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The Value of International-National Interactions and Norm Interpretations in Catalysing National Prosecutions of Sexual Violence

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Abstract

This article examines the unexplored potential for the International Criminal Court's (ICC) direct engagement with States to influence national prosecutorial priorities for international crimes, and how this may be leveraged to improve criminal prosecutions for crimes of sexual violence in particular. The article focuses on the intersection of two phenomenona: first, how international norms can influence national behaviour; and second, how systemic failures to prosecute crimes of sexual violence can be challenged. The article centres on engagement between the ICC and States pursuant to the principle of complementarity in The Rome Statute, as manifested in preliminary examinations. Drawing on the transnational legal process (TLP) framework, the article suggests how complementarity can be utilized to promote national compliance with the international norm of criminal accountability for international crimes. By examining ICC documents and practice, the article contends that exposing the gendered dimensions of State de-prioritization of sexual violence crimes will enable the ICC, as an international institution interacting with these regimes, to better facilitate gender-sensitive criminal justice responses to international crimes.

Keywords

Gender; sexual violence; International Criminal Court; complementarity; international crimes; post-conflict

Resumen

Este artículo analiza el potencial inexplorado del compromiso directo entre la Corte Penal Internacional (CPI) y los estados para influir en las prioridades nacionales procesales por crímenes internacionales, y cómo esto se puede aprovechar para

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mejorar en particular los procesos penales por delitos de violencia sexual. El artículo pone el acento en la intersección de dos fenómenos: en primer lugar, cómo pueden influir las normas internacionales en el comportamiento nacional; y en segundo lugar, cómo se pueden impugnar los fallos sistémicos para enjuiciar los crímenes de violencia sexual. El artículo se centra en el compromiso entre la CPI y los estados, en virtud del principio de complementariedad del Estatuto de Roma, tal y como se manifiesta en su preámbulo. Tomando como referencia el marco del proceso legal transnacional (PLT), el artículo sugiere que se puede utilizar la complementariedad para promocionar el cumplimiento nacional de la norma internacional de la responsabilidad criminal ante delitos internacionales. Analizando los documentos y la práctica de la CPI, el artículo defiende que si se expone la dimensión de género de la falta de prioridad de los estados sobre delitos de violencia sexual, la CPI podrá, como institución internacional que interactúa con estos regímenes, ofrecer una mejor respuesta de la justicia penal ante delitos internacionales, que sea sensible a la circunstancia de género.

Palabras clave

Género; violencia sexual; Corte Penal Internacional; complementariedad; delitos internacionales; post-conflicto

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1. Introduction

After decades of invisibility, sexual and gender-based violence (SGBV) is now the focus of international campaigns, high profile conferences, and government pledges to the broader international community. At the 2014 London Summit to End Sexual Violence in Conflict, the UK Foreign Secretary hosted over 1,000 participants from more than 100 countries in the largest ever gathering to 'shatter the culture of impunity for sexual violence in conflict' (Global Summit to End Sexual Violence in Conflict 2014). Just one week prior, the Prosecutor of the ICC had published a comprehensive policy paper on sexual and gender-based crimes – the first such policy of any international criminal institution (ICC-OTP 2014). The policy was formulated to 'contribute to ensuring not only the effective investigation and prosecution of sexual and gender-based crimes, but also to enhancing access to justice for victims of these crimes, through the ICC' (ICC-OTP 2014). Sexual and gender-based violence (SGBV),[1] and sexual violence specifically, is now publicly and conspicuously presented as a priority for prosecution at the international level. Ostensibly, this international solidarity is intended to translate into national efforts to prevent and punish sexual violence 'on the ground'.

Prevention may be the ultimate goal, but the method chosen by the international community for its achievement, as expressed through the ICC, appears to be prosecutions in national criminal justice systems. This emphasis is both pragmatic and political: prosecutions are more palatable than other more proactive forms of direct military/humanitarian intervention which are politically fraught, economically draining, and unable to guarantee the cessation of violence. However, the ICC's track record of only two judgments in 12 years has incontrovertibly proven its limited capacity to conduct anything beyond a few exemplary trials – widespread national convictions are required to end the impunity enjoyed by perpetrators.

Whether and how already over-extended national criminal justice systems, which have historically been notoriously inadequate at investigating and prosecuting sexual violence crimes, can fulfil the expectations created by the Rome Statute treaty regime is still uncertain. As discussed further below, the implementation of international norms into domestic laws, policies and practices results from complex interactions among actors including transnational advocacy networks (Keck and Sikkink 1998, p. 90, Risse and Sikkink 1998). Compounding general pre-existing obstacles is the frequent political post-conflict or transitional regime reluctance to conduct any prosecutions at all, and certainly not of high-profile leaders who may retain political or military influence.

Efforts to secure accountability for sexual violence and the catalytic potential of complementarity appear to be converging. Indeed, as its first event as one of two new focal point States for complementarity in the Assembly of States Parties to the Rome Statute, Sweden hosted a workshop on 'Combating Impunity for Sexual and Gender-based Crimes at the National Level'.[2] The workshop facilitated exchanges between international and national prosecutors, policymakers and civil society, and included lessons learned from the international tribunals and challenges experienced by victims as reported by national non-government organisations (NGOs).[3] Numerous recommendations for national actors were identified, including for States to reinforce policy commitments and craft policies to more effectively prosecute SGBV crimes.

[1] I use both the terms sexual violence and SGBV here, acknowledging the problems in reducing women's experiences in conflict to sexual violence crimes without acknowledging the broader forms of gender violence they experience. However, I also recognize the criminal justice system is ill-equipped to adequately address the range of gender violence experienced by women, but that practically, challenging impunity through domestic prosecutions will be most successful if it builds on pre-existing international and national practice, which focuses on sexual violence (Ni Aoláin, *et al*. 2011a).

[2] The opening speech delivered by the Swedish State Secretary, Tanja Rasmusson, delivered on 20 May 2014, on file with author.

[3] Chairman's Conclusions, on file with author.

The fundamental operational challenge is one not quite of politics or law: how these internationally espoused norms can influence State behaviour to improve both the quantity and quality of prosecutions for sexual violence. More specifically, as considered in this article, how can the ICC as an international institution engaged with States reluctant to fulfil their Rome Statute responsibility to prosecute international crimes within their jurisdiction encourage them to do so? In answer, this article first examines the principle of complementarity, which governs the admissibility of cases before the ICC, and therefore shapes ICC-State engagement, before applying the concept of internalization to these international-national exchanges to understand how the ICC may capitalize on its influence over State prosecutorial priorities.

The third part of the article very broadly traces the relationship between SGBV and international criminal law, culminating in the text of the Rome Statute and the practice of the ICC both within and beyond the courtroom. This provides a loose 'baseline' from which to assess recent changes in the Office of the Prosecutor's (OTP) policy and practice in its engagement with States, and emerging opportunities to potentiate its influence. Drawing upon field research as well as the Transnational Legal Process approach, the article suggests that, through its interactions with States and civil society at the national level, the ICC has unexplored potential to influence post-conflict government and policy priorities. More specifically for the purposes of this article, targeted strategic engagement may enhance the ICC's capacity to persuade States to improve criminal prosecutions for SGBV crimes and gender justice more broadly.

A few foundational premises underpin the analysis in this paper, some of which are conditional or contested and require elaboration. First, that a criminal justice approach to sexual violence crimes can have a positive impact and/or has inherent value; second, that focusing on prosecutions of SGBV crimes is one important facet of post-conflict rebuilding, as part of a broader agenda to hold individuals criminally responsible such that the rule of law is re-established and the likelihood of repetition reduced. Third, that ICC influence to include SGBV prosecutions in criminal justice initiatives can improve gender-based outcomes in a manner desired by the women constituents of post-conflict countries. This last premise does not extend to asserting any causal relationship between prosecutions and broader gender equality in economic development and opportunities.

At the domestic level, the gendered inadequacies of the criminal justice system are well documented (UN Women 2011). Early feminist critiques established international criminal justice suffers the same challenges (Pratt and Fletcher 1994). In response, while carceral feminism's goal is to 'push rape and other sexual violence up the hierarchy of crimes' including by imposing tougher sentences on perpetrators' (Halley 2008, p. 76), others have questioned whether such a flawed prosecutorial system can ever be expected to effectively ensure accountability for sexual violence in a manner that does not further disempower the victim of the crime (Engle 2005). 'Criminal justice systems are probably the least effective institutions to look to for transformative change' (Snider 1998, p. 11), since the focus on punishment is fundamentally incompatible with the 'precepts and goals' of feminist activism directed at eradicating gender inequality (Buss 2012, p. 415-416).

Second, in response to the inherent and inevitable flaws of the criminal justice system some suggest other responses to sexual violence are more gender-sensitive and so more likely to deliver justice to and restore the dignity of sexual violence victims (Rubio-Marin 2009; Ni Aoláin and Turner 2008). Truth commissions are most frequently invoked as a mechanism more likely to ensure victims' voices are heard and restore their dignity while establishing a more accurate systemic factual record of the nature of violations and their impact on victims. Reparations are recognized as more effective than convictions in tangibly improving victims' lives, offering important symbolic and commemorative redress and potentially

contributing to the prevention of recurrence. This article suggests that prosecutions offer unique benefits that are complementary to those promoted by truth-seeking initiatives and a variety of reparative measures, but they should not be regarded as the central or most important pillar of addressing international crimes. Moreover, prosecutions cannot in themselves challenge structural gender inequalities across political, economic and social spheres the way that reparations may trigger such transformations (United Nations 2014). Indeed, the international focus on sexual violence in crisis often diverts attention from structural issues of global justice rather than flowing on to 'peacetime' challenges of access to justice and equality (Grewal 2010).

The recent dominance of criminal justice as a response to international crimes does a disservice to victims of sexual violence whose interests will never be prioritized in a prosecutorial process designed primarily to determine the guilt or innocence of individuals, rather than recognize and attempt to redress the harm suffered by the victim. Overemphasizing prosecutions also undermines the broader social benefit they may otherwise deliver when expectations are appropriately calibrated such that victims appreciate individual accountability is necessary, but only one part of a more holistic response to systemic crimes. Particularly with respect to sexual violence crimes, which are often a manifestation of pre-existing gender inequality (Ni Aoláin *et al*. 2011a), the failure to punish perpetrators entrenches their impunity, and *de facto* legitimizes their behaviour by failing to condemn it. The foundation of criminal law across all societies is that punishing crimes serves to maintain the social code, and deter criminal behaviour. Thus, when perpetrators are prosecuted and punished for other crimes, but not for sexual violence, it normalizes sexual violence even as a society is otherwise more adequately addressing the range of other human violations committed in the same time period, and by the same actors. On the other hand, prioritizing prosecutions at the expense of addressing pre-existing systemic socio-economic gender inequalities is unlikely to effectively reduce sexual violence, or violence against women more generally (Reilly 2007). It also ignores the correlation between gender inequality and both *inter*state and *intra*state conflict (Caprioli 2000, 2005).

Finally, more sensitive and effective sexual violence investigations and prosecutions may indirectly promote broader gender justice goals in more nuanced ways; although research suggests that this far from guaranteed (Vinjamuri and Snyder 2004). While a full explanation is beyond the scope and purpose of this article, it is worth noting two effects that may flow from this. The first is purely legal: successfully prosecuting sexual violence crimes often requires reform of substantive and procedural criminal laws including expanding the definition of crimes, introducing effective witness protections measures, and providing for particular interview, trial procedure and case management processes. Such reforms go beyond criminal law to affect civil law procedures, sometimes because of their universality, and sometimes through future reforms to resolve inconsistencies between different laws. For example, reforming laws such that two women's testimony is equivalent to a man's testimony will apply not just to criminal prosecutions, but also to civil court proceedings.

The second effect is seen in new laws that promote gender equality or combat violence against women, but is one step further removed. The review of certain aspects of the legal system relating to violence against women can open up political space for advocacy and pressure for further reforms that consolidate such progress. For example, a survey of States Parties to the Rome Statute evidences a modest positive correlation between state ratification and subsequent modification and augmentation of domestic laws regarding sex-based harms against women (Ni Aoláin 2013). Acknowledging the many other potential causal factors and a time lag in ratification across some States, the coincidence rates nevertheless suggest ratification creates an opportunity to remedy repressive domestic laws, and increases the political space to extend such legislative progress. This momentum

may also interact with and mutually reinforce pressure applied from international institutions, which is the focus of the discussion below.

2. The ICC, complementarity, and catalysing national prosecutions

To understand the significance of the rationale behind the design of the ICC and the jurisprudential context within which the Rome Statute was drafted, it is useful to briefly canvass the development of modern international criminal law. The five decades following the post-WWII Nuremburg and Far East international tribunals' exposition and development of ICL were remarkable for the absence of international initiatives to prosecute and punish international crimes. Then, in response to the 1990s atrocities in Rwanda and the Balkans region, the UN Security Council applied its Chapter VII powers in an unprecedented manner to create the two *ad hoc* international tribunals – the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY).

Political palatability, proof of feasibility and the tangible outcomes of convictions and sentences at the ICTY and ICTR made ICL an increasingly popular institutional response to conflicts and atrocities, and precipitated the establishment of other tribunals. Varying institutional structures and legal instruments have been created after the *ad hoc* ICTY and ICTR tribunals, each tailored to the specific domestic and international political surrounding circumstances. Notwithstanding their proliferation, the effectiveness of the tribunals, and the criteria by which this is measured, remains disputed (Cronin-Furman 2013, Akhavan 2013). However, in 1998 when the Rome Statute was being drafted to create the first permanent international criminal tribunal intended to prosecute situations from around the world, the ICTY and ICTR were the templates.

The 1998 Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Rome Statute Conference") occurred in a very particular legal, political and economic context. Some suggest it represented the culminating point of a 'norm cascade' whereby a critical mass of States recognized the validity and value of a permanent criminal institution (Finnemore and Sikkink 1998). Legally, the ICTY and ICTR had developed, clarified and analysed ICL to an unprecedented depth, creating a cogent foundation of ICL jurisprudence for the Rome Statute drafting process. Beyond the legal precedent they created, the two *ad hoc* tribunals created a reassuring model of how an international court and an independent prosecutor could work successfully (Schabas 2001, p. 120).

Politically, 'the enthusiasm was quite astonishing, with essentially all the delegations expressing their support for the concept' (Schabas 2011, p. 18). Professor Schabas suggests that part of the unexpected success of the Rome Statute drafting process was because the ICC was to be an institution distinct from the United Nation yet exercising authority in a field traditionally occupied only by the Security Council: to this extent, it was an attempt to 'effect indirectly what could not be done directly, namely, reform of the United Nations and amendment of the Charter (Schabas 2011, p. 26, Schiff 2008, p. 72).[4] Only seven States, including the United States, China and Israel, opposed adoption of the Statute, while 20 other States (including several Arabic and Islamic) abstained.[5]

The biggest challenge, as predicted, was the manner in which cases would be admissible before the ICC. Complementarity was conceived of very early in the drafting process to sufficiently limit incursions into sovereignty to allay States' concerns while still challenging impunity for the international crimes of genocide, war crimes, crimes against humanity, and potentially in the future, aggression (Kleffner 2008, p. 73, 98). By making the Statute more acceptable to States,

[4] Iraq, Libya, Yemen and Qatar were the other four states to vote against the adoption at that time.
[5] UNDoc. A/CONF.183/SR.9, paras. 28, 33 and 40.

complementarity influenced the rate and scale of ratification, which will ultimately be a critical determinant of the ICC's success.

2.1. Introducing complementarity

The Rome Statute establishing the ICC was drafted with an unprecedented ambition: to universally end impunity for international crimes and to contribute to the prevention of such crimes (Rome Statute, Preamble). Its articulated method to achieve this is through ensuring effective prosecution at the national level and by enhancing international cooperation, including through the complementary operation of the ICC (Rome Statute, Preamble). To this end, the ICC was designed as a court of last resort expected to conduct a few, exemplary trials of the most senior perpetrators only when a State is found to be unwilling or unable genuinely to carry out the investigation and prosecution of a case. This principle is operationalized in Article 17 of the Rome Statute, which confirms the primacy of State jurisdiction by rendering cases inadmissible if they are being investigated or prosecuted by a State unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; or when the State has decided not to prosecute the person concerned (unless this is due to inability or unwillingness); or if the case has been tried; or if it is not sufficiently grave (Article 17(1) Rome Statute).

In determining unwillingness the ICC is to consider whether the proceedings or decision not to proceed was to shield the person concerned from criminal responsibility; whether there has been an unjustified delay in proceedings inconsistent with an intent to bring the person to justice; and whether the proceedings were conducted impartially or independently (Article 17(2) Rome Statute). The ICC considers inability to be shown when, due to a total or substantial collapse or unavailability of its national justice system, the State is unable to obtain the accused or the necessary evidence and testimony; or is otherwise unable to carry out proceedings (Article 17(3) Rome Statute).

The OTP originally conceived its role in implementing complementarity as one of 'encouraging genuine national proceedings where possible, relying on national and international networks, and participating in a system of international cooperation' (ICC-OTP 2006). However, by 2010 the OTP had refined this approach into two dimensions: the admissibility test pursuant to Article 17 of the ICC Statute, i.e. how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and the positive complementarity concept, i.e. a proactive policy of cooperation aimed at promoting national proceedings (ICC-OTP 2010).

One aspect of the OTP's implementation of complementarity is the use of preliminary examinations to determine whether a reasonable basis to proceed with an investigation exists. The preliminary examination phase represents the 'first opportunity for the Office to act as a catalyst for national proceedings', through monitoring situations, sending missions, requesting information, and assisting stakeholders to better identify the steps required to meet national obligations under the Statute (ICC-OTP 2010, p.10). Under Article 53(1)(a)-(c) of the Rome Statute, a preliminary examination covers an assessment of jurisdiction, admissibility (comprising complementarity and gravity), and the interests of justice.

The OTP does not 'enjoy full investigative powers, but may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources that are deemed appropriate' (ICC-OTP 2013, p. 3). The OTP is to consider the 'extent to which its preliminary examination activities can serve to stimulate genuine national proceedings' (ICC-OTP 2010, p. 5).

In 2012, the Assembly of States Parties confirmed capacity building as a matter for 'States, the United Nations and relevant specialized agencies' (Assembly of States Parties 2012). The ICC's limited role in this regard is distinguished from the role it

plays in the judicial determination of admissibility. Importantly, the ICC's interactions with States in the course of analysing, investigating or prosecuting can nevertheless promote, support and catalyse domestic prosecutions (Assembly of States Parties 2012). This is a politically and economically based division, reflecting the ICC's institutional and resource limitations, as highlighted by the low number of ICC trials over the past decade. The ultimate aim of a combined approach: States are politically motivated to prosecute those most responsible for international crimes, and that they receive the material assistance necessary to do this properly.

As articulated in the 2013 formal OTP policy paper on preliminary examinations, the 'narrow' judicial test of complementarity contained in Article 17 comprises: first, an empirical assessment of the existence of relevant national investigations or prosecutions (cases). The absence of national proceedings is sufficient to make the case admissible, without considering inability or unwillingness (ICC-OTP 2013, p. 12). As there are no 'cases' at the preliminary examination stage, the OTP is to consider potential cases that could be identified based on the information available and that would likely arise from an investigation into the situation.[6] The ICC has defined 'case' as proceedings against the same person of interest to the ICC Prosecutor, for the same conduct the ICC Prosecutor seeks to prosecute.[7] Thus, prosecuting rape as a domestic crime, even if it occurred as part of a systematic or widespread attack (crime against humanity) or in the context of armed conflict (war crime) would be sufficient to render that case inadmissible before the ICC.

When there are national proceedings, the OTP will consider unwillingness or inability to investigate or prosecute a case. In assessing inability, domestic inactivity that may render a case admissible can include the absence of an adequate legislative framework to prosecute the same conduct or forms of responsibility; the existence of laws that bar domestic proceedings (e.g. amnesties, immunities); the deliberate focus of proceedings on low-level perpetrators despite available evidence on those more responsible; and other general issues related to the lack of political will or judicial capacity (ICC-OTP 2013, p. 12-13). Inability may also arise from (among other factors) a lack of capacity of authorities to exercise their judicial powers, and the lack of security for witnesses, investigators, prosecutors and judges (ICC-OTP 2013, p. 14).

Unwillingness may be evidenced by (among others):[8] unjustified delay in proceedings; lack of impartiality or independence, which may be evidenced by manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel (ICC-OTP 2013, p. 13). The OTP's determination on these two grounds is explicitly *not* a judgment of the national justice system as a whole.

Each of these factors, and each of these grounds for admissibility, provide a point of entry for the OTP to engage with States, to highlight its priorities, and potentially, to influence State choices in distributing scarce resources within the criminal justice system. Given the ICC's resource limitations, this broader concept of complementarity as a means of stimulating domestic prosecutions becomes increasingly important to ending impunity for sexual violence crimes. The ICC's potential to influence State priorities in prosecuting senior perpetrators could see specific resources dedicated to ensuring SGBV crimes are no longer comprehensively neglected.

[6] Situation in the Republic of Kenya, Request for authorization of an investigation pursuant to Article 15, II-01/09-3, 26 November 2009, paras. 51 and 107; Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, paras. 50, 182 and 188.
[7] Case No. ICC-01/04-520-Anx2, [31].
[8] Case no. ICC-01/04-01/07-1213-tENG, [77].

The principle of complementarity not only crystallizes and entrenches the norm of individual responsibility for international crimes; it also re-calibrates the relationship between domestic governments, domestic criminal justice systems, and potential ICC suspects. Deemed 'integral to the functioning of the Rome Statute system and its long term efficacy' (Assembly of States Parties 2010), complementarity reinforces 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (Rome Statute, Preamble). Indeed, from the outset, the first Prosecutor linked the success of the ICC to the number of international prosecutions avoided because of the increased effectiveness of domestic prosecutions for international crimes (Moreno-Ocampo 2003), which are in turn likely to have been catalysed by the relationship with and scrutiny of the ICC (Burke-White 2008). The evolution of the OTP's approach to complementarity and its impact becomes particularly important when assessing the ICC's capacity to promote national initiatives to hold individuals accountable for international crimes.

2.2. Complementarity as a mechanism to internalize prosecutions

Borrowing from Cass Sunstein, Finnemore and Sikkink viewed the success of the Rome Statute conference as an expression of a 'norm cascade', the second stage of a three-stage 'life cycle' of a norm comprising: norm emergence, norm cascade and internalization (Finnemore and Sikkink 1998, p. 895). A 'norm cascade' occurs when a critical mass of relevant state actors adopt the norm (Finnemore and Sikkink 1998, p. 895). This easily equates to the successful adoption of the Rome Statute at the Rome Statute Conference 1998 by attending States, and also to its entry into force in 2002 when the 60th State ratified the Rome Statute. The term 'justice norm cascade' was used more specifically to denote a series of norm-affirming events including the decisions of national courts to try international crimes, the NGO and government support for the establishment of the ICC, and the ratification of the Rome Statute (Lutz and Sikkink 2001, p. 4).[9]

The surprisingly good ratification rate of the Rome Statute in the years following its adoption is consistent with the notion of a norm cascade for international criminal justice occurring among States on the international level. Finnemore and Sikkink describe the final stage of internalization to be when 'norms acquire a taken-for-granted quality and are no longer a matter for broad public debate' (Finnemore and Sikkink 1998, p. 895). It is possible the norm of individual criminal accountability for international crimes has been internalized in those States that generally uphold the rule of law and have functioning independent judicial systems, and those that have prosecuted senior political leaders for international crimes. However, internalization is hard to claim in States where international crimes are well-documented and those most responsible have not been genuinely investigated, prosecuted or appropriately punished. These are the States most likely to be under either OTP preliminary examination or investigation.

The next question is: how can the OTP's implementation of complementarity promote internalization of this norm in States that would otherwise be deemed 'unwilling' pursuant to Article 17? This question presumes that the resulting national prosecutions are more desirable than either an ICC investigation or no prosecutions at all – a fundamental premise of the Rome Statute itself, and one that is not discussed in great detail here as a result.

Harold Koh's Transnational Legal Process (TLP) is a useful framework to examine how internalization may be achieved through complementarity with respect to prosecuting and punishing individuals responsible for international crimes under the Rome Statute treaty regime. Rather than traditional State-to-State horizontal engagement, the TLP focuses on 'mechanisms of "vertical domestication," whereby

[9] Goodman and Jinks (2013) would use the term acculturation to describe this process.

international law norms "trickle down" and become incorporated into domestic legal systems' (Koh 1998, p. 627). This maps neatly onto the Rome Statute obligations imposed vertically on States such that ultimately national authorities prosecute international crimes.

TLP conceives international law as a 'product of a constructivist, dynamic, non-statist, and highly participatory process requiring an interdisciplinary approach' (Stevens 2012). It is the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individual – interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalize the rules of transnational law (Koh 1996).

Koh articulated three phases through which norm internalization occurs: interaction, interpretation, and internalization.[10] Through repeated cycles of "interaction-interpretation-internalization," interpretations of applicable global norms are eventually internalized into states' domestic legal systems (Koh 1999, p. 1399, 2006, p. 747) and political structures, through executive action, legislation, and judicial decisions that take account of and incorporate international norms' (Koh 1996, p. 204). Koh distinguishes between compliance to an international norm – an instrumentalized coercive process to avoid punishments or obtain rewards – and internalization of a norm, where the norm has been incorporated into an internal value system (Koh 1998, p. 628).

The TLP has not been applied to demonstrate how complementarity may promote the internalization of international norms within the ICC treaty regime. However, Koh's three-pronged strategy for promoting the internalization of human rights norms may prove helpful: first, provoke interactions; second, provoke norm interpretations; and third, provoke norm-internalizations (Koh 1998, p. 677). For example, 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.

This helps us understand why otherwise reluctant States will choose to invest scarce financial, technical, political and human resources in prosecutions. State compliance, manifested in domestic prosecutions of the most senior perpetrators of international crimes, is likely to be politically motivated by the desire to avoid the 'punishment' of losing control over the prosecution process rather than the 'reward' of praise for norm adherence. ICC investigations and prosecutions are to the material advantage of States because all the costs are outsourced. However, since senior perpetrators either still wield political power or are enemies of the government, relinquishing control over prosecutions can result in punishment that is politically intolerably harsh (in the former situation), or that fails to deliver the desired level of retribution (in the latter situation).

TLP identifies three forms of internalization:

1. Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it.
2. Political internalization occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy.
3. Legal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three (Koh 1998, p. 642, 1999, p. 2400).

[10] In his 1998 Frankel Lecture, Koh (1998) identified four phases: interaction, interpretation, internalization, and obedience, but in his later works he refers to only the first three phases.

The sequencing among the various forms of internalization can vary so that in some cases social internalization paves the way for legal internalization, while in other cases, legal internalization (particularly through executive action) will precipitate social internalization. More specifically, an international norm can be internalized through executive action such as government policies; through legislative action such as the passage of new laws; and judicial incorporation through domestic judgments that rely on international law (Koh 1998, p. 642-643). However, extra-legal internalization is critical in States with an obligation to prosecute individuals responsible for international crimes, because the arrest, prosecution, and punishment process involves not only the legislature and the executive, but also the police, prosecutors, military, prison staff and a multitude of other government agents.

It is beyond the scope of this article to detail the roles played by key agents in the internalization process (Koh 1998, p. 647, 2006, p. 746) or provide a comprehensive mapping of the TLP onto the complementarity dialogue, but a broad description assists with understanding its catalytic potential. For example, the TLP has not been applied to demonstrate how complementarity may promote the internalization of international norms within the ICC treaty regime. However, Koh's three-pronged strategy for promoting the internalization of human rights norms may prove helpful: first, provoke interactions; second, provoke norm interpretations; and third, provoke norm-internalizations (Koh 1998, p. 677). For example, 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.

While the direct interaction occurs between the ICC and the executive government, many more actors interpret the norm: the OTP, the executive government, prosecutors, the judiciary, and civil society. The OTP's engagement with these various actors stimulates norm interpretations and provides opportunities for civil society in particular to reinforce the international norm. Transnational norm entrepreneurs, such as NGO members of the Coalition of the ICC (CICC), can critically promote awareness of the norms embodied by the Rome Statute within local communities to enhance their public legitimacy and thereby achieve social internalization. Political internalization is facilitated when political elites make public commitments in response to their dialogue with ICC staff, and incorporate them into government policy. The subsequent legal internalization is evidenced through new laws providing for the prosecution of international crimes, police procedures to facilitate the arrest, prosecution and conviction of perpetrators of international crimes, and judgments from national courts that incorporate international norms into the decision-making process.

Even a general application of TLP to the preliminary examination stage, involving multiple expressions of the minimum justice requirements to demonstrate willingness to prosecute, suggests that ICC engagement with State and non-State actors is important for compliance, and also for norm internalization. Whether these interactions actually produce improved national prosecutions is a question best answered empirically and by focusing on specific examples, as analysed in Section 3.3. with respect to prosecutions of sexual violence.

3. Gender and the ICC

The gender dimensions of the ICC's practice are situated within the broader historical development of international criminal law, which in turn evolved from national criminal justice systems. The relatively recent recognition of sexual violence crimes within international criminal law both contrasts with and draws upon domestic legislation, jurisprudence and evolving prosecutorial practice standards. Worldwide, national jurisdictions continue to struggle to sensitively and

effectively codify, prosecute, convict and appropriately punish SGBV crimes. 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. These challenges are compounded in post-conflict contexts by extremely scarce financial, human and technical resources, collapsed or dysfunctional institutions, and an overwhelming number of criminal cases within the justice system. This part draws on examples from some of these domestic jurisdictions - particularly those subject to ICC investigations or under ICC scrutiny.

3.1. International criminal institutions

The domestic tendency to regard SGBV crimes as crimes of honour or dignity was mirrored at the international level (Coomaraswamy 1990) up until the 1990s when it was first recognised and addressed as an international crime. For example, while neither of the Charters of the Post-WWII tribunals mentions rape or sexual violence, sexual violence crimes such as sterilization and forced abortion were prosecuted at both tribunals.[11] After the tribunals concluded their cases in 1948, there were no further prosecutions for international crimes in international tribunals until the 1990s. Nevertheless, international criminal law developed incrementally and sporadically through national legislation and practice regarding war crimes, crimes against humanity and genocide. During this period, women's rights and gender justice also progressed at the international level, as a result of multi-jurisdictional advocacy, scholarship and leadership.[12]

Against this backdrop of slowly evolving international criminal law developments, the two ad-hoc tribunals established in the early 1990's - the ICTY and the ICTR - were remarkable in their identification of a range of gender-based crimes as types of war crimes, crimes against humanity and genocide.[13] The Special Court of Sierra Leone (SCSL), particularly in its landmark prosecutions of sexual slavery and forced marriage,[14] further developed the body of ICL jurisprudence, which informs the definitions of SGBV, procedural and protective measures, and the elements of crimes in the Rome Statute.

The Rome Statute consolidated previous developments in its recognition of: rape, sexual slavery, enforced prostitution, enforced sterilisation and other forms of sexual violence as war crimes (Rome Statute, Article 8(2)(b)(xxii)) and crimes against humanity (Rome Statute, Article 8(2)(e)(vi)); and rape and sexual violence as acts of genocide (Rome Statute, Elements of Crimes, Article 6(b)). It also expanded definitions, such as including forced pregnancy as a war crime (Rome Statute, Article 8(2)(b)(xxii)). Beyond its substantive provisions, the Rome Statute's significant and more controversial innovation was the introduction of victim participation in court proceedings through the Victims and Witnesses Unit (VWU),[15] accompanied by the power to award reparations to victims. Other provisions require VWU staff to have expertise in sexual violence-related trauma to assist and protect victims and witnesses during proceedings.[16]

The ICC Rules of Procedure and Evidence (RPE) articulate important procedural restrictions in cases of sexual violence: Rule 70 prohibits the inference of consent

[11] International Military Tribunal for the Far East, Indictment, app. D § I, reprinted in Boister and Cryer 2008, p. 59); *United States v. Karl Brandt, et al.* (The Medical Case), 1 Nuremberg Military Tribunal 694–738 (1947).

[12] Examples include the Convention on the Elimination of Discrimination Against Women 1979, UN Security Council Resolution 1325 on women, peace and security.

[13] See for example, Prosecutor v Akayesu*,* Case No. ICTR-96-4-T, Trials Chamber, ¶ 5.5 (2 September 1998), Prosecutor v Kunarac, Kovac and Vukovic*,* Case No. IT-96-23-T, ¶¶ 4-8; 685-727; 782; 822 (22 February 2002)

[14] See eg. Prosecutor v. Brima, SCSL–04-16-A, ¶196. (2008).

[15] Rome Statute, Article 24(6) creates the VWU; Article 68(3) permits the views and concerns of the victims to be presented and considered in court proceedings.

[16] See eg. Rome Statute, Articles 68(2) and (3); ICC RPE, Rules 89-93; see also Prosecutor v Germain Katanga and Mathieu Ngudjolo, Trial Chamber II, ICC-01/04-01/07, 29 February 2008, para.307.

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across a range of circumstances, and Rule 71 presumptively prohibits evidence related to other sexual conduct. The Rome Statute also imposes an explicit duty on the Prosecutor to investigate crimes of sexual and gender violence.[17] The OTP has in turn created a Gender and Children Unit to advise on SGBV crimes against children,[18] and both Prosecutors appointed Special Gender advisors to provide specialist advice on gender violence with respect to policies, submissions and investigations.[19] Very clearly, the ICC is the most progressive international legal instrument in terms of articulating SGBV crimes, incorporating gender-sensitive provisions, and providing institutional support for victims of SGBV crimes.

The track record of the ICC in terms of indictments and successful prosecutions for sexual crimes is more ambivalent. While the OTP has laid charges for rape,[20] rape as torture,[21] sexual enslavement,[22] and persecutions through rape,[23] by 2010 only 60 per cent of SGBV charges had been confirmed by the Pre-Trial Chamber (PTC). As at 2012, the confirmation rate had dropped to a rate of 50 per cent: further, of 204 OTP requests for arrest warrants or summons, only seven charges were not included by the PTC – but five of these seven were for SGBV (WIGJ 2012, p. 106). Such disturbing trends highlight the difficulty in reaching an evidentiary threshold for SGBV crimes – whether this is result of evidence collection or the PTC's perceptions of requisite thresholds across different categories of crimes is unclear.

As a litmus test, the first ICC case of *Lubanga* [24] conspicuously failed to include SGBV crimes, despite available evidence confirming their occurrence and supporting their characterisation as international crimes (WIGJ 2006). Evidence of rape and sexual slavery, particularly with respect to the forcible recruitment of girl child soldiers was elicited throughout the trial proceedings, prompting the OTP to request the inclusion of additional charges to encompass this conduct; this request was rejected on appeal and contributed to substantial procedural delays.[25]

The Trial Chamber (TC) referenced evidence of sexual violence in its judgment, but was compelled to note that it had 'not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused'[26] because there were no allegations of sexual violence in the indictment. Despite this, in its recent reparations judgment[27] the Trial Chamber explicitly recognized that reparations must consider victims of SGBV violence, that priority may need to be given to victims in particularly vulnerable situations, and that it may adopt measures that seek to guarantee equal access to reparations for vulnerable victims.[28]

In contrast, the PTC did not include charges of enforced nudity as a war crime and crime against humanity in its arrest warrant for Jean Pierre Bemba Gombo, on the grounds of insufficient evidence establishing the gravity of these crimes compared to other forms of sexual violence articulated in Article 7(1)(g) of the Rome

[17] Rome Statute, Article 54(1)(b).
[18] Rome Statute, Article 42(9); OTP Regulations 6(a) and 12, ICC-BD/05-01-09.
[19] Rome Statute, Article 42(9); OTP Regulations 6(b).
[20] Defendants charged with rape include Joseph Kony, Vincent Otti, Germain Katanga, Mathieu Ngudjolo Chui, Ahmad Harun, Ali Kushayb, Omar Hassan Ahmad Al Bashir, Jean-Pierre Bemba Gombo and Callixte Mbarushimana
[21] Callixte Mbarushimana is the only defendant charged with rape as torture.
[22] Defendants charged include Joseph Kony, Vincent Otti, Germain Katanga and Mathieu Ngudjolo Chui.
[23] Defendants charged include Ahmad Harun and Ali Kushayb.
[24] Prosecutor v Thomas Lubanga Dyilo, Trial Chamber I, 14 March 2012, ICC-01/04-01/06 (hereinafter "*Lubanga*").
[25] *Lubanga* Judgement,paras. 10-12.
[26] *Lubanga*, Judgement, para. 896.
[27] Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, 7 August 2012, ICC-01/04-01/06-2904
[28] See Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, 7 August 2012, ICC-01/04-01/06-2904, paras. 189, 200, 202, 207-209.

Statute.[29] This ruling undermines ICTR jurisprudence that determined "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact".[30]

In the same case the PTC made a finding that the crime of rape was not legally distinct to the crime of rape as torture or as an outrage upon personal dignity.[31] This narrow interpretation fails to consider that the elements of rape do not require humiliation, degradation or another form of violation as part of the act, and that the aspects comprising an outrage upon personal dignity are not the same as those aspects that establish the element of force or coercion in rape (WIGJ 2009).

Most recently on 7 March 2014, the second defendant to be tried before the ICC, Germain Katanga, was convicted by majority as an accessory for the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as for murder as a war crime and a crime against humanity.[32] He was acquitted as an accessory to rape and sexual slavery, both as war crimes and crimes against humanity,[33] and of the war crime of using child soldiers.[34] While the Trial Chamber found the sexual violence witnesses to be credible, the majority found there was insufficient evidence to conclude that the sexual crimes formed part of the common purpose of the attack, unlike all the crimes charged, for which he was convicted. A preliminary critique suggests the judges required a higher standard of evidence supporting a more deliberate intention to commit the sexual violence crimes than any other crimes that were committed (Inder 2014, p. 1).

This is a disturbingly perverse outcome, whereby the very entrenchment of sexual violence as a 'weapon of war' that has characterized the DRC conflict and rendered it an implicit assumption in hostilities is the reason the evidence relating to intention is deemed insufficient to support a conviction. The extent to which the ICC's effectiveness at promoting national prosecutions of sexual violence is tied to its own courtroom track record is not yet known. ICC jurisprudence is yet another source of international norms to be used by national norm entrepreneurs such as NGOs to promote accountability for international crimes of sexual violence. It seems likely that just as progressive definitions of sexual violence in the Rome Statute have prompted more expansive national legislation, so too will conservative decisions reduce the space to demand more of national prosecutorial practices. The longer-term concern is that although the ICC is supposed to represent 'best practices', this is not expected of resource-poor national systems: lower-than-optimum international benchmarks permit even lower national standards. Far from contributing to improved criminal justice responses to sexual violence, conservative ICC jurisprudence may indirectly contribute to the further entrenchment of the disparities in prosecutorial treatment between this and other categories of crimes.

3.2. Beyond international criminal institutions

Of course, the broader significance of the Rome Statute's gender provisions and the ICC's practice of criminal law with respect to SGBV crimes is their effect on the domestic practice of ICL. First, the ICC's practice materially determines the evolution of ICL with respect to SGBV, and this influence will only grow as other international criminal institutions conclude their work and close. Second, the ICC's gender-focused provisions are more progressive than most domestic legislation. While this sets desirable higher standards, constructive implementation is key to demonstrating the positive outcomes flowing from a more gender-sensitive

[29] Prosecutor v Jean-Pierre Bemba Gombo, Pre-Trial Chamber, ICC-01/05-01/08-14-tEN, para 40. ("*Bemba")*; Amended Arrest Warrant of 10 June 2008, ICC-01/05-01/08-tENG.
[30] Prosecutor v Jean Paul Akayesu, Case No. ICTR-96-4-T, *Judgement,* 2 September 1988, para.688.
[31] *Bemba,* para. 202.
[32] ICC-01/04-01/07-3436, p 709-710.
[33] ICC-01/04-01/07-3436, p 710.
[34] ICC-01/04-01/07-3436, p 710.

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approach. Third, prosecutors, lawyers and activists in transitional contexts pay attention to ICC proceedings, often using ICC standards and practices to bolster domestic advocacy and support innovative gender-sensitive approaches to prosecuting SGBV crimes.[35] For example, women's rights activists in Colombia noted the absence of SGBV crimes against Lubanga with disappointment[36] - it was seen as a lost opportunity to strengthen domestic advocacy leverage around sexual violence prosecutions.

Particularly in resource-poor post-conflict societies, the failure to prioritize sexual violence crimes inevitably perpetuates their invisibility, and the culture of impunity surrounding perpetrators of such crimes. As an international institution, the ICC represents a normative authority on the threshold of acceptable justice and can encourage better standards of practice. In the case of sexual violence, this could be a powerful tool to persuade resource allocation that ensures effective prosecution. To date, the ICC has not maximized its capacity to use its complementary function to focus on improving prosecutions SGBV crimes, despite its mandate to do so (Chappell *et al*. 2013).

One approach to augment the ICC's impact on national prosecutions of sexual violence crimes is through a gender-sensitive interpretation of the terms unwillingness and inability. Chappell *et al*. adopt and describe this approach with specific reference to the preliminary examinations in Colombia and Guinea, because both situations are characterized by sexual violence crimes and the preliminary examination stage is when complementarity is first assessed. Much of their analysis is valuable and accurately identifies lost opportunities to promote a gender-sensitive approach to complementarity, and preliminary examinations specifically. As the focus of this article is on sexual violence crimes, and also on how interactions between the ICC and State and non-State actors give rise to norm interpretations that may encourage national prosecutions for these crimes, the engagement during preliminary examinations is particularly relevant. Accordingly, some of the discussion below builds upon and engages with their conceptual analysis of complementarity vis-à-vis gender, and with respect to the two country case studies.

One suggestion Chappell *et al*. make in response is that unwillingness could be interpreted to encompass rules that discriminate against victims of sexual violence such as valuing a woman's testimony less than a man's or lacking procedures to protect rape victims from re-traumatisation (Chappell *et al*., 2013). They suggest inability could be understood in terms of gender incompetency, including systemic elements such as laws, procedures and policies governing the investigation and prosecution of sexual violence crimes (SáCouto and Cleary 2009, p. 344) and the failure to provide gender-sensitive witness protection (Chappell *et al*. 2013).

However, these suggestions appear inconsistent with the OTP policy, based on ICC jurisprudence, to assess the outcomes for cases against particular individuals, rather than systematic aspects of domestic legal systems as a court of judicial review might. In some cases, impunity enjoyed by individuals may be a result of systemic legislative or procedural loopholes specific to SGBV which makes it difficult to conclude inability or unwillingness without assessing the background causes. Nevertheless, an interrogation concerning the legal architecture is a substantial extension of the OTP's scrutiny to date and there is some conceptual overlap in the aspects capable of constituting both inability and unwillingness – namely, legal rules and procedures.

This approach also falls more logically within the 'broad' interpretation of complementarity, rather than the 'narrow' conception involving 'jurisdictional

[35] Interviews with Patricia Guerrero and Patricia Hernández, Bogota, Colombia, February 2013, on file with author

[36] Interview with Patricia Guerrero, February 2013, on file with author.

conflicts between states and the ICC' Chappell *et al*. (2013, p. 459) seek to address. Indeed, resolving such conflicts is under the purview of the ICC Pre-Trial Chamber rather than the OTP: the OTP is the ICC organ most likely to create 'incentives for states to incorporate Rome Statute crimes into domestic penal codes, enabling the prosecution of perpetrators at the national level' (Chappell *et al*. 2013, p. 459). OTP identification of flawed procedural laws and definitions is exactly the type of incentivizing precondition for catalyzing national law reform to promote compliance with Rome Statute standards – an aspect of the broad, rather than narrow, notion of complementarity.

The position adopted here, to reconcile differences between the two approaches to Article 17, is that unwillingness could be interpreted with respect to specific individuals, but inability understood as systemic barriers, such as legal definitions, discriminatory legal rules or procedures that make it difficult, if not impossible, to prosecute and punish sexual violence crimes. Such an approach is more consistent with the text of Article 17, where unwillingness relates to bringing an individual to justice, and inability relates to the obstruction of obtaining evidence and testimony or court proceedings due to the unavailability of the justice system. Indeed, if an individual is prosecuted and punished for a range of crimes but not for sexual violence, it may be difficult to prove an unwillingness to bring her/him to justice *per se*: it would be necessary to imply a requirement for justice for the entire range of crimes for which he/she is responsible into Article 17. Conversely, the prosecution of one charge (or very few charges) of sexual violence should not be sufficient to constitute willingness if there is evidence to suggest a much higher level of culpability in terms of both the range and number of sexual violence acts the accused may be responsible for. There would need to be very compelling evidence to support the prosecutorial decision not to proceed with more charges to avoid an outcome that defeats the purpose of the Rome Statute.

For example, the inability to collect the necessary evidence and testimony necessary to prosecute sexual violence could be evidenced by the absence of procedural regulations requiring interviews with women victims of sexual violence to be conducted in secure and confidential settings. 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. Further, since victims of sexual violence are more likely to face discrimination, social stigma, exclusion from their community or physical harm, protection systems that may be appropriate for victims who do not face these additional risks may be inadequate to protect victims of sexual violence, either because the risk of harm is realised or because witnesses refuse to testify.

Unwillingness to prosecute sexual violence crimes could include the failure to use other available evidence in the absence of DNA forensic evidence, giving insufficient weight to the victim witness' testimony, or requiring corroborative evidence. Charging sexual violence acts as a less serious crime, such as an indecent assault or an act of indecency, may in some cases be an example of inadequate charging in relation to the gravity of the alleged conduct. Further, if sexual violence crimes in a situation under preliminary examination are well-documented and evidenced as systemic and/or widespread, and yet there are no national prosecutions for these crimes despite ongoing proceedings for other international crimes, unwillingness could be inferred by the selective allocation of resources.

This article does not adopt the position that it is *necessarily* more concerning for sexual violence crimes to be prosecuted as domestic rather than international crimes compared to other crimes (Chappell *et al*. 2013, p. 462). Undoubtedly, sexual violence is often instrumentalized in conflicts, and exposing its systemic commission is critical to understand this strategic use. However, at the national level a more pragmatic and victim-centred approach may have better prospects of

success. For instance, the 2014 North Kivu Operational Military Court convictions of only two soldiers in a sexual violence case against 39 soldiers on the basis of command responsibility was devastating for over 1,000 victims who had participated in the case (ASF 2014). Like the recent Katanga verdict, there was insufficient evidence before the court to link the commission of sexual violence by soldiers to their commanding officers. Rather than exposing and ensuring accountability for the systemic use of sexual violence, the trial is at risk of further entrenching the impunity enjoyed by sexual violence perpetrators.

This in turn is attributable to limited resources, technical expertise and poorly strategized investigation and prosecution, which is not unexpected in post-conflict resource-poor contexts. In such circumstances, it is hard to argue that justice is served by a largely unsuccessful attempt to prosecute sexual violence as an international crime rather than as 'ordinary' sexual violence. Similarly, a victim-centred approach acknowledges that the experience of sexual violence is not qualitatively different depending on its legal classification as an international or 'ordinary' crime (See eg. Copelon 1995). It is likely that a balance between very few carefully investigated cases against senior perpetrators for international crimes and many more cases prosecuted as domestic crimes may better challenge widespread impunity for sexual violence crimes.

Beyond specific cases, an explicitly gender-sensitive OTP policy can 'broadcast' minimum standards to the general international community, which may in turn prompt broader improved domestic post-conflict responses to sexual violence. Just as the crimes, definitions, procedures and conceptions of liability within the Rome Statute have prompted State Parties to be on notice of the types of crimes requiring prosecution and punishment, a gender-sensitive OTP approach to unwillingness and inability sets clear expectations that neglecting sexual violence crimes is unacceptable and has consequences. For example, the general trend for States to improve domestic laws related to sexual-violence harms in response to an articulated international standard as embodied by the Rome Statute (Ni Aoláin 2013) could well be replicated in post-conflict country responses to an OTP policy that similarly identifies sexual violence crimes as an essential aspect of its assessment.

3.3. Emerging opportunities to influence state behaviour

The crux of this paper lies in the intersection between a strategic application by the OTP of positive complementarity, and particularly in its engagement with States through preliminary examinations, and the impetus to rectify ongoing impunity for SGBV international crimes. The OTP can not only catalyse domestic processes: its dialogues with individual States could achieve a broadcasting effect if they communicated a consistent standard that all states potentially the subject of ICC investigations are required to meet to avoid a formal investigation. More specifically as suggested below, OTP communication with States identifying its priorities in assessing unwillingness may affect State policy decisions including resource allocation, prosecutorial strategy and case prioritization.

Koh's TLP framework provides a more nuanced basis from which to understand the process through which the OTP's catalytic influence over national prosecutions may be maximized. An application of TLP to complementarity suggests that more interactions between the OTP and States increase the opportunities for norm interpretations that in turn promote social, political and legal internalization of the norm of accountability for international crimes. Of the two contexts in which a case is admissible before the ICC, this paper focuses on States that may be judged unwilling, rather than unable, to prosecute those most responsible for international crimes. Inability to prosecute is often characterized by material and resource constraints, which require investment rather than incentivizing a choice to comply with international standards. Unwillingness in post-conflict contexts is more likely

attributable to internal political pressures, which may be overcome as an international norm becomes increasingly internalized.

Chappell *et al*. analyse the OTP's preliminary examination methodology and practice with respect to the two situations that both substantially feature sexual violence crimes – Colombia and Guinea. While a detailed updated description of the prosecutions in these countries is beyond the scope of this article, a few aspects are highlighted for the purposes of analysing emerging opportunities for the OTP to enhance its catalysing influence.

The first situation of Colombia involves armed conflict that has lasted almost half a century, and an ICC preliminary examination since 2004 (ICC-OTP 2013. The full procedural complexities of Colombia's engagement with the ICC are discussed comprehensively elsewhere (Ambos 2010, p. 161, Seils 2011, p. 989); for the current discussion, only the characteristics pertinent to establishing where the 'acceptable minimum threshold of justice' may lie are discussed. The former ICC Prosecutor identified Colombia as a testament to the success of positive complementarity, but others criticize OTP management of the situation because years of engagement have not yet yielded enough justice or a formal OTP investigation that would lead to convictions of the most senior perpetrators of international crimes.[37]

Relevant to this discussion, up until recently Colombia's failure to effectively prosecute SGBV crimes had not been specifically raised by the OTP. In 2011, the OTP acknowledged rape and sexual violence as a category of alleged crimes committed in Colombia, but not in its assessment of the adequacy of domestic proceedings according to complementarity (ICC-OTP 2011, p. 17). This is notwithstanding the abundant evidence to suggest that SGBV constituted a permanent and central part of the Colombian conflict but had not been prosecuted, as well as international and domestic civil society pressure to prosecute these crimes. Despite the Colombian Constitutional Court's recognition of the pervasiveness of sexual violence and its 2008 referral (through a case called Auto 092) of 183 such cases to the Prosecutor-General to be prioritized, the vast majority of cases have yet to reach the trial stage and paramilitaries continue to deny their involvement. In fact, in late 2011 a symbolic court against sexual violence was constituted to raise awareness of the scale and gravity of sexual violence crimes that remain uncharged and unpunished (Humanas 2011). SGBV crimes were clearly on the political radar as widespread, grave and conspicuously unaddressed in the criminal justice system.

In this regard, while sexual violence is undeniably underreported to authorities, this article contests the claim that sexual violence is poorly documented in Colombia (Chappell *et al*. 2013, p. 466). Although disparate, the various estimated numbers of sexual violence victims are still very high and more than enough to ground charges for sexual violence committed as international crimes (Casa de la Mujer 2011; ABColombia 2013, Sheldon 2014). Indeed, this article proposes that the gathering momentum to end impunity for sexual violence is partly because such extensive documentation and evidence exists about the extent of sexual violence and the systemic nature of its commission. It is the absolute incongruity between the volume of available evidence and the absence of prosecutions that enhances both the impetus and the leverage the ICC has to encourage national authorities to focus on sexual violence.

The ICC's engagement with Colombia provides some tentative evidence of its capacity to promote improved post-conflict criminal prosecution processes: applying the TLP helps explain why this may be the case. A general dialogue between

[37] For a comprehensive assessment, see Reed *et al*. (2012).

Colombia and the OTP around accountability from 2005 onwards coincides[38] with numerous prosecutions for war crimes and crimes against humanity (ICC-OTP 2011, p. 16-17). At that time, the OTP found, "[t]here is no basis at this stage to conclude that the existing proceedings are not genuine' (ICC-OTP 2011, p. 18), despite the failure to prosecute the sexual violence cases referred by the Constitutional Court, the creation of a symbolic court in response to State prosecutorial inactivity, and the numerous reports identifying sexual violence as both prevalent and instrumentalized in the armed conflict. While norm interpretations around accountability were provoked in general, the lack of specific dialogue around sexual violence meant the national norm of deprioritizing sexual violence crimes was not contested sufficiently to promote increased levels of compliance and initiate the internalization process.

Then, in November 2012, the OTP's report on preliminary examinations explicitly prioritized sexual violence in its assessment of domestic justice initiatives by listing rape and sexual violence as one of five focus issues in Colombia (ICC-OTP 2012a, p. 28). In the same month, the OTP released an interim report on Colombia that noted the limited number of national proceedings concerning rape and sexual violence despite the scale of the phenomenon (ICC-OTP 2012b, p. 6). The OTP recommended Colombian authorities prioritise the investigation and prosecution of these crimes (ICC-OTP 2012b, p. 68) and reinforced this message in two missions to Bogota in 2013 to discuss and monitor progress, which explicitly focused on the investigation and prosecution of SGBV crimes. The Colombian government's response indicated not only an awareness of this priority, but a desire to demonstrate the progress made in this regard.[39]

By the following year, a draft Bill to codify certain conflict-related sexual violence as crimes and recognize them as war crimes and crimes against humanity had been approved by the House of Representatives and was under debate in the Senate (ICC-OTP 2013 p. 35). Sixteen macro-investigations including several sexual violence charges against paramilitary commanders had been prioritized (ICC-OTP 2013 p. 35); and charges in general had been 'broadened to include conduct amounting to sexual violence' (ICC-OTP 2013 p. 37). While only 11 of the 183 Auto 092 cases had resulted in sentences by October 2013,[40] in December 2013 the Prosecutor General's office reported its investigation into 1,169 sexual violence cases relating to the armed conflict (Zwehl 2013). These mixed messages are interesting because despite valid criticisms of inadequacy, the Colombian government is nevertheless engaging in a norm-interpretative interaction by publicly announcing progress achieved in prosecuting sexual violence. The Colombian State has consistently communicated its general commitment to accountability over the past decade, particularly to the OTP, but only recently has this extended to include the historical blind spot of sexual violence.

In 2014 another major milestone was reached when the Senate approved the draft Bill and passed Law 1719, recognizing forced acts of nudity, abortion and pregnancy as sexual violence; establishing sexual violence can constitute a crime against humanity; and eradicating any time limits to investigating and prosecuting international crimes (Bangura 2014). Notwithstanding Colombia's complex politico-legal context and the impossibility of concluding a causal relationship, a number of inferences could be made from its recent increased attention to prosecuting crimes of sexual violence.

[38] It is important to note the relationship is correlational only, and there are many other interconnecting factors affecting the Colombian prosecutorial process.
[39] Interview with Fabricio Guariglia, OTP Senior Legal Counsel, 30 May 2013, on file with author.
[40] Access to Justice for Women victims of Sexual Violence: fifth follow-up report to Auto 092 of the Colombian Constitutional Court, Working Group to monitor compliance with Auto 092 of 2008 of the Colombian Constitutional Court

First, notwithstanding long-term international and domestic civil society pressure on Colombia to prosecute sexual violence crimes, the most significant legislative and resource-related progress in prioritising their prosecution occurred after 2011. This leads to the second inference: that the failure to prioritise and therefore prosecute SGBV crimes previously, including since the OTP started its preliminary examination in 2004, was due to the discretionary allocation of resources. Third, the Colombian government is sufficiently responsive to ICC priorities that it will alter policies and practices to the extent necessary to demonstrate positive action i.e. a willingness to hold perpetrators accountable. This last inference does not claim ICC scrutiny and engagement as the sole determinative force, but rather that prosecutorial action is consistent with Colombia's public commitment to secure justice for international crimes, and that this commitment arises from a vested interest in doing the bare minimum to avoid an ICC investigation.

Whether these changes achieve meaningful progress for SGBV victims seeking justice for the crimes they have experienced remains to be seen. Certainly, ICC scrutiny of and active engagement with Colombian prosecution processes makes it more difficult for the Colombian government to continue its disproportionate neglect of SGBV crimes. By requiring sexual violence prosecutions in its assessment of sufficient justice to constitute willingness in its interactions with Colombia, the OTP strengthened domestic 'norm entrepreneurs' (Koh 1998, p. 647-648) and their advocacy capital, as well as expanded the political space and possibility of public platforms for norm interpretations within Colombia. Law 1719's focus on sexual violence is an example of political internalization of the norm, while the improved investigative approach and record reflects legal internalization. While entrenched cultural attitudes may delay social internalization, if the coming few years produce positive criminal justice outcomes for SGBV crimes significantly exceeding those of the previous decade, the ICC's influence through norm-focused interactions will be hard to deny.

The second situation in Guinea arose because of a September 2009 stadium massacre of opposition supporters who were protesting in a stadium in the capital city of Conakry by security forces. Over a 156 people were killed and at least 109 women were victims of some form of sexual violence (ICC-OTP 2013, p. 42). Concerns with the failure to investigate senior political potential suspects in Guinea and lack of transparency around charges for crimes are both valid and substantial (Chappell *et al*. 2013, p. 468). However, without evidence to suggest sexual violence is either being systematically de-prioritized or unintentionally neglected, this alone does not support a sexual violence-specific critique of national processes. Potential suspects' continuing impunity and a slow judicial process are general concerns, notwithstanding there may be evidence of sexual violence, along with other crimes.

Indeed, charges subsequently laid against the Head of Presidential Security, Claude Pivi, including for sexual violence, are indicative of a slow-moving, but not necessary unwilling, judicial system (ICC-OTP 2013, p. 44). Pivi's continuing liberty and retention of his government position may be grounds for questioning willingness if his trial seems disproportionately delayed compared to other defendants – but again, this would be general unwillingness, rather than unwillingness to prosecute sexual violence specifically.

Similarly, although the absence of a formal witness protection program is particularly problematic for vulnerable victims, including those of sexual violence, it is hard to conclude that is deterring witnesses from giving evidence such that it would constitute inability, given the hundreds of witnesses who have already testified (HRW 2012, ICC-OTP 2013, p. 44).[41] On the other hand, unwillingness for

[41] The ICC-OTP's (2013) Report on Preliminary Examinations noted over 370 victims had provided testimony; this is consistent with an interview with Presiding Judge of the Stadium Massacre Case, Conakry 12 June 2013, on file with author.

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sexual violence specifically may be concluded if, at a later stage, the process of laying charges is complete and sexual violence charges are not included in a manner reflective of the number of victims who testified to its commission.

The OTP has visited Guinea eight times since initiating a preliminary examination (ICC-OTP 2013 45). While it is possible the eight indictments and 370 victim hearings may have occurred regardless of ICC engagement and scrutiny, Guinean human rights lawyers note that charges are laid around ICC visits, security for judges increases when ICC staff are in Guinea, and that the continuing liberty enjoyed by some of the defendants indicates the government's underlying reluctance to pursue genuine justice.[42] On the other hand, ICC visits and engagement have also empowered civil society to mobilise more effectively and articulate their concerns at national and international levels.[43]

The coincidence of norm-based interactions with further acts of legal internalization is consistent with the TLP framework. While the Guinean government may be inherently reluctant to pursue senior perpetrators, its repeated assurances to the OTP of genuine willingness and sustained scrutiny of its fulfilment of such assurances fuel the internalization process. It also offers increased opportunities for civil society to provide norm interpretations as norm entrepreneurs, bolstered by articulated international expectations.

The ICC has yet to explicitly focus on substantive and procedural obstacles to prosecuting sexual violence such as legal definitions, witness protection measures and evidentiary burdens that could constitute unwillingness or inability to prosecute such crimes. Unsurprisingly, Guinean criminal law regarding sexual violence remains restrictive and inconsistent with international law: Article 321 of the Guinean Penal Code defines rape as any act of sexual penetration of any kind,[44] which excludes other forms of sexual violence committed in the massacre, such as sexual slavery (United Nations 2009, p. 24).

While the entire prosecution process itself is politically fraught and progressing only incrementally, the OTP is nevertheless engaging with government and non-State actors to support their continuing scrutiny. The Colombian example of enhancing the specificity of OTP-State interactions to include a focus on sexual violence suggests that doing the same in relation to Guinea may facilitate legislative and procedural reform, provide further space for advocacy on the issue, and more broadly strengthen the impetus for a sharper criminal justice focus on sexual violence. Moreover, Guinea's efforts to demonstrate capacity and willingness under the Rome Statute confirms the leverage the OTP wields in its interactions, and therefore the influence its norm interpretations with respect to prioritizing sexual violence may have on national prosecutorial priorities.

4. Conclusion

The ICC's potential to shift priorities towards criminal accountability, including for SGBV crimes, in Colombia and Guinea may be more subtly echoed in other contexts. President Musevini's referral of the situation involving international crimes committed only by the Lord's Resistance Army (LRA) in Uganda to the ICC is largely recognised as a political limitation to the scope of actors under the jurisdiction of the ICC to ensure accountability of government and military actors remains a domestic matter (Nouwen and Werner 2010). The ICC had only limited engagement with Ugandan domestic prosecutions after the OTP began charging a handful of the most senior LRA leaders – a missed opportunity to promote broader improvements in securing post-conflict criminal accountability. Notwithstanding subsequent resistance to the ICC as an institution, Uganda passed the International Criminal

[42] Interviews with human rights lawyers, Conakry, Guinea, May 2013, on file with author
[43] Interviews with representatives of victims' associations, May 2013, on file with author.
[44] Code Penal de la Republique de Guinee (Loi No 98/036), Article 321.

Court (ICC) Act in 2010, incorporating the Rome Statute into domestic law so that Ugandan courts can try genocide, war crimes and crimes against humanity, as defined in the Rome Statute.

Importantly, this Act and the prior adoption of Rome Statute standards (as norm interpretations) provided women's advocates (as norm entrepreneurs) the opportunity to lobby for law reform to meet these standards. For example, discrepancies created between the definition of rape as an international crime under Uganda's ICC Act 2010 and rape as a domestic crime prompted women's rights organisations to lobby for review and reform of the domestic Penal Code Act. The Ugandan Law Reform Commission is currently reviewing the Act to propose reforms that would remedy inconsistencies with other more recent legislation such as the ICC Act 2010.

This limited review of policy and procedural shifts following ICC scrutiny and direct interactions with governments suggests that pursuing gender justice is ultimately about specifically challenging pre-existing norms that are inconsistent with accountability for international sexual violence crimes. The ICC can play an important role in national post-conflict measures and prosecutorial strategies, both through its direct engagement with States and its broader standard-setting role that expands the political space for domestic norm entrepreneurs. While the standards within ICC instruments related to SGBV are progressive, the ICC's court outcomes are ambivalent – at times furthering international understandings of SGBV crimes and at times disappointing national civil society actors who look to use the ICC as a source of international norms to bolster national efforts for criminal law reform.

The ICC's real potential to affect post-conflict or resource-poor agendas lies in its interaction with policy makers, advocates and those working within national criminal justice systems. State interests in avoiding the politically unacceptable costs of an ICC investigation provide the OTP with leverage in its interactions to provoke norm interpretations and influence the discretionary allocation of scarce resources. There is some evidence from countries like Colombia, Uganda and Guinea to suggest that the ICC's scrutiny and articulation of norms can influence State actors, and that a failure to prioritize prosecuting sexual violence crimes in its norm interpretations perpetuates the continued invisibility or de-prioritization of them. More subtly, the Rome Statute standards, ICC jurisprudence and OTP identification of important reform areas can empower norm entrepreneurs such as advocates, prosecutors and judges to incorporate international conceptions of SGBV into national practice. Persuading governments to re-direct resources may also have symbolic value and help re-calibrate gender relations more broadly within society.

The OTP has a vested financial interest in not opening new investigations that would further strain its limited resources and thus reduce the quality of its investigations and prosecutions. States dealing reluctantly with international crimes are frequently motivated to retain control over prosecutions of senior perpetrators, either because of their continued political power or because of the public appetite for harsh punishment. Consistent with the Transnational Legal Process framework, provoking norm interpretations that specifically incorporate sexual violence crimes as a focus seems to shift political, legal and resource priorities within Colombia. The more general OTP interactions with Guinea appear to be producing similar results.

By increasing interactions that incorporate sexual violence crimes as a priority, and therefore opportunities for norm interpretations around accountability for sexual violence, the OTP could realise its normative influence on their effective prosecution. This may initially be a slow and instrumentalized process to avoid ICC investigations, but as in Uganda, domestic norm entrepreneurs can use the bare minimum compliance with OTP articulated norms as leverage to advocate for broader gender-sensitive law reform. Re-establishing the rule of law in this respect

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by challenging the culture of impunity enjoyed for sexual violence crimes is critical to minimising the chance of repeated violence. Capitalising on the ICC's direct and indirect influence is one strategy to encourage heightened attention on sexual violence prosecutions and perhaps to contribute to more enduring gender-sensitive laws and prosecutorial practices.

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