda Lioko Mudiayi (Ms Mabunda) as his *Répresentant personnel en charge de la lutte contre les violences sexuelles et le recrutement des enfants*.[894] She has focused her work on highlighting successes in the national judicial response to sexual violence under the ICC's principle of complementarity, cooperating in that endeavour with the UN and civil society organisations. For instance, Ms Mabunda's office has put in place a monitoring system to better track cases that are addressed in the courts. In 2016, she reported that the military courts heard 496 cases of sexual violence, relating to 2,589 individual complaints submitted by victims. Of these, 280 cases had reached the judgment stage, with 225 resulting in convictions and 55 resulting in acquittals. The majority of the 225 convictions (involving 472 convicted persons) related to the Congolese armed forces (with 319 convicted persons), and the police (with 135 convicted persons). Only 18 members of armed groups or civilians had been convicted.[895] Her role, however, has been primarily one of advocating or lobbying, rather than creating necessary changes on the ground, [896] and it seems that seeking approval and commendation from the international community has been a primary objective. Nonetheless, she does act as a norm entrepreneur or agent of change in a limited way by keeping the issue of sexual violence on

[892] Interview with NGO representative (Brussels, September 2015), *on file with author*.

[893] ASF has reported, for instance, that members of his militia group threatened the families of witnesses who testified. 'DR Congo: conviction of Colonel '106' and risk of reprisals' (2014); 'RDC: la perpétuité pour le «Colonel 106»', *Radio France Internationale - Afrique* (16 December 2014), available at <http://www.rfi.fr/afrique/20141215-rdc-perpetuite-le-colonel-106>, accessed 19 May 2017.

[894] See, *e.g.*, Zainab Hawa Bangura and Leila Zerrougui, 'Joint statement: Appointment of Presidential Adviser on Sexual Violence and Child Recruitment marks a new dawn in the fight against conflict-related sexual violence and child recruitment and use in the Democratic Republic of the Congo', (14 July 2014), available at <http://www.un.org/sexualviolenceinconflict/press-release/appointment-of-presidential-adviser-on-sexual-violence-and-child-recruitment-marks-a-new-dawn-in-the-fight-against-conflict-related-sexual-violence-and-child-recruitment-and-use-in-the-democratic-repu/>, accessed 16 May 2016.

[895] 'Résultats 2016 - juridictions militaires', *Bureau du Représentant Personnel du Chef de l'Etat en charge de la Lutte contre les Violences* (February 2017), available at <http://stopdrcsexualviolence.com/wp-content/uploads/2017/02/Synth%C3%A8se-des-statVJp1.jpg>, accessed 22 May 2017.

[896] Interview with Congolese military court representative (Kinshasa, June 2016), *on file with author*.

the national political agenda. For instance, in October 2016, her office organised a conference in Kinshasa in partnership with the UN Office of the Special Representative of the Secretary General (UNSRSG) on Sexual Violence in Conflict, MONUSCO, and UNDP to assess ongoing accountability efforts and establish a roadmap for national priorities for the next three years. At the conference, UNSRSG Bangura welcomed Ms Mabunda's ongoing efforts, and, noting the reduction by half of incidents of sexual violence in 2015 compared to 2013, called the DRC as "success story".[897] Her ongoing efforts have equally been welcomed by a large group of civil society organisations, who noted the importance of using the Rome Statute in bringing a measure of accountability in the DRC and specifically compared the DRC's efforts (with a reported 250 judgments in cases of sexual violence between 2014 and 2015) to the ICC's (with 1 conviction for rape).[898]

In other words, there is a concerted effort on a political level to reclaim the narrative of the DRC's ability to provide justice and accountability for Rome Statute crimes, including in relation to sexual violence crimes, and an increasing emphasis on strengthening national judicial efforts. However, despite the relative advancements made in accountability efforts for sexual violence crimes, the fight against impunity for sexual violence crimes remains difficult and has left a number of complementarity gaps. There have only been very few trials of higher-level perpetrators, with most cases focusing on foot soldiers and direct perpetrators. This is in part due to operational and statutory constraints on the mobile military courts, where judges must be of a higher rank than the accused persons. This has effectively left high-level military officials beyond the reach of the justice system. In addition, this situation is perpetuated by difficulties in proving direct perpetration. For instance, the 2014 *Minova* trial, so important because of the social and legal internalisation processes around protective measures described earlier in this chapter, resulted in an overwhelming acquittal for most accused because the victims had been unable to identify their perpetrators.[899] Only two of the 39 accused persons were eventually convicted for rape – one of these was convicted because the victim had described how her attacker missed a thumb. The judges easily confirmed the perpetrator's identity when they asked all accused persons to hold out their hands.

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[897] 'UN Recognises the DRC as 'Most Successful Experience' in Countering Sexual Violence', *AllAfrica* (3 November 2016), available at <http://allafrica.com/stories/201611031004.html>, accessed 22 May 2017.

[898] 'Violences sexuelles en RDC : les ONG impliquées dans la lutte attestent des progrès réalisés en trois ans', *AllAfrica* (14 March 2017), available at <http://fr.allafrica.com/stories/201703140879.html>, accessed 22 May 2017.

[899] For a more detailed analysis of the case, see *e.g.*: Human Rights Watch, *Justice on Trial: Lessons from the Minova Rape Case in the Democratic Republic of Congo* (2015).

Furthermore, the lack of effective enforcement of justice and accountability beyond holding trials remains problematic. Prison breaks remain an all too frequent reality,[900] thus jeopardising the effective enforcement of sentences. For instance, in 2006, Bokila Lolemi and others sentenced for rape in the *Songo Mboyo* case escaped from the Mbandaka prison; they remain at large. This also puts victims at increased risks of reprisals and continued insecurity with perpetrators essentially roaming free. Furthermore, reparations ordered by the mobile military courts (which under Congolese law is limited to monetary compensation), have never been implemented, even in situations where accused persons have been convicted *in solidum* with the Congolese state.[901] More than 10 years after the court pronounced a reparations order in the *Songo Mboyo* case, none of the victims have ever received any money. Victims must advance around 6% of the amount ordered as compensation (known as 'proportional fees'). With reparations orders often reaching thousands of dollars, many of the victims simply do not have such resources. For instance, in the *Songo Mboyo* case, the proportional fees were reportedly set at USD 28,000.[902] Furthermore, the convicted persons often have no resources from which reparations could be drawn, and there are no enforcement mechanisms available within Congolese law to enforce reparations against the state. With little political commitment from the state to pay such reparations, essentially nothing happens and impunity continues to prevail.

5.4.3 *In sum*: Mimicking the ICC but continued impunity gaps

While the attempts to create specialised courts or chambers have as of yet remained unsuccessful in the DRC, they do reveal interesting aspects of the way in which the Rome Statute is viewed and instrumentalised at a national level. As with the direct application of the Rome Statute by military courts, and the *verbatim* incorporation of the Rome Statute in the Implementing Legislation, the emphasis through such executive action has been one of "mimicking" the ICC: the ICC as an institution was used as an example to be replicated at a

[900] In May 2017, in the largest prison break in Congolese history, more than 4,000 inmates escaped from the maximum-security Makala prison in Kinshasa. Kimiko Freytas-Tamura and Steve Wembi, 'An Unfortunate Record for Congo: Thousands Flee Cells in Biggest Jailbreak', *New York Times* (19 May 2017), available at <https://www.nytimes.com/2017/05/19/world/africa/congo-prison-break-kabila.html>, accessed 12 June 2017.

[901] See, *e.g.*, International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*.

[902] International Federation for Human Rights, *DRC: Victims of sexual violence rarely obtain justice and never receive reparations - major changes needed to fight impunity*, at 60.

national level in order to complement that same institution. Furthermore, the establishment of specialised courts would be important because it would consolidate the experience of military court judges on the investigation and prosecution of sexual violence crimes, discussed earlier in this chapter. With the current transfer of jurisdiction from military courts to civil courts, this would also structure the necessary knowledge transfer. At the same time, such a specialised court or chamber would ensure a closing of the jurisdictional gap where the ICC implementing legislation and the mobile courts focus primarily (if not exclusively) on crimes committed after the entry into force of the Rome Statute. The specialised chambers could provide a way to address the impunity gap for crimes committed before 2002, which are equally not addressed at the ICC). In other words, they would contribute to *reversed* complementarity, with DRC proceedings complementing investigations and prosecutions by the ICC.

Although the specialised chambers have not yet been established, this approach to reversed complementarity has come into view quite clearly in relation to the Katanga case, with DRC authorities seeking to prosecute an individual originally sent to the ICC because of the domestic system's inability to deal with his case. Over time, the DRC judicial system, with critical financial, logistical and technical support provided by civil society organisations, multilateral donors and the UN, has in some ways increased its capacity to deal with crimes committed by lower level perpetrators. Also more recently, with the conviction of a senior commander of the FARDC, important inroads have been made towards holding higher level perpetrators accountable for crimes committed by those under their command. While the ICC was of relevance in relation to the attempted establishment of specialised chambers to the extent that its framework was used as a model to be replicated at a national level, in relation to these limited domestic accountability proceedings, the ICC itself has been of very little relevance other than providing the relevant normative framework governing the proceedings. Over time, there has been an increasing push in the DRC to reclaim the narrative on its ability to conduct investigations and prosecutions for Rome Statute crimes. As with the domestication of the Rome Statute through judicial and legislative internalisation described earlier, here again we see the importance of interactions between the government and civil society organisations, who act as norm entrepreneurs in triggering internalisation. Even though the ability of the DRC to deliver justice has arguably increased somewhat since the ICC first conducted its admissibility assessment in relation to opening an investigation, significant impunity gaps remain.

SECTION 5.5

CONCLUSIONS

When UNSRSG Margot Wallström labelled the DRC the "rape capital of the world" in 2010, this prominently put the spotlight on the high levels of sexual violence crimes in the country that continued to be committed with almost complete impunity. This situation was exacerbated by the social and economic consequences for victims of speaking out about these crimes, the inadequacies of the national legal framework, and the inability of judges or prosecutors to run cases and of investigators to conduct the necessary investigations given their lack of resources and understanding of these crimes. The ongoing instability in many parts of the country further complicated the situation and incapacitated the judicial system. In this context, it has been, and continues to be, incredibly difficult to pursue justice for victims of sexual violence (as for other crimes) at a national level. When the ICC opened an investigation into the situation in the DRC in 2004, therefore, this was welcomed widely by victims, affected communities and Congolese civil society organisations, who saw in the ICC the only realistic avenue to bring a measure of justice given the fragility of the DRC's own legal system. It is thus disappointing for many that the ICC has not yet successfully prosecuted any individuals for sexual violence committed in the DRC. Fuelled by this growing sense of disappointment with the ICC, and in recognition of the fact that the ICC can only realistically prosecute a small number of perpetrators, there is growing emphasis on seeking ways to increase domestic accountability for sexual violence crimes at a national level. The ICC's importance from a complementarity perspective in the DRC, therefore, arguably lies in the broader processes that are triggered and instrumentalised to build national capacity to complement the ICC's presence and grounded in the broader Rome Statute system of justice.

Compared to many other countries under investigation or preliminary examination by the ICC (such as Colombia), the DRC courts have adjudicated a relatively high number of cases for Rome Statute crimes, despite the ongoing difficulties. Although these trials have continued to face numerous obstacles, for instance in relation to witness protection, they do in small ways start to address the country's impunity problem, particularly around crimes of sexual violence. Key to this progress has been the internalisation of the Rome Statute's gender justice accountability norms through legal internalisation (judicial, legislative, and

executive action) and to a more limited extent social internalisation processes. Indeed, as this chapter has illustrated, transplanting international legal standards encapsulated in the Rome Statute to the national level has made some progress, however limited, towards reversing the cycle of impunity for sexual violence crimes in the DRC. Most importantly, grounding national prosecutions in the Rome Statute has removed potential statutes of limitations or time constraints upon conducting investigations and prosecutions, and amended restrictive legal definitions and evidentiary requirements. As this chapter illustrated, the ICC's presence in the DRC contributed to a series of normative interactions before the mobile military courts, within the executive, and on a legislative level among a range of different actors. As in Colombia, this normative influence of the Rome Statute is particularly strong where it is driven or championed by actors other than the ICC; civil society organisations have been particularly instrumental in this process.

In this concluding section, I will aim to answer the question raised in the beginning of this chapter: how, why and in what way have the Rome Statute's standards around accountability for sexual violence become active and effective in the DRC, and to what extent has this contributed to an increase in domestic accountability for these crimes? This section will provide conclusions regarding the norm internalisation processes identified, zooming in on the relevant actors involved in these processes, and the substance of the internalised norms. It will also discuss its relevance from a positive complementarity perspective, and discuss the ICC's failed implementation of burden-sharing complementarity. It concludes that, while many actors have encouraged and facilitated accountability for sexual violence crimes as war crimes and crimes against humanity using the ICC or its Rome Statute, the ICC itself has been of little relevance. This has disappointed Congolese actors, and discredited the ICC's own 'burden-sharing' approach to positive complementarity. Unlike Colombia, where there have been some direct interactions between the ICC and national authorities in relation to national accountability processes, in the DRC, these have almost exclusively been on a normative level. In this way, positive complementarity has given rise to a broader set of norm internalisation and institution-building processes that underpin domestic accountability efforts. These broader processes, championed by civil society and other international actors but equally relying upon an openness and willingness from domestic political actors, have been critical in moving the Congolese conversation on accountability for sexual violence forward.

5.5.1 Norm internalisation and instrumentalisation of the Rome Statute

As in Colombia, the internalisation of the Rome Statute in the DRC has happened at various levels, each one of which was triggered by civil society organisations acting as norm entrepreneurs in first raising the issue, and subsequently providing the necessary drafting and advocacy support. At times, explicit reference has been made to the provisions of the Rome Statute; other times this reliance upon Rome Statute norms has been more implicit – the relevance of international legal standards embodied in the Rome Statute has been constant, however. The overarching approach has been one of mimicking the ICC. Mobile military courts explicitly adopted procedures and legal definitions identical to the ICC's, various legislative amendments copied *verbatim* the Rome Statute's provisions into Congolese law, and the attempts to establish specialised chambers have equally focused on creating institutions within the Congolese legal system that are modelled on the ICC's institutional structure and its procedural regulations. This culminated in the continuation of the domestic case against Katanga for very similar allegations for which the ICC convicted him.

The first, and most active, institutions to incorporate the Rome Statute have been the military courts, which have spearheaded the country's accountability efforts. In this instance, the Rome Statute has permeated the legal culture in the DRC via the direct application of the Statute and its subsidiary documents in these court proceedings. DRC military courts have relied upon the Rome Statute in relation to charges of sexual violence and have, at times, advanced progressive legal reasoning as a result. The emphasis has been on definitions of crimes, evidentiary standards, and procedural safeguards. In these three areas, recourse to the Rome Statute constituted a significant (positive) change for the further development of the judicial system's capacity to deal with sexual violence as an international crime. Interestingly, DRC courts are increasingly relying upon subsidiary documents of the Rome Statute, such as the EoC and RPE. This suggests a more wholesale integration of Rome Statute norms than a mere reliance upon the substantive provisions of the Statute. At the same time, however, particularly in relation to protective measures, they adapted those international standards to the national context in very creative ways, cognizant of the (operational and financial) constraints they faced. Such direct reliance upon the Rome Statute to increase the capture capacity of Congolese law through judicial interpretation is a very clear example of legal internalisation within Koh's transnational legal process. Furthermore, the conversations held among judges, lawyers and others involved in these mobile courts

created a sense of local ownership of the process, which makes it easier for such practices to "stick" – it has to become part of national practices and not perceived as imposed from above. It thus highlights a degree of social internalisation beyond the legal internalisation through judicial interpretation. Nonetheless, the practice has not been consistent across the different courts, in part because of a limited ability of the different courts to access each other's judgments; a harmonised practice has remained difficult to achieve as a result.

This *ad hoc* adoption of the Rome Statute by military courts as relevant legislative framework subsequently contributed to the amendment of existing legislation to formally incorporate these same standards into the Congolese criminal law framework. Although it was not until 2016 that the DRC government enacted specific legislation on the implementation of the Rome Statute, since 2002, there have been several attempts to integrate a selection of norms into domestic penal legislation. This has been particularly important in amending the ordinary penal code to include the broad range of sexual violence crimes covered by the Rome Statute. Textually very similar, the 2006 sexual violence legislation relies specifically upon the Rome Statute in relation to definitions of crimes and procedural mechanisms, including standards of evidence. Some of the definitions of the different types of sexual violence are directly based on those provided in the Elements of the Crimes. However, there are notable differences and the revisions to the law have stopped short of a full integration of Rome Statute standards. Nonetheless, the sexual violence legislation goes significantly further than the original 2002 amendments to the military penal code, and applies Rome Statute definitions to situations of so-called "peace" (i.e. outside the context of war crimes, crimes against humanity or genocide). This move was consolidated in the 2016 Rome Statute Implementing Legislation, which incorporates the Rome Statute in full into the national legal framework.

A third way in which the Rome Statute's norm of accountability is translated into the domestic system is through the attempted establishment of specific mechanisms of justice. Most notably, there have been repeated attempts to establish a special court or specialised chambers within existing courts to deal specifically with war crimes, crimes against humanity, and genocide. The proposals for the establishment of such a court have again relied extensively upon the Rome Statute, and its subsidiary documents, as normative basis. Here we again find a remarkable textual closeness in the proposed legislation establishing the court/chambers and the Statute that established the ICC. In many ways, such a court would mimic the ICC domestically. It relies fully upon the Rome Statute's list of crimes,

incorporates evidentiary standards and procedural safeguards (protective measures for victims, and the rights of the accused), and even mimics the Statute's institutional requirements of gender-sensitivity among judges and staff.

Much of this reliance upon the Rome Statute in the domestic system has been because of an extensive network of civil society organisations centred around the ICC's presence. International NGOs collaborate with local organisations and train them in the use of the Rome Statute for domestic advocacy efforts, and international donors (particularly from the US and Northern Europe) and UN agencies require adherence to international standards, oftentimes explicitly referring to the Rome Statute. Tied to the increased emphasis in the international community on the need to redress impunity in the DRC for sexual violence crimes, much of the progressive changes using the Rome Statute happened because of a close collaboration between these actors and the government. Civil society and international donors are critical actors in training stakeholders in the country, including politicians, journalists, judges, and lawyers. Most notably, the mobile gender courts rely upon judges and lawyers specifically trained by international NGOs in the application of the Rome Statute at a national level. UN agencies and international organisations also provide continued logistical and material support to these courts. This demonstrates a distinct transnational legal process that underpins the internalisation of the Rome Statute in the DRC; as in Colombia, this process is distinctly non-ICC driven.

Importantly, these processes of harmonising national legal practices with international Rome Statute standards opened up a space for talking about sexual violence that did not exist before. The norm interpretative interactions triggered by the work of civil society organisations, supported by domestic political actors and governmental sponsors, as well as international donor organisations and the UN, may over time contribute to a reimagined space of justice and accountability for sexual violence crimes, as is already taking place before the military courts. In particular, these developments attest to a degree of social internalisation, particularly when judges and lawyers work creatively to make international standards work within the logistical and financial constraints faced by the mobile courts. These measures are no longer seen as imposed from above, but have become an integrated practice at a national level. In this way, positive complementarity can be an effective tool in the fight against impunity for sexual violence crimes where legal and social internalisation processes merge and reinforce one another.

Nonetheless, this reliance upon the Rome Statute is not necessarily an unmitigated good. The flipside of these developments is that the space for alternative conceptions of justice has narrowed. The focus through such 'replica ICCs' has been heavily skewed towards criminal (punitive) justice. This prioritisation of punitive justice over other forms inevitably comes at a cost. For instance, despite an initial commitment to create a local trust fund, reparations have been left largely unaddressed in this process of domestication, and in the latest legislation domestically implementing the Rome Statute, any reference to reparations or a trust fund had been taken out. Similarly, although the military courts on sexual violence have issued important judgments, victims have still not received reparations. The lack of adequate mechanisms to enforce such judgments against the state mean that without the political will to provide for reparations, victims will be left to their own devices. Furthermore, the normative progress must be offset against the reality that accountability in terms of numbers of successful prosecutions compared to the number of crimes committed remains low. While amending legal frameworks is important, it can only represent a first step towards reclaiming the narrative on the ability of the DRC's legal system to provide justice and accountability for Rome Statute crimes, an issue that is becoming increasingly more important for the DRC.

5.5.2 Complementarity, the ICC and accountability for sexual violence

Unlike Colombia, where there are some norm-interpretative interactions before the ICC, these norm interactions in the DRC have happened almost exclusively at a national level: the ICC itself has been of very little relevance and has not played a particularly prominent role in these norm internalisation processes. While the ICC is committed to encouraging national accountability processes for Rome Statute crimes in all countries it works, including those under investigation, in reality such active encouragement is a lot more limited when it has opened an investigation. Engagement and interactions with national authorities during investigations are, understandably, focused on enabling the ICC to conduct its own investigations. For this reason, as this chapter illustrated, the Office of the Prosecutor has not directly engaged in capacity building activities in the DRC unless invited by other actors to contribute, it does not follow law reform activities, and has not engaged with the DRC on the establishment of specialised court mechanisms. This is understandable as it is simply not the Court's mandate to engage in rule of law activities at a national level; the Court is not and

should not wish to be a development actor. Positive complementarity in the DRC where the ICC has opened investigation, therefore, is a lot more nebulous than during preliminary examinations. The existence of the Court and its founding principle of complementarity, however, have been instrumentalised by many of the national and international actors and civil society organisations supporting the internalisation of the Rome Statute. In other words, it is the standards enshrined in the Rome Statute and its subsidiary documents rather than the ICC itself that have been of influence in catalysing positive complementarity activities. However, without the existence of the ICC as an institution and its normative framework, championed by civil society organisations, it would arguably have been much more difficult to trigger the effects analysed here.

Whereas in Colombia, the threat of ICC intervention hung over many of the choices made around accountability and justice and was instrumentalised to pursue various goals by different actors, in the DRC, the ICC has lost this 'threat'-factor. Instead, the emphasis has been on a more collaborative approach to complementarity and accountability, which has been instrumentalised by various actors to spur the domestic legal system into action. Notably, accountability efforts at a national level, often supported by civil society organisations, have focused primarily on cases that would not have been the subject of ICC investigations. Importantly, this has included a number of cases for sexual violence crimes. From a positive complementarity perspective, these domestic trials are important not necessarily because they keep cases that would otherwise have been of interest to the ICC at a national level, but because they establish a measure of accountability for these crimes at a national level within the broader Rome Statute system of justice. Importantly, many actors have specifically supported these trials because of a commitment to implementing or developing 'complementarity'. However, besides providing the relevant normative framework that is incorporated through these trials, the ICC itself has served little purpose in these national accountability efforts.

The Office of the Prosecutor, upon opening the investigation, specifically advanced a commitment to burden-sharing complementarity: "the prospect of a division of labour between international and national justice and the promise of international support to the reconstruction of the national justice system were among the factors that made the ICC so attractive to most in the Congolese legal community."[903] While a recurring theme in my

[903] Kambale (2015), at 185.

interviews was the "exemplary" relationship of "cooperation" between the DRC and the ICC, almost all of my interviewees agreed that this cooperation has mostly been a one-way street. The cooperative framework has been focused primarily on facilitating the ICC's investigation and cases, not the other way around. The idea of positive complementarity as 'burden-sharing' never in fact materialised in the DRC, in part due to security considerations. Indeed, the ICC cannot be given credit for the changes identified in this chapter that occurred within a narrative of complementarity.

For the Office of the Prosecutor, therefore, complementarity during the DRC investigations seems to relate primarily to the admissibility of its own cases. For instance, when asked about complementarity in the context of the DRC investigation, one member of the Office of the Prosecutor said that this had been "dealt with extensively" in the context of the admissibility challenges in the Katanga and Lubanga cases.[904] Notably, whereas the ICC in the earlier stages of its investigation would request a lot of information from the government of the DRC about ongoing domestic proceedings, primarily in an effort to assess the admissibility of its own cases, over time its attention to following domestic proceedings has abated. This is in part due to resource limitations – once an investigation is opened, the Office of the Prosecutor simply does not have sufficient resources (or interest) to follow domestic developments to the same extent as during preliminary examinations. While individual cooperation advisers remain interested in domestic developments and sometimes ask their domestic counterparts in the DRC for general updates, it is no longer part of the Office of the Prosecutor's institutional engagement with the DRC.

While it is indeed not the mandate of the ICC to engage in an advisory role in relation to rule of law activities at a domestic level, there are still ways in which the ICC can engage in positive complementarity activities without expanding its mandate or using significantly more resources, something that has been lacking in the DRC. For example, when rejecting requests for access to information collected during the course of the ICC's investigations, rather than outright rejecting such requests, the Office of the Prosecutor could indicate specific areas of concern leading to this decision. If it is concerned about the DRC's capacity to store confidential, sensitive information, highlighting this specific concern could provide an indirect way of working towards positive complementarity, and could open up possibilities of reigniting its burden-sharing promises. Of course, such a decision by the Office of the

[904] Interview with OTP representative (The Hague, October 2015), *on file with author*.

Prosecutor would do little to increase a domestic system's capacity in this respect. However, it could tap into the broader processes of internalisation and capacity building engaged in by other actors, and could thus (indirectly) facilitate and encourage the development of domestic capacity.

Finally, it must be stressed that even in a context where the ICC has opened an investigation, there remain a number of important gender justice complementarity deficits where accountability is not provided either at the international level of the ICC, or at a domestic level. The first relates to crimes committed before the entry into force of the Rome Statute, including sexual violence crimes, which as described in the introduction to this chapter are extensive. The specialised chambers that have not yet been implemented would include jurisdiction over crimes committed before the entry into force of the Rome Statute. This is where impunity remains highest in the DRC. The mobile courts, important as they are, have only focused on crimes committed since 2002, as has the ICC. A broader complementarity gap is the exclusive focus of the trials that do take place on sexual violence *as international crimes*. The difficulties involved in reporting and addressing sexual violence as ordinary crimes remain the same, yet all money is being poured into justice efforts to address sexual violence deemed to be international crimes only. This means that survivors of sexual violence whose victimisation narrative does not easily fit within this framework of crimes against humanity or war crimes are effectively left out of justice efforts. This creates a painful (and ongoing) complementarity gap for these victims. In other words, despite the jurisprudential advancements that were made through the integration of Rome Statute standards around accountability for sexual violence, these practical and operational constraints have left significant impunity and therefore complementarity gaps. While there is important commitment among individuals, it appears institutional, structural engagement remains wanting. This is ultimately the story of justice and accountability for sexual violence crimes in the DRC: for each two steps forward, it takes one step backward.

6

CONCLUSIONS

Although strictly speaking, the Rome Statute had one purpose only: the establishment of a permanent international criminal court to "end impunity" for "the most serious crimes of concern to the international community", by weaving a principle of complementarity through its constitutional framework, the drafters also did something else. They created a system of justice administered jointly by the ICC and states, with those national and international processes of accountability becoming inextricably linked. Over time, the Rome Statute has grown into something more akin to a human rights convention, whereby states are held accountable for the extent to which they take on their share of the task, and the extent to which those national processes adhere to the standards set in the Rome Statute. These standards are particularly significant in relation to accountability for sexual violence crimes given the unprecedented attention for gender justice infused within the Statute. The Rome Statute is increasingly becoming *the* normative framework we use to speak about sexual violence and through which we conceptualise the judicial response to sexual violence in conflict, whether at a national or international level. Yet, as someone remarked in the context of my consultancy with FIDH, criminal justice is just a sliver of a broader circle of truth, justice, and reconciliation, and the ICC just a sliver of that sliver. With the significant and increasing budget constraints on the ICC, and a mandate focused primarily on those most responsible for crimes, such as individuals in the higher echelons of militia groups, state armed forces, or other institutional structures, the ICC cannot be the only avenue of accountability. The future of international criminal justice is decidedly national.[905]

In other words, an important question remains how to ensure that the continued development of international criminal justice at a national level is as sensitive to gender justice considerations as the Rome Statute within this framework of complementarity. In connecting complementarity to the Rome Statute's gender justice principles, this thesis thus

[905] Stone has argued similarly: "Despite the long-standing failings of the domestic courts in many countries, despite the cynicism they engender, despite their bias and corruption, domestic courts are where justice will need to be done, under the eye of the ICC." Stone (2015), at 288.

examined the ways in which the Rome Statute's norms (or standards) around accountability for sexual violence have been domesticated in two specific national settings, and what these processes of internalisation and domestication reveal about (positive) complementarity as a tool in the fight against impunity for these crimes.

The two case studies in this thesis illustrate that the ICC and its Rome Statute are expanding in all kinds of different ways we would not have expected when the Court was first created. Ratification of the Rome Statute and engagement with the ICC and its normative framework has given rise to harmonisation of national criminal law frameworks, the creation of special mechanisms of justice modelled on the Rome Statute, the adoption of prioritisation and selection policies mirroring the ICC's own practices, and direct reliance on the Rome Statute before national courts. Yet, many of these normative domestication processes have little to do with the ICC itself: such normative engagement with Rome Statute standards around accountability for sexual violence, oftentimes, is championed by actors formally external to the complementarity system. This has implications for our understanding of positive complementarity and what kinds of effects we should or should not expect it to trigger at a national level. This thesis thus aims to illuminate both the prospects and the limitations of (positive) complementarity in the fight against impunity for sexual violence crimes.

This last chapter sets out comparative conclusions drawn from the two case studies, and addresses lessons to be learned from this analysis for (positive) complementarity, and its connection to broader norm diffusion theories. While some lessons learned are specific to issues of sexual and gender-based violence, many can be applied more broadly and as such, it is hoped that these conclusions will invite self-reflection among the different actors involved in complementarity work, whether or not they work on issues of gender justice or sexual violence. The next three sections draw conclusions in relation to the following three key themes, respectively: (i) gender justice limitations and silences within the complementarity framework; (ii) positive complementarity and its intersection with norm internalisation processes; and (iii) key actors and agents of change. The final section of this chapter discusses what these conclusions reveal about the potential of (positive) complementarity as a tool in the fight against impunity for sexual violence crimes and introduces some policy recommendations flowing from these conclusions.

SECTION 6.1

GENDER JUSTICE LIMITATIONS AND SILENCES WITHIN COMPLEMENTARITY

While the Rome Statute contains no specific obligation on states to domesticate its provisions, increasingly, demands are being made on states to do so, particularly in relation to sexual violence crimes. Indeed, as discussed earlier, several authors have advanced the idea that the ICC's admissibility provisions can catalyse certain developments at a national level, such as an increase in investigations or prosecutions, or the domestication of the Rome Statute's provisions. This would either be out of a desire to avoid the ICC's interference (and a negative determination on the willingness or ability of a state), or because of a more general commitment to international justice that is demonstrated by domestically implementing the ICC's Statute. Indeed, as this thesis' case studies in Colombia and the DRC have illustrated, ratification of the Rome Statute was followed in both by the domestic implementation of (aspects of) the Rome Statute despite the absence of a particular legal obligation to do so. However, this thesis has also argued that relying solely on this admissibility or threat mechanism to trigger domestic accountability is insufficient because of the absence of any formal link between the Rome Statute's gender justice provisions and the admissibility or complementarity framework. Although the admissibility test does not contain particular rules or provisions that *explicitly* exclude gender justice concerns, the problem lies in the *silences* created through the judicial interpretation of the different components of this test.

The third chapter of this thesis, examining the ICC's models of complementarity, thus argued there is a degree of disconnect between the admissibility test (i.e. the 'legal' life of complementarity) and the Rome Statute's gender justice provisions, which risks overlooking or eliminating concerns around sexual violence crimes in the ICC's complementarity assessment. Obstacles specifically affecting accountability for sexual violence crimes (for instance restrictive legal definitions, or obstructive evidentiary requirements) may too easily be overlooked within the tests of action, sameness, genuineness of ability or willingness, and gravity as interpreted by the ICC's judges, and thus applied by the ICC's Office of the Prosecutor, to rule cases inadmissible before the Court. This interpretation of article 17 tells states how they can show action, and genuine willingness and ability to investigate and prosecute Rome Statute crimes domestically, and thus pre-empt the ICC from exercising its

jurisdiction. That gender justice considerations do not form part of the official legal rules around complementarity means they are both seen as less important (and thereby reinforce misconceptions around the gravity of SGBV) and are subjected only to the less-settled, informal mechanism of positive complementarity, i.e. the process through which the ICC, directly or indirectly, encourages, facilitates or assists national accountability for Rome Statute crimes.

Chapters 4 and 5 thus examined accountability measures for sexual violence crimes at a national level within this system of complementarity. Of the various issues identified, those that can be described as focusing on complementarity on a procedural level are particularly interesting and important to enable accountability for sexual violence crimes taking root. The incorporation of Rome Statute definitions of sexual violence crimes either through the adoption of new legal frameworks or the amendment of existing legal definitions is important because it represents a first step towards bringing often restrictive national legal frameworks and criminal justice practices in line with progressive international standards, thus increasing their capture capacity. For instance, before the entry into force of the Rome Statute, the crime of rape in the DRC was exclusively defined as a crime committed by a male perpetrator against a female victim. Incorporating the Rome Statute's gender-neutral definition in the 2006 Sexual Violence Legislation allowed legislators to expand the capture capacity of Congolese criminal law to become more inclusive: it allowed courts to address rape regardless of the gender of the victim or perpetrator. Nonetheless, what mattered most for tying such definitional changes to an accountability effect before the courts was the incorporation of procedural and evidentiary improvements into the practice of the trials. Having an adequate legal framework is important, but only represents a first step. The creative integration of protective measures in mobile courts in remote locations in the DRC, adapting international legal standards to the domestic legal context, was critical for increasing accountability for sexual violence crimes in practice.

Nonetheless, such procedural developments would have been deemed negligible in the ICC's admissibility (or legal complementarity) determinations. Indeed, how the Rome Statute is used or implemented at a national level, as valuable as this has proven to be in both Colombia and the DRC in advancing accountability for sexual violence, is irrelevant within a strict reading of admissibility. As we have seen in chapter 3, the requirements to satisfy an assessment of unwillingness or inability cannot take into account general difficulties in a legal system and is generally focused on factors that *deliberately* inhibit accountability or

shield an accused from justice. This interpretation by the ICC leaves less obvious or subtle difficulties specifically affecting sexual and gender-based violence, such as the continued deprioritisation of these crimes during investigations or the allocation of insufficient resources for training, outside the scope of assessment. Indeed, attempts by women's rights groups during the negotiations of the Rome Statute to specifically recognise situations "where procedural or evidentiary requirements particular to sexual violence preclude or unreasonably obstruct a proper conviction"[906] as relevant factors for admissibility were ultimately unsuccessful. Similarly, states are not required to classify crimes as international crimes before domestic courts to successfully challenge the admissibility of a case before the ICC. Since legal frameworks in many countries often inadequately recognise and capture sexual violence, if at all, this essentially tells states such restrictive frameworks do not matter and thus creates little incentive for them to change such frameworks in their efforts to avoid negative determinations on complementarity. While this does not explicitly exclude gender justice concerns, such silences or pressure points render sexual and gender-based violence vulnerable to exclusion or continued deprioritisation at a national level in situations where states look to the ICC for guidance on what to focus domestic investigations and prosecutions on. This perpetuates impunity for these crimes and restricts the ICC's ability to correct gender justice limitations at a national level through its admissibility assessment.

The practical limitations of this disconnect have come to the fore particularly clearly in the context of the Colombian preliminary examination. When deciding whether to open investigations, the ICC must assess whether investigations or prosecutions are taking place at a national level for the same *types* of cases that would *most likely* be the subject of any potential ICC investigation; only the absence of genuine national investigations or prosecutions for such cases would justify an ICC investigation. Although the current Prosecutor has made it clear that sexual violence is a particular priority area, her Office appears hesitant to open an investigation solely on the basis of limited progress for sexual violence crimes at a national level. While the Office of the Prosecutor has repeatedly expressed general concern around the lack of progress in addressing sexual and gender-based violence through the national courts in Colombia, this has not resulted in a negative complementarity assessment. In other words, even a situation of ongoing impunity for high-level perpetrators of sexual violence crimes before the national courts for more than 12 years has not led to the opening of an ICC investigation. This suggests that although impunity for

[906] *Gender Justice and the ICC* (1998).

sexual violence crimes is a relevant factor to assist the Office's determinations on admissibility, gender justice concerns are not sufficient in isolation to trigger the ICC's jurisdiction.

At the same time, it is worth highlighting that the result of an admissibility assessment taking into consideration such gender justice concerns, specifically the opening of an ICC investigation, would be insufficient to reverse impunity for sexual violence crimes. As we have seen in the DRC, with no convictions at the ICC to date for sexual violence in this situation, an ICC investigation does not necessarily guarantee justice for victims of sexual violence. Despite having the most advanced legal framework recognising the broadest range of sexual and gender-based violence in international criminal law to date, the ICC has struggled as much as many national systems to provide accountability for this particular category of crimes. While a number of important strategy and policy changes have recently been implemented signalling a change in this respect at the ICC, an ICC investigation is not necessarily an infallible solution to difficulties around accountability for sexual violence crimes at a national level. If anything, it could risk the centralisation of justice for sexual violence crimes at the international level, thus reinforcing an absence of capacity to adjudicate these crimes at a national level, and removing opportunities for victims to see justice done in their own courts by their own judges. Nonetheless, to say it is insufficient to open an ICC investigation does not mean it is not necessary; within the framework of complementarity, international and national accountability mechanisms must operate in unison. Concerted efforts at *both* a national and an international level remain necessary to address accountability for sexual violence crimes. This thesis thus focused on examining complementarity in its broader, 'positive', guise, whereby the complementarity system aims to increase accountability for Rome Statute crimes at the national level.

The gender justice gaps in the formal rules around admissibility matter not only because they restrict the ICC's ability to step in and 'correct' impunity at a national level by assuming responsibility for sexual violence investigations. They matter because they can unintentionally be reproduced in the specific activities undertaken by the Office of the Prosecutor (or others) within its positive approach to complementarity pursuant to which it seeks to encourage national proceedings for Rome Statute crimes. For instance, as described in chapter 4, the Office of the Prosecutor has inserted itself many times into the ongoing discussions in Colombia around the creation and development of its national transitional justice framework. When the Colombian Congress was discussing amendments to the Justice

and Peace Law framework, which included possibilities of suspended sentences, the Prosecutor engaged with the Constitutional Court on the importance of sentences within the Rome Statute, reiterating that the complete suspension of sentences would be contrary to Colombia's obligations under complementarity. Two years later, Deputy Prosecutor James Stewart addressed the matter in more detail during a speech in Colombia in the context of the ongoing peace negotiations with the FARC-EP. Similarly, when Colombia adopted a policy of prioritisation focusing on those most responsible for the most serious crimes in an effort to streamline and focus its investigations and prosecutions within JPL, the Prosecutor again interjected reiterating the state's obligation to prosecute *all* crimes, not just those which the ICC focuses on for mandate and policy reasons. Finally, most recently, the Prosecutor wrote an op-ed in the Colombian newspaper *SEMANA* to express her concern about Colombia's conceptualisation of the theory of command responsibility within the peace agreement with the FARC-EP. These instances of interaction between the ICC and national authorities on the substance and procedures of national accountability processes, as well as those described in more detail in chapter 4, exemplify the Office of the Prosecutor's approach to positive complementarity in Colombia. By issuing statements and directly engaging with Colombia on particular aspects of the peace agreements and transitional justice framework, the Office hopes to influence those proceedings and steer them towards what it views as "compliance" with complementarity requirements within the Rome Statute system of justice, and therefore pre-empt the necessity of an ICC investigation. Yet, while the Office of the Prosecutor has made targeted statements on issues such as sentences and command responsibility, it has not done so to express concern around particular issues that may negatively affect accountability for sexual violence, such as restrictive evidentiary regulations requiring corroboration, limited legal definitions of crimes, or simply the absence of cases against higher-level perpetrators. It has restricted itself to making general public statements in its yearly report on preliminary examination activities, rather than issuing separate targeted statements addressing sexual violence accountability in particular. This is surprising, especially because of the high impunity rate for sexual violence in Colombia. It seems the gender justice silences encapsulated in the admissibility test reverberate through the Office's engagement with Colombia within its approach to positive complementarity.

The admissibility assessment is perhaps less directly relevant in situations where the ICC has opened an investigation, such as in the DRC, because in such instances, the ICC has already determined that the situation and cases arising from the investigation are admissible

before the Court. In other words, the 'threat' of a negative determination by the ICC is no longer present. Nonetheless, positive complementarity remains relevant particularly in a situation where the country concerned, like the DRC, over time appears to become able and willing to carry out proceedings for Rome Statute crimes, thus seeking a reversal of the initial complementarity determination. In such a situation, for instance, national courts may seek to complement the ICC's proceedings in a collaborative effort, by focusing on lower level perpetrators and leaving the more complicated cases to the ICC. Given the degree of mimicking identified in this thesis in both the DRC and in Colombia, how the ICC interprets its mandate remains highly relevant and important from a complementarity perspective even once an investigation has been opened.

Ultimately, the comparison between the situations in Colombia and the DRC illustrates that despite their different level of engagement with the ICC, complementarity has remained an important element underpinning domestic accountability efforts regardless of the procedural stage of engagement. Importantly, while an investigation was opened in the DRC, this has not stopped national developments around accountability for sexual violence. In other words, even in a situation where the country is no longer under 'ICC investigation threat', this does not necessarily stop all progress at a national level. This suggests that arguments that the Colombian preliminary examination is best left ongoing rather than progress to the investigation stage in order to facilitate the continued development of national accountability efforts for Rome Statute crimes may not be as compelling as initially thought. This is not to say that there is no strength in the 'shadow of the ICC' in Colombia, which remains present especially on a political level, but suggests ways may still be found to ensure progressive development at a national level in relation to accountability for sexual violence crimes in the absence of an 'ICC investigation threat'.

Given these gender justice admissibility limitations, I respectfully disagree with Hunter's claim that positive complementarity "should be aligned to its judicial counterpart" of admissibility.[907] Doing so would risk a perpetuation of the gender imbalances and silences inherent in the admissibility test identified in chapter 3 of this thesis, and would therefore contribute little to addressing ongoing impunity for these crimes. In fact, I would argue that positive complementarity's strength in relation to sexual violence crimes is greatest when it is detached from admissibility because it can then tap into broader processes of norm

[907] Hunter (2014), at 236.

internalisation. While these broader processes of internalisation might not fall strictly within the traditional understanding of (positive) complementarity, they are critical for achieving the goal of positive complementarity, i.e. an increase in accountability, in particular for sexual and gender-based violence, at a national level. This thesis thus argues in favour of disconnecting positive complementarity from its legal conception, and infusing within it a focus on the diffusion and internalisation of Rome Statute accountability norms and standards.

SECTION 6.2

POSITIVE COMPLEMENTARITY AND NORM INTERNALISATION

As we have seen in both Colombia and the DRC, regardless of the procedural stage of engagement with the ICC, engagement with complementarity at a national level has triggered a norm diffusion process through which Rome Statute standards around accountability for sexual violence crimes have become internalised into the domestic legal framework. These norm internalisation processes have been particularly important in generating greater attention for crimes of sexual violence, a first critical step towards increasing accountability for these crimes. This thesis has used transnational legal process theory as a mechanism to understand and contextualise these processes. As discussed, in the mid 1990s, Harold Koh identified what he called a distinct transnational (interactive) legal process through which norm interpretative interactions between states and non-state actors at an international and national level facilitated the internalisation of international human rights norms at a national level. This thesis has illustrated that a similar interactive internalisation process can be identified within the Rome Statute system of justice. This process contributes to the internalisation of Rome Statute norms of accountability for sexual violence crimes through a series of repeated norm interpretative interactions. While the social, legal, and political contexts, and the idiosyncrasies of the conflicts in Colombia and the DRC are very different, as is their level of engagement with the ICC, it is interesting to see a number of very similar processes taking place.

As chapters 4 and 5 have illustrated, the Rome Statute's norms around accountability for sexual violence crimes were domesticated in both Colombia and the DRC by bringing national criminal law frameworks in line with those international standards. Such harmonisation took place through the adoption or amendment of laws, the integration of international norms in domestic criminal trials through judicial interpretation, or the creation of new justice mechanisms or prosecutorial policies to structure domestic accountability. Sometimes the provisions of the Rome Statute were directly transplanted into the national legal framework, for instance when copy-pasting its provisions into a national criminal procedure law; other times, the integration was more indirect, for instance, when the Rome Statute's provisions were used as inspiration by mobile court judges regarding protective

measures for victims of sexual violence. Interestingly, such harmonisation processes not only refer to and rely upon the Rome Statute, but equally upon its subsidiary documents, including the Rules of Procedure and Evidence, which, as an internal working document of the ICC, was never intended to have any broader impact. Finally, in both Colombia and the DRC there has been a high degree of mimicking or mirroring the ICC's practices. Notably, in restructuring its transitional justice framework, the *Fiscalía* adopted a prioritisation strategy that focuses on "those most responsible" for "the most serious crimes of international concern" – language that is identical to the ICC Office of the Prosecutor's selection and prioritisation protocols. Similarly, in the DRC, the proposals to establish a special court or specialised chambers were directly modelled on the ICC, thus attempting to establish 'mini-ICCs' at a national level. This strengthens arguments around the exemplary (or norm-expressive) function of the ICC in setting a normative framework for the investigation and prosecution of Rome Statute crimes, and underscores the importance of ensuring the quality of those standards within its own practices. Where states look to the ICC for guidance, either directly or indirectly, how the ICC interprets its mandate, what crimes it focuses on, and how it conducts its investigations and prosecutions is highly relevant.[908]

What lies at the heart of such harmonisation and transplantation is a dialogic process in which various actors at both a national and international level interact on the interpretation of accountability norms. The integration in the DRC of protective measures by allowing women to wear wigs or sunglasses and to testify remotely using a microphone happened because a conversation was held among the actors involved in the trials. Lawyers appearing on behalf of victims, who were trained and supported by (international) civil society organisations on international standards around accountability for sexual violence crimes, litigated within the context of ongoing trials to have such international standards explicitly recognised in the jurisprudence of the mobile courts. While this may not immediately have been fully effective at protecting victims and witnesses, transnational legal process theory suggests that over time, these standards can become habitualised practice through such repeated interactions and adaptations, and thereby increase accountability for sexual violence. Indeed, we saw that the reliance by mobile courts on the Rome Statute contributed to subsequent legislative amendments. Similarly, civil society organisations, through their

[908] On the expressive function of the ICC's selection policies, see, *e.g.*: Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', 30 *Ethics & International Affairs* (2016); Margaret M. DeGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Michigan Journal of International Law* (2012).

participation in a monitoring mechanism set up by the Colombian Constitutional Court to monitor compliance by the *Fiscalía* with its rulings, interacted on the interpretation of norms with judicial and prosecutorial actors, which subsequently resulted in revised investigation protocols and prioritisation policies. It is often through the work of these civil society organisations that domestic legal actors become exposed to and sensitised in the use and application of international legal norms and standards.

What is particularly interesting about these processes is the interaction between and across the different harmonisation efforts undertaken before various norm interpretative fora. For instance, when military courts started using the Rome Statute to bypass restrictive Congolese legal frameworks in trials dealing with sexual violence as war crimes and crimes against humanity, this was subsequently consolidated into national law through the adoption of the Sexual Violence Legislation in 2006. One type of internalisation gave rise to another, which strengthens the overall internalisation process: if a court subsequently does not use the Rome Statute's gender-neutral definition of rape, this would not only be in contravention of their own (*ad hoc*) practice, but equally of domestic legal obligations. Similarly, following repeated assertions by both the Colombian Constitutional Court and the ICC about the inadequacy of justice measures at a national level in Colombia in dealing with sexual violence crimes (whereby the two courts used each other's findings to reiterate the same message), the *Fiscalía* internalised international standards through an interactive process with civil society. The result was the adoption of an extensive investigations protocol integrating a number of the lessons learned and hard-fought-for international legal standards into the domestic framework, as well as a prioritisation policy focusing on those most responsible for the most serious crimes, inclusive of sexual violence. Again, while the mere adoption of such amendments, frameworks, and policies does not by itself produce a change in the experience of accountability of victims, they signal a first awakening of the need to challenge restrictive legal processes from a gender justice perspective.

The analysis conducted here also underscores the importance of interactions, dialogue and contestations of norms specifically *at a national level* (as opposed to only on an international or transnational level). The processes of interaction are much more horizontal than we may think, although they are linked to the international level through the centrality of the Rome Statute in these interactions. The ICC, while essential in providing the relevant normative framework within which many of these interactions take place, is only one actor in a much larger process. In fact, a cross-institutional dialogue between women's groups, the

Fiscalía, and the Colombian Constitutional Court, fortified by statements and ongoing monitoring by the ICC, proved necessary to integrate greater awareness of the existing and ongoing constraints within the Colombian legal system around accountability for sexual violence. Similarly, in the DRC, the repeated interactions triggered by civil society organisations before the mobile courts and in parliamentary law reform discussions were crucial in moving the conversation on accountability for sexual violence forward. Such processes of internalisation may also contribute to a greater degree of acceptance of international criminal justice at a national level.[909]

Although it has been ascribed different definitions, the principle of positive complementarity is often conceptualised as a logical extension of complementarity's legal life, particularly for the ICC, whereby the ICC, either directly or indirectly, encourages national authorities to conduct proceedings for Rome Statute crimes in order to pre-empt the need for the ICC to intervene. This close link to admissibility is understandable given the ICC's limited mandate as a criminal court, and the increasing push by the Assembly of States Parties to eliminate from the ICC's budget any activities that could be construed as moving beyond those strict legal limits. In other words, what is focused on through a legal or strict reading of (positive) complementarity is an increase in prosecutions at a national level. While this is understandable given the ICC's limited mandate, it means that the perception or measurement of 'success' is equally limited. As the case studies in this thesis have illustrated, a much broader process of internalisation underpins the operation of positive complementarity both during preliminary examinations and investigations. This norm-interpretative interactive process contributes to the re-interpretation of norms around how to conduct investigations or trials of sexual violence, and to the reform of restrictive legal or procedural frameworks at a national level that inhibit accountability for these crimes. Yet, many of these developments – such as the incorporation of Rome Statute definitions of sexual violence crimes, or its standards on the protection of witnesses during investigations and trials – are irrelevant from a strict complementarity perspective. In other words, what we see as the successful implementation of positive complementarity when we measure positive complementarity by tying it to its legal 'life' is limited.

[909] On the acceptance of international criminal justice see, *e.g.*: Susanne Buckley-Zistel, Friederike Mieth, and Marjana Papa (Eds.), *After Nuremberg: Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* (Nuremberg: International Nuremberg Principles Academy, 2016).

What the case studies in this thesis ultimately demonstrate is that if we take a broader approach to the conceptualisation of positive complementarity, what we see as a success becomes more tangible. This thesis argues that transnational legal process theory is particularly helpful in this respect because of its threefold emphasis on legal, political, and social internalisation. This framework is particularly useful in considering the reality and potential of positive complementarity in the fight against impunity for sexual violence precisely because it points to three categories that are key to ensure adequate investigations and prosecutions of sexual violence crimes. You need the right laws and legal procedures (*legal* internalisation), the right policies and prioritisation strategies (*political* internalisation), and the acceptance of these crimes as serious crimes (*social* internalisation) to create a space in which accountability for sexual violence is not just demanded by the international community, but is called for from within a national (legal) system. The latter aspect of social internalisation is particularly important when it comes to crimes of sexual violence because of the challenges described in the first and second chapter of this thesis around gendered assumptions and discriminatory attitudes and frameworks. Sexual violence crimes face unique social challenges – whether patriarchal attitudes among police officers or court personnel, or social dynamics of shame and stigmatisation – that must be challenged and reinterpreted for an increase in accountability to truly take root in a legal system for this category of crime. The adoption of legal and political frameworks, while an important step, is insufficient alone to achieve accountability for sexual violence crimes. Indeed, as chapters 4 and 5 illustrated, while there is increased attention for accountability for sexual violence in both Colombia and the DRC because of the legal internalisation of Rome Statute norms of accountability, reversing impunity for these crimes has remained challenging.

Strictly speaking, complementarity within the Rome Statute system only takes root upon the successful implementation of investigative and prosecutorial policies: i.e. when these result in an actual increase in accountability. Unlike other categories of crimes, however, where simply increasing available resources may trigger such a result, sexual violence crimes require an additional element of having to change restrictive social practices, for which internalisation is crucial. As Lisa Laplante has argued: "… simply conducting standard procedures like criminal trials or creating formal legal structures like new penal codes does not automatically create the cultural buy-in that internalises these values".[910] Indeed, increasing the number of trials for sexual violence crimes as such does little to realise

[910] Laplante (2010), at 678.

meaningful accountability. This is not to say that those aspects of legal internalisation are not important. Indeed, in both Colombia and the DRC, the legal internalisation process contributed to opening up a space at a national level for talking about sexual violence that did not exist before. Opening up such spaces is hugely important, but our understanding of positive complementarity should not stop there if the aim is to increase accountability for sexual and gender-based violence at a national level.

Norm internalisation is a mechanism through which pressure points affecting accountability for sexual and gender-based violence at a national level can be challenged. Notably, the instances of harmonisation of criminal laws, the adoption of prosecutorial policies, or the instrumentalisation of the Rome Statute in domestic sexual violence trials in both Colombia and the DRC, each speak to the relevance of creating a degree of social acceptance of the need to reform restrictive gender justice standards. Most importantly, as we have seen, the Rome Statute has been instrumentalised on a normative level in both Colombia and the DRC to reform restrictive practices and frameworks around accountability for sexual violence crimes, with the ICC thereby assuming merely a secondary, *indirect*, role within positive complementarity efforts as a norm-expressing entity. While it can be disputed whether these broader norm diffusion processes should still be called positive complementarity *proper*, or whether another term might be more appropriate, this thesis argues that norm diffusion forms a critical part of the relationship between the ICC and national accountability, and can contribute to the success of positive complementarity efforts. For this reason, I argue that these broader norm internalisation processes must be conceptualised as an integral part of positive complementarity: without challenging restrictive norms negatively affecting accountability for sexual and gender-based violence (e.g. around prioritisation), the more concrete part that matters for legal complementarity, i.e. successful prosecutions, is unlikely to materialise. Rather than concluding that the idea of positive complementarity has failed altogether, however, this thesis argues for a reconceptualization by integrating these broader processes of norm internalisation within our understanding of the successful implementation of positive complementarity.

SECTION 6.3

KEY ACTORS AND AGENTS OF CHANGE

By relying on transnational legal process theory, in addition to approaching positive complementarity from a more expansive perspective, this thesis essentially calls for a realignment of expectations about who is going to provide what, in what form, and how within this broader positive complementarity framework. As we have seen in both Colombia and the DRC, the interactive process underpinning broader efforts of positive complementarity is decidedly non-ICC driven, even though the ICC essentially provides the normative framework that contextualises and underpins those interactions. However, national actors, rather than the ICC, triggered the majority of norm interpretive interactions that proved critical to facilitate and foster the internalisation of accountability for sexual violence crimes. While interactions triggered by the ICC and the Office of the Prosecutor are important, the case studies underscore that it must be viewed more broadly, with civil society organisations in particular playing a multitude of different roles in the norm diffusion processes that underpin (positive) complementarity around sexual violence. Nonetheless, both the Rome Statute and the ICC have been instrumentalised by these different actors, which means the Court retains a prominent (supportive) place in the harmonisation efforts even though perhaps not as a primary agent of change.

As we have seen, there are both theoretical and practical limitations to the ICC's ability to encourage, facilitate, and assist national accountability for Rome Statute crimes. The ASP consistently pushes back against any activities construed as positive complementarity as these fall outside the Court's mandate and would, in the ASP's view, unnecessarily drive up its resources. For the ASP, any capacity building activities fall squarely within the purview of other actors, not the ICC. This means that during preliminary examinations, for instance, the Office of the Prosecutor's ability to encourage, facilitate, or assist national accountability processes is limited to conducting meetings with state authorities and issuing statements encouraging national authorities to conduct proceedings in relation to specific crimes, or engaging in capacity building activities when funded by other actors. Furthermore, there are a number of very real concerns and an understandable degree of hesitation around sharing evidence within a burden-sharing approach to positive complementarity during investigations. While the DRC has requested access to the ICC's

database of evidence to assist its domestic investigation efforts, the Office of the Prosecutor has dismissed these requests for confidentiality and security concerns. The paradox is that the ICC does not necessarily have faith in domestic actors correctly using its evidence to strengthen domestic accountability efforts, but at the same time does not have the budget to train or mentor national prosecutors or investigators in order to open up such possibilities. This evidently means that for positive complementarity to successfully take root, the ICC's activities *must* be linked to broader capacity building, rule of law, and development activities from other actors. Furthermore, successful positive complementarity may also ultimately have important budgetary implications – when more national authorities are better able and willing to conduct the necessary investigations and prosecutions for Rome Statute crimes, this leaves more space in the ICC's budget for it to intervene in those situations where international intervention is critical.

In other words, positive complementarity conceptualised as a mechanism through which the ICC facilitates, encourages, or assists national accountability processes in an attempt to minimise the need for international intervention is difficult to realise given these theoretical and practical limitations. However, to dismiss the idea on this basis is premature. Instead, this thesis argues that where it taps into broader norm internalisation processes, positive complementarity can be very useful, and can have tangible accountability effects at a national level. That is not to say the ICC's role within norm internalisation processes is irrelevant: the existence of the ICC has brought with it a normative legal framework that has proven particularly important and useful for the encouragement of domestic accountability for sexual violence crimes in both countries. In other words, the ICC acts as a norm-expressing authority, and has great institutional relevance within this broader framework. The Rome Statute's normative influence is particularly strong where it is cultivated by actors external to the direct interactions between the ICC and the national authorities, such as civil society organisations and domestic political norm entrepreneurs. Although to varying degrees, each of the developments described in this thesis has benefited from repeated norm-interpretive interactions between civil society (in particular women's groups), national courts, legislators, international supporters, and, to a limited extent, the ICC.

This does not mean, however, that the ICC has little to add in relation to impunity for sexual violence crimes. In fact, I would argue that the institutional presence of the Court is significant. I believe that without the existence of the Court, it would have been much more difficult for domestic norm entrepreneurs to push for the integration of its normative

framework at a national level in both Colombia and the DRC. Many of the actors who have been instrumental agents of change in pushing for the reinterpretation of restrictive legal frameworks have instrumentalised both the ICC and its Rome Statute to pursue various goals. For example, as discussed in chapter 4, civil society organisations challenged the *Fiscalía*'s lack of attention for crimes of sexual violence using Colombia's commitment of ratifying the Rome Statute before both the Constitutional Court and the ICC. Similarly, as illustrated in chapter 5, in the DRC, civil society organisations have continuously used the DRC's status as an ICC State Party to push for the necessary law reforms and the adoption of Rome Statute Implementing Legislation. In other words, civil society organisations – in particular women's rights groups – called attention to matters affecting accountability of sexual violence and highlighted areas in need of reform; as norm entrepreneurs or agents of change,[911] they triggered the necessary interactions between judicial actors, law makers, and international and national prosecutors to eventually contribute to revised prosecutorial strategies, investigations protocols, or legislative frameworks. They did so by capitalising on the Rome Statute's accountability norms and the perceived obligations of States Parties within the broader Rome Statute justice system underpinned by complementarity.

In short, the ICC's greatest influence from a complementarity perspective stems not from its own direct interactions with national accountability processes, but can be found at a symbolic or normative level, tied to the existence of the ICC as an institution, and the institutional norms and standards embodied in the Rome Statute. Importantly, the key actors and agents of change who have contributed most strongly to an increase in accountability for sexual violence crimes in both Colombia and the DRC are formally external to complementarity: they are not the actors traditionally included in positive complementarity as a mechanism through which the ICC encourages, facilitates or assists national accountability for Rome Statute crimes. In other words, the ICC is being used on an *indirect* level, yet this was important in both DRC and Colombia to advance accountability for sexual and gender-based violence. To recognise this and integrate it within positive complementarity, we must exploit complementarity's 'double life' and the ICC's norm expressing function.

[911] Recall the definition by Finnemore and Sikkink: norm entrepreneurs or agents of change "call attention to issues or even 'create' issues by using language that names, interprets and dramatises them". Finnemore and Sikkink (1998), at 897.

SECTION 6.4

POSITIVE COMPLEMENTARITY & THE FIGHT AGAINST IMPUNITY FOR SEXUAL VIOLENCE

Positive complementarity has become somewhat of a buzzword in international criminal justice, yet the challenge is that 'real' complementarity is difficult to measure externally and empirically. As we have seen, admissibility and complementarity only speak to one component of a much broader process and this one component can be misleadingly optimistic as far as indicators of progress are concerned in relation to accountability for sexual and gender-based violence. As is, for instance, the case with an amendment of a law, which does not necessarily translate into an increase in accountability. This thesis thus argues for a shift in what complementarity is or should be doing; the ICC cannot do it all, so it is important to capitalise on the role it *can* play within the confines of its mandate. This includes making its case law more widely accessible through translation in more languages, and more transparency about its policy and strategic choices, which could assist national authorities seeking to either transplant or complement ICC jurisdiction in better articulating their own policies and frameworks. As we have seen, the ICC embodies a normative or exemplary function for national systems addressing international crimes. Such normative interactions using the Rome Statute's legal framework, international jurisprudence, or ICC policies have all been important constitutive elements of the domestication process in both Colombia and the DRC, and contributed to creating greater space for discussions on accountability for sexual violence crimes in both countries. They thus contribute to a re-interpretation of existing norms around accountability for sexual violence. Ultimately, this thesis argues that positive complementarity's strength in relation to sexual violence crimes stems from the fact that it can be (or is) delinked from admissibility because it can then tap into these broader processes of norm diffusion. Knowing that this specific transnational legal process underpins positive complementarity, civil society organisations – who, as we have seen, are key agents of change – can more effectively strategise and streamline their efforts, and the Office of the Prosecutor can in a more targeted way contribute to positive complementarity within the confines of its mandate.

Notably, while the ICC should not act as a rule of law or development organisation, as this would fall entirely outside its judicial mandate, there nonetheless remain ways in which

the Court can be involved in positive complementarity efforts without expanding either its mandate or its resources. Most importantly, this can and should be done during both preliminary examinations and investigations. As the case studies in Colombia and the DRC have shown, the ICC's practices and procedures are highly relevant for national accountability processes, regardless of the procedural stage of engagement. There is thus a lot to be gained from simply sharing best practices. Importantly, in order to increase accountability for sexual violence crimes, an open and honest conversation within the ICC about its own strengths and weaknesses, such as that published by the ICTY in late 2016,[912] could become a very valuable tool in efforts to reform restrictive practices at a national level. Further research into similar questions and processes in non-States Parties would be very valuable to consolidate these conclusions.

There are also more concrete ways in which the ICC can contribute to positive complementarity through the cooperation framework. For instance, several interviewees suggested that the option of using article 93(10) assistance is not very well known by many state authorities. The ICC's cooperation seminars that have been organised in the last couple of years are important moments to sensitise focal points about their state's cooperation obligations,[913] but should equally be used as moments in which to raise awareness about possibilities for assistance within the ICC's mandate. While the ICC will still need to assess each individual request for access to information or evidence on a case-by-case basis, creating awareness about the collaborative framework encapsulated in the Rome Statute and the procedures that are available to states may have positive effects at a national level. Similarly, a more detailed response to requests for assistance denying access to its evidence, in a public manner where possible, could also be used by other actors supporting accountability efforts at a national level to more efficiently target their capacity building activities and streamline these within the Rome Statute system of justice. This way, the Office of the Prosecutor's activities within the confines of its mandate can tap into broader processes of capacity building and can contribute on an indirect level to positive complementarity even once an investigation has already been opened. Notably, if the Office

[912] Michelle Jarvis and Serge Brammertz, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016).

[913] In July 2011, the first cooperation seminar with focal points of States where investigations have been opened or are taking place was organized at the seat of the Court. The second was organized in November 2014, and the third in November 2015. In addition, a number of regional high-level seminars on cooperation with a broader group of states have thus far been held in Argentina (May 2014), Ghana (July 2014), Romania (March 2016), Trinidad & Tobago (January 2017), and Seoul (April 2017).

of the Prosecutor more clearly indicates what the problems are around sharing evidence, this may help other actors to engage more strategically with domestic capacity building activities to reinforce the Rome Statute system of justice and accountability.

What this thesis also illustrates is that an almost exclusive focus on legal internalisation can be illusory – it looks as if necessary action is taken, but if it is never applied, it skews the test. For instance, in Colombia, the advanced legal framework, which has in some ways internalised the Rome Statute's gender justice sensitivities, has not contributed to a significant increase in accountability. While there have been a few important cases, generally, impunity rates for sexual violence crimes remain high. While it is important that some of the cases that are addressed by the courts are against those most responsible, it remains equally important not to side-line other cases against lower level and direct perpetrators, particularly for women's experience of justice and accountability. On the other hand, in the DRC, while the mobile courts have indeed made some progress towards addressing sexual violence crimes through direct reliance upon the Rome Statute, the cases have almost exclusively focused on lower level perpetrators, and any reparations ordered against perpetrators, even if ordered *in solidum* against the State, have never been paid. In other words, while on paper both the DRC and Colombia have adopted important frameworks and standards that seem to comply with their respective obligations under complementarity (which has led to some accountability action in the courts), this has not translated into an overall greater degree of accountability for sexual violence crimes.

The ICC is realistically only able to examine evidence of legal internalisation, because this is the evidence that is easily accessed through its limited mandate. Yet, assessing legal internalisation alone does not mean complementarity has taken root in any meaningful way. This is because there are unique pressure points affecting sexual violence: social internalisation matters more for this particular category of crime than any other. Indeed, as we have seen, real complementarity truly and successfully takes root where legal, political, *and social* internalisation processes merge. For instance, in Colombia, the acceptance of the need to pay particular attention to women's concerns and their participation, fuelled by active civil society mobilisation, led to the unprecedented move to create a Gender Sub-Committee during the peace negotiation with the FARC-EP. This, in turn, contributed to a certain degree of social internalisation of how to tackle accountability for sexual violence crimes in accordance with international standards. This is a first step towards changing restrictive practices.

On a practical level, what the analysis of the two cases ultimately illustrates is the need for ongoing engagement and interaction, even in the face of opposition: if you run up against a wall, going sideways will help. For instance, when the domestic political landscape in the DRC was not at all welcoming to incorporating the Rome Statute into domestic criminal legislation, aspects did enter the DRC legal system by other means, such as through the actions of judges and lawyers relying specifically on the Rome Statute's provisions. These smaller measures of internalisation planted the seeds for further internalisation on a legislative and political level. The reality is that interactions and dialogues can happen in different fora, involving a variety of actors, and are much broader than traditionally conceived within the Rome Statute (which primarily envisages a vertical relationship between the ICC and national courts). In other words, I encourage those working on (positive) complementarity to exploit complementarity's 'double life' by focusing their efforts on triggering interactions at various levels, involving a range of different actors, and by targeting the diffusion of international norms and standards.

Zooming out from the details of these processes, this thesis has illustrated that the norm internalisation processes underpinning positive complementarity both enables and constrains domestic accountability processes for sexual violence crimes. The normative value of the Rome Statute, when integrated into domestic law, expanded the capture capacity of both Congolese and Colombian criminal law. In fact, in both instances, the harmonisation processes, integrating almost *verbatim* the Rome Statute's list of sexual violence crimes and their definitions, gave rise to a broader amendment. The move, critically supported by international and national civil society organisations, both expanded the list of relevant sexual violence crimes covered by national criminal law, and applied advanced Rome Statute definitions to contexts outside of war crimes, crimes against humanity or genocide (although it has yet to actually be applied to any such instances). On an *ad hoc* basis, this also contributed positively to increased accountability and justice before the courts. Yet, the Rome Statute also appears to limit the space within which justice is negotiated at a national level to an almost exclusive focus on punitive justice, despite its inclusion of a reparative component at the international level (this also given the absence of any clarity on what shape or form the ICC's own reparative justice dimension will take). Further research should investigate whether and how these norm internalisation processes can positively influence the development of a broader conceptualisation of justice.

The move to bring the national legal framework in line with international criminal law standards has created a somewhat artificial distinction between sexual violence crimes as international crimes, committed in times of unrest or conflict and to which these new and improved standards apply, and 'normal' sexual violence committed in times of so-called 'peace'.[914] This risks downplaying 'ordinary' gendered and sexual harms. The advancements around protective measures, definitions of crimes, and generally the high attention being paid to sexual violence as a war crime and crime against humanity has not necessarily translated into the same kind of attention for sexual violence when it is *not* (necessarily) an international crime. Yet, the difficulties involved in investigating and prosecuting sexual violence crimes are not necessarily different whether it is an international crime or an ordinary crime. For instance, notions that sexual violence crimes are not as serious or worthy of attention as other types of violations remain pervasive and affect the investigation and prosecution of these crimes regardless of the context in which they are committed. Furthermore, while the majority of sexual violence crimes are committed in the context of the conflicts in both Colombia and DRC, at the same time, research has shown that this situation of pervasive sexual violence has resulted in a dramatic increase in these crimes committed by civilians, including intimate partner violence. Such 'ordinary' crimes are not addressed through the DRC military courts or the Colombian transitional justice system, which is where all resources have been focused. In addition, the sexual violence crimes committed during conflict are often enabled by structural inequalities and gendered dynamics that existed pre-conflict and continue post-conflict, thus equally structuring dimensions of post-conflict justice.

In that sense, my analysis of the domestication of international criminal law in Colombia and the DRC serves as a reminder that transitional justice processes do not happen in a vacuum. International criminal law cannot be applied in the abstract, particularly not at a national level. For such harmonisation and domestication processes at a national level to have transformative potential, particularly in relation to sexual violence accountability, attention must be paid to how these processes are integrated in broader frameworks or mechanisms of transitional justice, and how they relate to broader questions of structural inequalities that

[914] However, as mentioned earlier, this distinction between sexual violence in situations of war and other violence against civilians and sexual violence in situations of so-called peace is somewhat arbitrary. Several authors have argued that the acts are part of a continuum of violence in general, and sexual violence in particular, that is premised on existing gender relations and patterns of discrimination and inequality. See footnote 17, above.

enable environments in which sexual violence becomes accepted. The emphasis through the ICC and the Rome Statute in both Colombia and the DRC has been skewed towards criminal justice and legal internalisation. While this should be expected from complementarity, and indeed must be welcomed, it illustrates the limits of this approach. The kinds of internalisations of international standards in national court practices, legislation and political commitments described in this thesis are of course important, but they only represent first steps towards successfully navigating the complex terrain that is a post-conflict situation, and redressing the ongoing cycle of impunity for sexual violence.

Finally, I hope that this thesis invites self-reflection among those involved in some aspect of (positive) complementarity, whether specifically working on gender and sexual violence crimes or not. The ICC in The Hague is far removed from the places in which its justice processes should matter, and the internalisation processes analysed in this thesis may provide some ways of bringing the two closer together. There are many highly committed individuals working in the ICC, but as an institution, the ICC risks suffering from the Ivory Tower syndrome. Those working judiciously for the development of its case law are often unaware of the relevance of their work beyond their building in the dunes. I see one of the greatest values of the ICC not necessarily in the cases that it prosecutes, but rather through the expressive function of its proceedings and its normative framework; greater awareness among those working in The Hague of the relevance of the standards they set through their work is therefore necessary. I hope my thesis contributes in some small way to bursting this bubble.

APPENDICES

TIMELINE OF KEY DEVELOPMENTS COLOMBIA

10 December 1998	Colombia signs Rome Statute
27 December 2001	Adoption of Legislative Act 001 *por medio del cual se adiciona el artículo 93 de la Constitución*
5 June 2002	Colombia enacts Law 742 (allowing Rome Statute ratification through constitutional amendment)
12 June 2002	President Pastrana submits Law 742 for constitutional review
30 July 2002	Constitutional Court issues *Sentencia* 578/02, confirming constitutionality of Law 742
5 August 2002	Colombia deposits instrument of ratification of the Rome Statute
1 November 2002	ICC jurisdiction over crimes against humanity and genocide in Colombia
December 2002	Peace negotiations begin with AUC
23 December 2002	Law 782 enacted providing for official pardons for individuals who had been part of illegal armed groups but who were not involved in the commission of grave crimes
June 2003	ICC receives first article 15 communication in relation to Colombia
15 July 2003	Initial peace agreement between Colombian government and AUC regarding the cessation of hostilities, the AUC's demobilisation, and their reintegration into society ('Santa Fe de Ralito accord')
August 2003	Proposal for Alternative Penalties Bill
23 September 2003	Submissions by UN Office of the High Commissioner for Human Rights and civil society warning that the *Ley de Alternatividad Penal* violated the Rome Statute
16 March 2004	Statement by AUC representatives Salvatore Mancuso and Carlos Castaño that political assurances against the involvement of the ICC are critical for their participation in the peace negotiations
June 2004	OTP opens preliminary examination in Colombia
June 2004	Colombian government withdraws Alternative Penalties Bill
2 March 2005	First letter from ICC Prosecutor Ocampo to Colombia requesting information on alleged crimes, on any investigations and prosecutions

	carried out by the Colombian authorities, and reasserting the need for legal framework of peace to accord with principles of justice and complementarity
31 March 2005	ICC Prosecutor's letter of 2 March is made public in the media; Colombian government confirms cooperation
25 July 2005	Justice and Peace Law enters into force
18 May 2006	Constitutional Court issues Sentencia 370/06 amending JPL following constitutional challenge by civil society
24 July 2007	Senator Juan Fernando Cristo, together with the organisation *Víctimas Visibles*, organises first public hearing of victims before the Senate
18-20 October 2007	ICC Prosecutor Ocampo's first visit to Colombia
November 2007	Minister of Justice and the Deputy Foreign Minister presented a draft law to the Colombian Senate on the incorporation into Colombian law of the ICC's Elements of Crimes and Rules of Procedure and Evidence
December 2007	Acceptance of *Proyecto de Ley 157* on Victims during first reading
14 April 2008	Constitutional Court issues Auto 092/08 on women and forced displacement
May 2008	First extraditions of senior AUC members to US on drug trafficking charges; start of parapolítica scandal
June 2008	Letter from Prosecutor Ocampo to Colombia expressing concern about extraditions of AUC members and progress under complementarity
August 2008	Prosecutor Ocampo visits Colombia and follows up on June 2008 letter, reiterating principle (and requirements) of complementarity
December 2008	Adoption of Law 1268 *por medio de la cual se aprueban las 'reglas de procedimiento y prueba' y los 'elementos de los crímenes de la Corte Penal Internacional'*
19 August 2009	Supreme Court issues decision declining extradition to US for paramilitary leaders subject to ongoing JPL procedures
1 November 2009	ICC jurisdiction over war crimes in Colombia
10 November 2009	Constitutional Court issues Sentencia 801/09, confirming constitutionality of Law 1268
September 2010	President Santos submits *Proyecto de Ley* on Victims
December 2010	President Santos becomes first Head of State to address ICC ASP during opening plenary session

17 May 2011	Colombia enters into framework agreement with ICC on enforcement of sentences
24 May 2011	Adoption of *Ley 1448 de 2011 por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones*
10 June 2011	Promulgation of *Ley 1448 de 2011 por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones*
January 2012	Entry into force of *Ley 1448 de 2011 por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones*
March 2012	Consultations with Colombian civil society by Angela Robledo and Ivan Cepeda on Law on Sexual Violence
18 April 2012	Constitutional Court issues *Sentencia* 290/12 finding that aspects of the Rome Statute form part of the Colombia block of constitutionality
25 July 2012	Angela Robledo and Ivan Cepeda submit *Proyecto de Ley 037* on Sexual Violence to Congress
31 July 2012	Government enacts Legislative Act 01, also known as the *Marco Jurídico para la Paz* (Legal Framework for Peace), including prioritisation of those most responsible
4 September 2012	President Santos and FARC-EP formally announce start of peace negotiations
28 September 2012	President Santos notes during a press interview that peace negotiations with the FARC-EP take place "in the shadow of the ICC"
4 October 2012	*Fiscalía* announces adoption of Directive 0001 (Prioritisation Policy), focusing on those most responsible and on sexual violence
14 November 2012	OTP publishes Interim Report on Colombia highlighting five priority areas, including sexual violence
19 November 2012	Initiation of peace negotiations with FARC-EP in Havana, Cuba
3 December 2012	Law 1592 amends JPL to allow prioritisation of those most responsible for the most serious crimes, and to harmonise the justice processes under JPL with the 2011 Law on Victims
18 December 2012	Constitutionality challenge to Law 1592 by Colombian Commission of Jurists on basis of incompatibility with Rome Statute system requirements
January 2013	Action plan for Justice and Peace Units within *Fiscalía*, prioritising sexual violence

15-19 April 2013	OTP mission to Colombia to follow-up on national proceedings in relation to its identified five focus areas, including sexual violence
25 July 2013	Public hearing on constitutionality challenge to Law 1592
26 July 2013	Prosecutor Bensouda sends a letter to the President of the Constitutional Court reiterating that the complete suspension of sentences within Law 1592 was not compatible with the Rome Statute
7 August 2013	Prosecutor Bensouda sends second letter to the President of the Constitutional Court clarifying that her Office's policy to focus on those most responsible for the most serious crimes was not to be construed as precedent in interpreting state obligations regarding the investigation and prosecution of international crimes
28 August 2013	Constitutional Court issues *Sentencia* C-579/13, confirming constitutionality of Legal Framework for Peace, and directing *Fiscalía* to prioritise sexual violence
23-25 October 2013	First Women's Peace Summit held in Bogotá (*Cumbre Nacional Mujeres y Paz en Colombia*)
25 November 2013	OTP issues Preliminary Examinations Report 2013
18 June 2014	Colombia adopts *Ley 1719 de 2014 por la cual se modifican algunos artículos de las leyes 599 de 200, 906 de 2004 y se adoptan medidas para garantizar el acceso a la justicia de las víctimas de violencia sexual, en especial la violencia sexual con ocasión del conflicto armado, y se dictan otras disposiciones* (Law on Sexual Violence)
September 2014	Gender sub-Commission established within peace negotiations with FARC-EP
20 November 2014	*Salvatore Mancuso Gomez* tribunal holds *bloque de constitucionalidad* allows for prosecution of sexual violence as international crimes despite absence of criminalisation in national law at the time of commission
2 December 2014	OTP issues Preliminary Examinations Report 2014
27 January 2015	Constitutional Court issues Auto 009/2015 on sexual violence
1-13 February 2015	OTP mission to Colombia, where it expresses concern over a lack of institutional coordination concerning sexual violence
27 February 2015	Announcement of inter-institutional coordination agreement on sexual violence
April 2015	European Center for Constitutional and Human Rights (ECCHR), CCAJAR, and Sisma Mujer submit an article 15 communication to the OTP on justice for sexual violence

13 May 2015	Deputy Prosecutor James Stewart in a speech in Colombia reiterated the OTP's views on the non-compatibility of suspension of sentences with Colombia's obligations in the Rome Statute
June 2015	Sisma Mujer drafts first version of sexual violence investigations protocol
23 September 2015	Framework agreement between FARC-EP and government of Colombia on Special Jurisdiction for Peace, according criminal and punitive justice central place in peace process, excluding sexual violence from amnesties, and reiterating compliance with Rome Statute
12 November 2015	OTP issues Preliminary Examinations Report 2015
24 November 2015	Sisma Mujer, together with the other organisations representing the *Mesa de Seguimiento*, submit an additional report to the OTP highlighting the continuing extremely high levels of impunity for sexual violence in the country
15 December 2015	Draft agreement on victims as part of peace negotiations made public
19 January 2016	*Procurador General de la Nación* (Inspector General) Alejandro Ordoñez sends a letter to the ICC Prosecutor indicating that Special Jurisdiction for Peace agreement constitutes an "impunity pact" and violates the norms of the Rome Statute
30 March 2016	Initiation of peace negotiations with ELN
14 June 2016	*Fiscalía* adopts sexual violence investigations protocol
19-21 September 2016	Second *Cumbre Nacional Mujeres y Paz en Colombia* held in Bogotá
26 September 2016	FARC-EP and Government of Colombia sign the peace agreement in Cartagena
2 October 2016	Colombians reject the peace deal in a referendum
14 November 2016	OTP issues Preliminary Examinations Report 2016
15 November 2016	Open letter by army representatives opposing integration of Rome Statute's theory of command responsibility in Peace Agreement
24 November 2016	Revised version of peace agreement signed in Bogotá
26 November 2016	FARC-EP statement clarifying its commitment to integrating Rome Statute Article 28 into the Peace Agreement's implementation
19 December 2016	*Proyecto de Acto Legislativo por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones* and *Proyecto de Acto Legislativo por medio del cual se crea un título de disposiciones transitorias de la Constitución aplicables a los agentes del Estado para la terminación*

	del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones introduced before Congress
30 December 2016	Amnesty Law adopted by the Colombian Congress
21 January 2017	Prosecutor Bensouda publishes Op-Ed in *Semana* newspaper addressing command responsibility within the Peace Agreement
4 April 2017	Adoption of *Acto Legislativo 01 de 2017 por medio de la cual se crean un título de disposiciones transitorias de la constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones,* which establishes the Integral System of Truth, Justice, Reparation, and Non-Repetition, including the Special Jurisdiction for Peace

TIMELINE OF KEY DEVELOPMENTS DRC

8 September 2000	DRC signs Rome Statute
March 2002	Sun City peace accord calls for establishment of ICC for DRC
11 April 2002	DRC ratifies Rome Statute
early October 2002	First draft law on Rome Statute Implementation introduced (exact date unknown)
late October 2002	Second draft law on Rome Statute Implementation introduced (exact date unknown)
18 November 2002	DRC legislature amends 1972 military penal code, granting military courts exclusive jurisdiction over international crimes
8 September 2003	Prosecutor Ocampo statement at ASP: "Our role could be facilitated by a referral or active support from the DRC."
25 September 2003	Prosecutor Ocampo sends letter to DRC inviting self-referral and proposing division of labour
3 March 2004	President Kabila refers situation in DRC to the ICC
23 June 2004	OTP announces opening of investigations in DRC
6 October 2004	DRC signs cooperation agreement with OTP
March 2005	Coordination meeting on Sexual Violence Legislation organised by Global Rights, in which more than a dozen national and international NGOs and UN representatives gathered
June 2005	Judges, academics, and representatives from civil society and public institutions adopt declaration recommending the creation of Special Chambers to deal with international crimes
5 October 2005	First proposed law on implementation of the Rome Statute submitted to the National Assembly, which did not discuss the matter, and the proposal lapsed
October 2005	DRC National Assembly considers two proposals for Sexual Violence Legislation
18 February 2006	DRC Constitution enters into force
2-4 April 2006	Prosecutor Ocampo and Deputy Prosecutor Bensouda visit Kinshasa
12 April 2006	Songo Mboyo case, *Tribunal Militaire de Garnison de Mbandaka*, first instance judgment, first case to directly apply the Rome Statute and hold that sexual violence constitutes a crime against humanity
7 June 2006	Songo Mboyo case, *Cour Militaire de L'Equateur*, appeals judgment

20 June 2006	Mutins de Mbandaka case, *Tribunal Militaire de Garnison de Mbandaka*, first instance judgment
20 July 2006	DRC adopts Sexual Violence Law
26-30 July 2006	First ICC mission (Registry and OTP) to DRC "to evaluate the possibilities for future cooperation"
22 January 2007	AGM, through the Procureur-General of the DRC, sends an official request for article 93(10) assistance to the OTP in relation to Germain Katanga
14 February 2007	OTP denies DRC request for assistance for reasons of security, confidentiality and witness protection concerns
March 2008	New proposed law on implementation of Rome Statute submitted to the National Assembly, introduced by Honourable Mutumbe and Honourable Nyabirungu
December 2009	ICC President visits DRC
27 April 2010	SRSG Margot Wallström terms DRC the "rape capital of the world"
30 September 2010	Introduction of draft bill on Specialised Mixed Court
1 October 2010	UN Office of the High Commissioner for Human Rights published a report mapping the most serious violations of human rights and international humanitarian law committed in the DRC between March 1993 and June 2003
3-4 November 2010	Presentation of Rome Statute implementation bill before National Assembly, which is declared admissible and sent to the Political, Administrative and Judicial Committee
Late November 2010	First multi-sector consultation conference on draft bill on Specialised Mixed Court, organised by Ministry of Justice
22 December 2010	Letter to the Minister of Justice and Human Rights, His Excellency Luzolo Bambi Lessa, on the draft legislation to establish specialized mixed chambers, signed by 37 civil society organisations
January 2011	Consultations with civil society on Special Mixed Court legislation
25 February 2011	Council of Ministers adopts draft bill on Specialised Mixed Court, which is sent to *Commission permanente de réforme du droit congolais*
March 2011	Second multi-sector wide consultation on draft bill on Specialised Mixed Court held in Goma
8 April 2011	Common Position Resulting from the Workshop held in Goma submitted to CPRDC on Establishment of a Specialised Mixed Court for the Prosecution of Serious International Crimes in the Democratic Republic of Congo

13 June 2011	Presentation of draft bill on Specialised Mixed Court by Minister of Justice, concerns around lack of clarity on relationship with draft bill on Rome Statute Implementing Legislation
2 August 2011	Second presentation of draft bill on Specialised Mixed Court during extraordinary session (without consideration of Rome Statute Implementing Legislation)
22 August 2011	Dismissal of draft bill on Specialised Mixed Court, and recommendation to harmonise with draft Rome Statute Implementing Legislation
11 April 2013	*Loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire*
April 2014	*Projet de loi modifiant et completant la loi organique n° 13/011-B du 11 avril 2013 portant organisation, fonctionnement et competences des juridictions de l'ordre judiciaire en matiere de repression des crimes de genocide, des crimes contre l'humanite et des crimes de guerre* (Proposal to establish Specialised Mixed Chambers)
8 May 2014	Parliament rejects draft bill for establishment of Specialised Mixed Chambers
June 2014	Parliament rejects draft bill on Rome Statute Implementation
July 2014	Appointment of Presidential Adviser on Sexual Violence and Child Recruitment
10 November 2014	First Congolese general convicted of rape (General Kakwavu)
December 2014	Colonel 106 convicted of rape as both commander and direct perpetrator
2 May 2015	DRC holds *États généraux de la justice* endorsing the fight against "all forms" of impunity
2 June 2015	National Assembly votes for adoption of Rome Statute Implementing Legislation
2 November 2015	Senate adopts Rome Statute Implementing Legislation
24 November 2015	DRC enters into agreement on enforcement of sentences with the ICC
8 December 2015	ICC Presidency designates the DRC as state of enforcement of sentences in Lubanga and Katanga cases
10 December 2015	Joint Parliamentary Committee of the National Assembly and Senate adopts final version of Rome Statute Implementing Legislation
19 December 2015	Germain Katanga and Thomas Lubanga transferred to the DRC to serve the remainder of their ICC sentences

30 December 2015	DRC *decision de renvoi* issued charging Katanga with war crimes and crimes against humanity
31 December 2015	Promulgation of Laws 15/022, 15/023, and 15/024 amending three sets of laws to domestically implement the Rome Statute
13 January 2016	Katanga finishes his ICC sentence but is not released from DRC prison
March 2016	Rome Statute Implementing Legislation enters into force following publication in the Official Journal in February 2016
7 April 2016	ICC Presidency authorises the domestic prosecution of Katanga on the basis of complementarity
February 2017	Domestic case against Katanga resumed after having been on hold since May 2016
March 2017	Domestic case against Katanga put on hold again, with no indication of when it would resume at the time of writing
19 May 2017	Biggest jailbreak in Congolese history with thousands fleeing a high security prison in Kinshasa

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