Exploring the catalytic potential of the International Criminal Court in preliminary examinations: the role of norm-interpretive interactions in catalysing national prosecutions of sexual violence in Colombia and Guinea

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Exploring the catalytic potential of the International Criminal Court in preliminary examinations: the role of norm-interpretive interactions in catalysing national prosecutions of sexual violence in Colombia and Guinea

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The problem investigated by this thesis is the continuing impunity for international crimes of sexual violence, notwithstanding States' international legal obligations to investigate and prosecute these crimes and the creation of the International Criminal Court (ICC) intended to end their impunity. Operating on a complementary basis to national jurisdictions, the ICC's goal is that States comply with their international obligations to exercise criminal jurisdiction over those responsible for international crimes. To promote this goal the ICC Office of the Prosecutor (OTP) has pursued a policy of positive complementarity to encourage and catalyse genuine national investigations of international crimes. Using a qualitative case-study methodology including desk and empirical research in Colombia and Guinea, this thesis offers both a theoretical and empirical contribution to the literature.

First, it offers a theoretical explanation, based on Koh's Transnational Legal Process (TLP) theory, of how the OTP could catalyse national investigations and prosecutions of international crimes of sexual violence. Second, it contributes to empirical literature through field research on national proceedings regarding international crimes of sexual violence in two States under preliminary examination: Colombia and Guinea.

The data demonstrates that TLP does generally explain how the OTP's engagements with various actors may induce or affect State investigations for crimes under OTP scrutiny. However, the discrepant lack in competence, frequency and adequacy between State responses for sexual violence crimes compared to other crimes was not well explained by TLP. As predicted by the thesis and consistent with feminist critiques of international and criminal law, TLP, as a gender-neutral compliance theory, could not account for this disparity. The empirical trends emerging from the two contrasting contexts indicate that explicit prioritisation of sexual violence crimes and a more nuanced gender-sensitive strategy by the OTP will yield more—and better quality—national investigations and prosecutions for international crimes of sexual violence. These findings inform recommendations on how to improve TLP's explanatory capacity in relation to gender-based international obligations and the OTP's catalytic influence on national proceedings for international crimes of sexual violence.

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Signed**.....**

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It is a privilege to have had the opportunity to complete this thesis. I hope it enables me to better contribute to challenging the impunity for crimes of sexual violence, and to support the victims who seek justice for them.

Content Warning

Readers are advised that this thesis contains descriptions of sexual and gender violence crimes.

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Table of Abbreviations

ACHR	American Convention on Human Rights
AGO	Attorney-General's Office of Colombia
ASP	Assembly of States Parties
CAR	Central African Republic
CEDAW	Convention on the Elimination of Discrimination Against Women
CICC	Coalition of the International Criminal Court
CNEI	Commission Nationale d'Enquête Indépendante
DINAC	Dirección Naciónal de Análisis y Contextos
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers of the Court of Cambodia
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ELN	National Liberation Army of Colombia
FARC	Revolutionary Armed Forces of Colombia
FIDH	International Federation for Human Rights
IACHR	Inter-American Commission for Human Rights
IACtHR	Inter-American Court on Human Rights
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMP	Iniciativa de Mujeres Colombianas por la Paz
ISIL	Islamic State of Iraq and the Levant
JCCD	Jurisdiction, Complementarity and Cooperation Division
NGO	Non-governmental organisation
NSW	New South Wales
OGDH	Guinean Organization for the Defense of Human Rights

OTP	Office of the Prosecutor of the International Criminal Court
PEX Policy	OTP Policy Paper on Preliminary Examinations
SGBC Policy	OTP Policy Paper on Sexual and Gender-Based Crimes
PEX	Preliminary Examination
RPE	Rules of Procedure and Evidence
SAS	Situation Analysis Section
SGBC	Sexual and Gender-Based Crimes
SRSG	Special Representative of the Secretary-General
SVC	Sexual Violence in Conflict
TLP	Transnational Legal Process
UN	United Nations
UNDP	United Nations Development Programme
UNSW	University of New South Wales
US	United States of America
UK	United Kingdom
VWU	Victims and Witnesses Unit
WIGJ	Women's Initiatives for Gender Justice
WWII	World War II

CHAPTER 1. INTRODUCTION

1. The enduring problem and the impetus for a better response

'The deep silence that has traditionally shrouded crimes of sexual violence is finally breaking…We have a solemn responsibility to convert a centuries-old culture of impunity into a culture of accountability and deterrence… All our words and laws and resolutions will mean nothing if violations go unpunished in practice, and if we fail in our sacred duty to care for survivors'.[1]

Crimes of sexual violence have historically been both ubiquitous and seemingly tolerated in times of armed conflict or widespread or systematic human rights violations. Notwithstanding increasing recognition, visibility and condemnation by both national and international criminal law of sexual violence in such contexts, they continue to be committed with almost total impunity. At various times, estimates of rape incidents have ranged from a high of 48 every hour in the Democratic Republic of Congo (DRC)[2] to an average of six an hour in Colombia.[3] Thousands of other reported instances, in countries such as Argentina, Peru, Kenya, Cambodia, Iraq, Libya, Mali and South Sudan, demonstrate that crimes of sexual violence continue to be committed across diverse geographical, cultural, religious and ethnic contexts, seemingly without inhibition or consequence.[4]

[1] United Nations (UN) Deputy Secretary-General Amina Mohammed, Security Council Open Debate on Sexual Violence in Conflict (15 May 2017) <https://www.un.org/sg/en/content/dsg/statement/2017-05-15/deputy-secretary-generals-statement-security-council-sexual>.

[2] This statistic derives from a 2006-2007 study based on cluster sample populations from across all DRC provinces: Amber Peterman, Tia Palermo and Caryn Bradenkamp, 'Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo' (2011) 101(6) *American Journal of Public Health* 1060, 1066.

[3] This number comes from a study spanning 2001-2009: Casa de la Mujer, *Campaign Rape and other Violence: Leave my Body Out of War. Sexual Violence against Women in the context of the Colombian armed conflict 2001-2009 First Survey of Prevalence* (2011) <http://www.usofficeoncolombia.org/uploads/application-pdf/2011-03-23-Report-English.pdf>

[4] For a survey of the recent diverse contexts in which sexual violence is committed, see *Report of the Secretary General: Conflict Related Sexual Violence,* UN Doc S/2017/249 (15 April 2017) ('*SRSG CRSV 2017 Report*').

Ending impunity for sexual violence perpetrated as international crimes (genocide, war crimes or crimes against humanity)[5] in the short term depends on guaranteeing its punishment; this is also a pre-requisite to deterring would-be perpetrators. Reducing the incidence of sexual violence long-term will occur only if the deterrent value of punishment creates a general trend of non-commission of sexual violence.[6] There are international legal norms obliging States to investigate, prosecute and punish international crimes, including international crimes of sexual violence.[7] Yet, national criminal justice institutions and actors typically fail to prosecute and punish sexual crimes effectively as international crimes. I suggest this is due to an inability or unwillingness to prosecute international crimes in general, as well as the multiple pre-existing barriers to prosecuting sexual crimes under national legislation.[8]

There are several complex inter-related reasons for the impunity that characterises crimes of sexual violence at the national level. These include laws that fail to criminalise the full range of sexual violence crimes, inadequate protection and support measures for victims, misogynistic or patriarchal cultural and social attitudes and structural gender inequality.[9] These factors correlate to and facilitate the perpetration of sexual violence crimes in times of conflict or large-scale human rights violations; that is, impunity of sexual violence in 'peacetime' exacerbates sexual violence perpetration in times of conflict.[10] As Chapter 3 explores, neither international or national efforts to punish and deter perpetrators of these crimes have been successful; this impunity gap is both the impetus for and focus of this thesis.

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[5] This thesis uses the term 'international crimes' to encompass these three crimes as defined in the *Rome Statute of the International Criminal* Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

[6] On the potential deterrence effect of such trials see Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939; on persuasion as the effect of punishment see Pablo De Greiff, 'Deliberative Democracy and Punishment' (2002) 5 *Buffalo Criminal Law Review* 373.

[7] Chapter 1.3.

[8] See e.g. UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52-54 <http://www.unwomen.org >.

[9] Ibid 52-54.

[10] SC Res 1820, UN SCOR, 5916th mtg, UN Doc S/RES/1820 (19 June 2008); Hilary Charlesworth, 'Feminist Methods in International Law' (2004) 36 *Studies in Transnational Legal Policy* 159, 177-178; Amnesty International, *Colombia: Hidden from Justice - Impunity for Conflict-Related Sexual Violence, a Follow-up Report* (2012).

Until the establishment of the International Criminal Court (ICC) in 2002, prosecutions of international crimes were selective and post-facto, conducted by ad hoc institutions designed to close once the crimes within their jurisdiction had been dealt with.[11] Challenging impunity more generally was neither their objective nor possible within their limited mandates and resources. In contrast, the ICC is a permanent court with the express goals of ending impunity for international crimes, including those of sexual violence, and contributing to their prevention in the future.[12] To achieve this, the ICC operates according to the principle of complementarity, whereby national courts are afforded the first opportunity to prosecute international crimes contained in the Rome Statute.[13] This principle reinforces the primary responsibility that States have to exercise criminal jurisdiction over international crimes within their jurisdiction.[14]

The ICC also has specific institutional features designed to promote accountability for sexual violence crimes and to overcome challenges to their prosecution. The Rome Statute includes the most expansive list of sexual violence crimes in any international legal instrument to date.[15] It, and the ICC's *Rules of Procedure and Evidence* (ICC RPE),[16] include provisions to protect all witnesses and victims, including those of sexual violence, and to reduce the impact on their physical and mental wellbeing of participating in legal proceedings.[17] The Office of the Prosecutor of the ICC (OTP) has specific obligations to interpret and apply the relevant law in a manner consistent with international human rights, to investigate crimes of sexual

[11] This includes charges that were dismissed, abandoned, or resulted in an acquittal or conviction. For a brief historical survey of institutions prosecuting international crimes see Amrita Kapur and Christopher Rassi, 'Landmarks and Developments in International Criminal Institutions and Their Contributions to International Humanitarian Law' in Julia Grignon (ed), *Hommage à Jean Pictet par le Concours de droit international humanitaire Jean-Pictet* in *Hommage à Jean Pictet par le Concours de droit international humanitaire Jean-Pictet* (Éditions Yvon Blais, 2016) 435.

[12] *Rome Statute*, Preamble [5]. Mirroring this approach of the Rome Statute, this thesis focuses on ending impunity for international crimes of sexual violence, on the understanding that achieving this goal will contribute to the prevention of such crimes in the future.

[13] *Rome Statute*, Preamble [6]. Note that the term 'complementarity' does not appear in the Statute, but was the term used to encompass the provisions that operate to affirm States' primary jurisdiction.

[14] *Rome Statute*, Preamble [6].

[15] Chapter 3.1.

[16] International Criminal Court, *Rules of Procedure and Evidence,* Doc No ICC-ASP/1/3 (adopted 9 September 2002) ('*ICC RPE*').

[17] See e.g. *Rome Statute*, art 68(2) and art 68(3); ICC RPE, r 70, 71, 89-93.

and gender violence and to appoint specialist advisers on 'sexual and gender violence'.[18]

Despite this, the track record of ICC indictments and successful prosecutions for crimes of sexual violence is mixed, with only three convictions from 25 cases involving 42 defendants resulting from approximately 16 years of ICC operations.[19] While there is a growing body of ICC jurisprudence that reinforces the legal obligation to investigate and prosecute international crimes of sexual violence,[20] the ICC's design is premised on it investigating and prosecuting international crimes only as a 'last resort'.[21] It was never expected to prosecute all international crimes, be they crimes of sexual violence or otherwise.[22] Further, the OTP has itself conceded that constrained resources and its broad range of prosecutorial priorities limit its institutional capacity to a 'handful of cases'[23] which are nevertheless intended to promote the punishment of the 'most serious crimes' through national measures and international cooperation.[24]

Admissibility is central to both promoting State exercise of criminal jurisdiction for international crimes and limiting ICC jurisdiction. Pursuant to Article 17 of the Rome Statute, cases are admissible before the ICC only when a State a) fails to investigate and prosecute international crimes, b) does not investigate the same conduct and person investigated by the ICC or c) investigates and prosecutes the same person for the same conduct investigated by the ICC, but 'in a manner inconsistent with an intent to bring the person concerned to justice'.[25] Jurisdiction, other admissibility

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[18] *Rome Statute* art 42(9); Regulations of the Office of the Prosecutor Doc No. ICC-BD/05-01-09 (entered into force 23 April 2009) ('*OTP Regulations*') 6(a) and 12.
[19] This data, as with all data in the thesis, is current as of 31 October 2017. See Chapter 3.2; Rose Grey, *Prosecuting Sexual and Gender Violence Crimes in the International Criminal Court - Historical Legacies and New Opportunities* (PhD Thesis, University of New South Wales, 2015), 107-240.
[20] Chapter 3.2.
[21] Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87, 94.
[22] Philippe Kirsch, 'The Development of the Rome Statute' in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law, 1999) 451–461; see also Mahmoud Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (Transnational Publishers, 1998) 1–2; Angela R Kircher, 'Attack on the International Criminal Court: A Policy of Impunity', (2003) 13 *Michigan State Journal of International Law* 263, 275–276.
[23] ICC Office of the Prosecutor ('ICC-OTP'), *Strategic Plan June 2016-2018* (2015), 31.
[24] Rome Statute, Preamble [4]. See *Prosecutor v Katanga, (Trial Chamber Décision Relative à la Peine (article 76 du Statut))* (ICC, Trial Chamber II, ICC-01/04-01/07-3484, 23 May 2014) [38].
[25] *Rome Statute* art 17(2).

criteria such as gravity and the interests of justice, as well as case selection and prioritisation criteria, further limit the cases that can come before the ICC.[26]

Since the ICC cannot investigate and prosecute international crimes around the globe comprehensively, ending impunity depends on the quality and quantity of successful national prosecutions that result in convictions.[27] This in turn relies on States being willing and able to investigate, prosecute and punish international crimes. When States are either unwilling or unable (or both) to investigate or prosecute, achieving accountability (and therefore ending impunity) will depend on catalysing genuine national investigations and prosecutions of international crimes in these States.[28] Catalysis depends on unwilling States being persuaded to investigate and prosecute,[29] and States that are unable to investigate and prosecute receiving the support to build capacity in these processes, or both.

The ICC was created with no explicit catalytic mandate or responsibility. However, its anticipated catalytic impact is implicit in both the operation and objective of complementarity, namely, effective national prosecutions for international crimes in fulfilment of international legal obligations. Indeed, the first ICC Prosecutor Luis Moreno-Ocampo, suggested that the ICC could, should, and would catalyse national prosecutions of international crimes such that 'the absence of trials before this Court … as a consequence of the regular functioning of national institutions, would be a

[26] These other criteria are not discussed in this thesis. Note that case selection criteria includes gravity of crimes as well. ICC-OTP, *Policy Paper on Case Selection and Prioritisation* (2016), 12-14.
[27] This reflects the argument that certainty of punishment rather than its severity determines the deterrent effect of the criminal justice system: Daniel S. Nagin and Greg Pogarsky, 'Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence' (2001) 39 *Criminology* 865; Raymond Paternoster, 'The deterrent effect of the perceived certainty and severity of punishment: A review of the evidence and issues' (1987) 4(2) *Justice Quarterly* 173. It also assumes that the logic and research on the deterrent effect of national prosecutions and convictions can be applied to prosecutions for international crimes, including of sexual violence, were such prosecutions performed with similar levels of certainty and severity of punishment: there is no research to suggest this is not the case. On the existence and extent of the deterrence effect see also Gustavo Gallón, The International Criminal Court and the Challenge of Deterrence, in Dinah L. Shelton ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000) 93, 103; Jo Hyeran and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity' (2014) 70(3) *International Organization*, 443.
[28] While there is consensus that prosecutions need to meet minimum standards, the content of these standards is still not settled. See Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17(3–4) *Criminal Law Forum* 255.
[29] This may be performed by the OTP, but also by other entities e.g. African Union, the United Nations.

major success'.[30] The OTP has chosen to pursue this goal through a policy of 'positive complementarity',[31] which is anchored in Article 17's admissibility test. Positive complementarity gradually evolved to be one of the four fundamental principles of the OTP's prosecutorial strategy, whereby the OTP 'encourages genuine national proceedings where possible' without capacity building or providing financial or technical assistance.[32]

However, not only is the existence of such a catalytic effect contested, there are also certain paradoxes within the complementarity regime that undermine it.[33] The existing empirical studies assessing the OTP's catalytic effect through positive complementarity focus on investigating and prosecuting international crimes broadly, rather than crimes of sexual violence specifically. Yet, the barriers to prosecuting sexual violence mentioned above suggest that there may be particular factors that need to be considered to catalyse national proceedings for these crimes. I seek to address the gap in the literature by empirically exploring whether the OTP in its practice of positive complementarity has had, or could have, any impact on national investigations and prosecutions of international crimes of sexual violence. Expressed in international legal terms, the thesis examines whether the OTP can promote or has promoted State compliance with the international legal norm requiring States to investigate and prosecute international crimes of sexual violence within their jurisdiction.

This thesis accepts that the precondition to ending impunity is effective national prosecutions. While it acknowledges the criticisms of positive complementarity,[34] it is premised on the OTP's deliberate choice to pursue catalysis of such proceedings

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[30] Luis Moreno-Ocampo, *Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court* (16 June 2003) <https://www.icc-cpi.int>.
[31] The OTP has no statutory obligation to actively promote national proceedings.
[32] See ICC-OTP, *Prosecutorial Strategy 2009-2012* (February 2010) <http://www.icc-cpi.int/>, 16-17.
[33] See e.g. Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013), 12-15; Leslie Vinjamuri, 'The International Criminal Court and the Paradox of Authority' (2016) 79(1) *Law & Contemporary Problems* 275. See also on the reasons for why 'the ICC has been less effective than might have been hoped,' Paul Seils, 'Putting Complementarity in Its Place' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 305, 305.
[34] See e.g. Padraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 *Chinese Journal of International Law* 259.

through positive complementarity. Accordingly, the key questions addressed by the thesis are as follows:

1. Is there potential within the complementarity regime of the Rome Statute for the OTP to catalyse national prosecutions of international crimes of sexual violence through positive complementarity?
2. If so, is there evidence to suggest that the OTP has contributed or can contribute to catalysing effective prosecutions for international crimes of sexual violence in national jurisdictions?
3. If there is such evidence, does it suggest how such catalysis has been or should be done? Alternatively, if the evidence suggests the OTP has not catalysed national prosecutions, what needs to change for this to occur?

This thesis answers the first question by applying the Transnational Legal Process (TLP) theoretical framework to preliminary examinations to identify the OTP's potential to catalyse national criminal investigations and prosecutions of international crimes. To answer the second question, I analyse desk and empirical field data from Colombia and Guinea within the TLP framework to assess the OTP's contribution to catalysing national proceedings for international crimes of sexual violence during preliminary examinations. The third question is answered through analysis of the empirical data that suggests recommendations for various actors to enhance the OTP's catalytic impact vis-à-vis national proceedings for international crimes of sexual violence.

2. The theoretical framework for 'norm internalisation'

Irrespective of whether the ICC as an international institution does *in fact* catalyse national prosecutions of international crimes, the premise of complementarity is that it has the potential to do so. This premise mirrors the claim by compliance theories that international institutions can—and do—promote State compliance with international norms.

Understanding how to promote norm compliance is particularly valuable in relation to international norms that do not appeal to the political or economic self-interest of State actors and that may, in fact, threaten those interests. The international legal

norm requiring States to prosecute international crimes exemplifies this type of norm. States do not contest the norm's existence nor its validity by denying their duty to prosecute at least some international crimes, but norm compliance has nevertheless historically been the exception rather than the general practice.

As described in Chapter 2, transnational legal process (TLP) approaches to compliance are particularly useful when examining the legal regulation of actions or events that transcend national boundaries and the legal relationships of and amongst individuals, corporations, and organizations as well as States.[35] The Rome Statute's creation of the ICC legal regime (and its relationships) allowing for prosecution of individuals at an international institution if the ICC deems a State Party has failed to do so exemplifies this type of legal context. TLP has also been applied to international commercial arbitration,[36] global economic development,[37] and international investment law.[38] More specifically, Harold Koh explicitly applied his approach to TLP to norms concerning women's rights:[39] and his conception of TLP has subsequently been applied to prosecution of international crimes,[40] human rights violations,[41] the right to dignity,[42] and compensation for sexual crimes.[43]

Accordingly, for these and other reasons explored in Chapter 2.2, this thesis draws upon Harold Koh's TLP theory, to explore how the OTP's practice of positive complementarity in preliminary examinations can promote State compliance with

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[35] Maya Steinitz, 'Transnational Legal Process Theories' in Cesare P R Romano, Karen J Ater and Chrisanthi Avgerou (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 340, 340.
[36] These include Yves Dezaley and Bryant Garth: ibid 350.
[37] For example, Jens Dammann and Henry Hansmann: ibid 346.
[38] For example, Gus Van Harten: ibid 346.
[39] Harold Hongju Koh, 'Why America Should Ratify the Women's Rights Treaty (CEDAW)' (2002) 34 *Case Western Reserve Journal of International Law* 263.
[40] Caleb J Stevens, 'Hunting a Dictator as a Transnational Legal Process: The Internalization Problem and the Hissene Habre Case' (2012) 24 *Pace International Law Review* 190.
[41] Marcelo Torelly, 'Transnational Legal Process and Fundamental Rights in Latin America: How Does the Inter-American Human Rights System Reshape Domestic Constitutional Rights?' in Pedro Rubim Borges Fortes et al (eds) *Law and Policy in Latin America: Transforming Courts, Institutions and Rights* (Palgrave Macmillan UK, 2017), 21-38.
[42] Frederic G Sougens, 'Functions of Freedom: Privacy, Autonomy, Dignity, and the Transnational Legal Process', (2015) 48 *Vanderbilt Journal of Transnational Law* 471.
[43] Naoko, Kumugai, 'Norm Internalization through Transnational Legal Process: The Case of Individual Compensation for the Former Wartime Comfort Women' (2011) *Conference Papers -- American Political Science Association* 1.

the norm requiring investigation and prosecution of international crimes of sexual violence. Preliminary examinations are chosen as the context for enquiry for several reasons, including that they offer a first opportunity for the OTP to 'act as a catalyst for national proceedings';[44] and are also the 'place where the Court can exercise the greatest influence on national prosecutions'.[45] TLP proposes that repeated interactions between various stakeholders give rise to norm interpretations that promote the legal, social and political internalisation of an international norm. TLP regards complete internalisation as the optimal form of State compliance with the norm because compliance is voluntary rather than instrumental (i.e., to avoid negative consequences, such as sanctions, or to attract positive consequences, such as improved relations with other States or international entities).[46]

As Chapter 2 sets out, TLP is both explanatory and predictive, and is based on the premise (accepted in this thesis) that '[i]f our goal is better enforcement of global rules, . . . voluntary obedience [that is, internalisation], not coerced compliance, must be the preferred enforcement mechanism'.[47] The goal of complementarity epitomises this approach, that is, that States voluntarily prosecute international crimes nationally so that the 'enforcement mechanism' of ICC prosecutions is rendered unnecessary.[48] Thus, TLP is a useful framework within which to test whether and how the OTP operates or could operate to promote internalisation of the norm obliging investigations and prosecutions of international crimes.

According to TLP, internalisation occurs across legal, political and social dimensions. This approach captures the different types of changes necessary to achieve genuine national proceedings for gender-based violence such as sexual violence[49] such as substantive and procedural law reform (legal internalisation), prosecutorial policies and codes of conduct (political internalisation), and

[44] ICC-OTP, above n 32, 10.
[45] Seils, above n 33, 309; Chapter 5.1.
[46] Harold Hongju Koh, 'How Is International Human Rights Law Enforced?' (1999) 13 *Indiana Law Journal* 1397, 1400-1401.
[47] This goal is also accepted by Thomas Franck, the Chayeses and social psychologists studying individual obedience to law: see Harold Hongju Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) 106 *The Yale Law Journal* 2599, 2645.
[48] ICC-OTP, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003) 4.
[49] Koh, above n 47, 2627.

enforcement measures to ensure they are adhered to (social internalisation). Thus, TLP captures aspects of how the OTP's approach to positive complementarity in preliminary examinations could lead to prosecutions when the barriers are not only formal legal ones but also include how criminal justice actors think and behave. This is not typical of other compliance theories in international law, which tend to assume compliance and/or fail to consider non-legal reasons for non-compliance.[50]

Finally, Koh claims that norm internalisation into domestic legal systems occurs because of repeated cycles of a three-phase process of 'interaction-interpretation-internalisation'.[51] Such processes characterise preliminary examinations, which provide the first opportunity for the OTP to directly catalyse genuine national proceedings without initiating an ICC investigation. During preliminary examinations, the OTP expresses what actions are required to comply with the norm in norm-interpretive interactions with stakeholders on a recurring basis. [52]

Accordingly, the thesis explores how the OTP's behaviour in two States under preliminary examination – Colombia and Guinea – can be understood in TLP terms. That is, whether and how the OTP's norm interpretations in its engagement with other stakeholders promote, or could better promote, legal, social and political internalisation of the norm obliging investigations and prosecutions for international crimes of sexual violence.

The TLP approach does, however, have limitations in measuring the extent of norm internalisation and, importantly, in its gender neutrality: these are discussed further in Chapter 2.3. The empirical research in Colombia and Guinea seeks to overcome

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[50] Note that Koh also assumes international norms *are* internalised, even if they are at odds with the self-interests of the State: Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90(6) *California Law Review* 1825, 1835-1836; Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds) *Handbook of International Relations* (Sage Publications, 2002) 540-558; Roda Mushkat, 'Dissecting International Legal Compliance: An Unfinished Odyssey' (2013) 38 *Denver Journal of International Law and Policy* 161, 175.

[51] In his 1998 Frankel Lecture, Koh identified four phases: interaction, interpretation, internalisation, and obedience, but in his later works he refers to the first three phases only: Koh, above n 38, 1399; Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24(4) *Pennsylvania State International Law Review* 745, 747.

[52] Chapter 5.1; ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) 10 <http://www.icc-cpi.int> ('*PEX Policy*').

the first limitation by triangulating different data sources to determine changes in norm internalisation in the two countries over time. To address the second limitation, I draw on feminist legal theories (without adopting one specific framework) and rely on research that establishes that a gender-sensitive approach is required to respond effectively to a gender-based challenge, such as impunity for sexual violence.[53]

3. Key conceptual definitions

This section defines the key concepts used throughout the thesis. First, the term **'norm'** is used throughout the thesis 'in a generic sense to include a broad class of generalised prescriptive statements – principles, standards, rules, and so on – both procedural and substantive'.[54] A 'norm' generally denotes a standard of appropriate behaviour for actors with a given identity.[55] This definition comprises both intersubjective and evaluative components; the community of which the actor is a member judges what is appropriate and praises norm-conforming behaviour while norm-breaking behaviour generates criticism, disapproval or stigma.[56] A highly internalised norm is so taken for granted that compliance with it provokes no community reaction because it is expected.[57]

The transition from one standard of appropriate behaviour to another necessarily involves interaction or contestation between norms. Accordingly, one foundational premise for this analysis is that 'new norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interest'.[58] This is particularly relevant to the

[53] See e.g. Barbara Bedont and Katherine Hall-Martinez, Ending Impunity for Gender Crimes Under the International Criminal Court (1999) 6 *Brown Journal of World Affairs* 65, 66; Fionnuala Ní Aoláin, 'Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies' (2009) 35 *Queen's Law Journal* 219, 232.
[54] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998) 48.
[55] PJ Katzenstein (ed), *The Culture of National Security* (Columbia University Press, 1996), 5; Martha Finnemore, 'Norms, Culture, and World Politics: Insights from Sociology's Institutionalism' (1996) 50(2) *International Organization* 325, 347; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 891; Kathryn Sikkink, *The Justice Cascade* (W.W. Norton & Company Ltd, 2011), 11.
[56] Finnemore and Sikkink, above n 55, 892.
[57] Ibid.
[58] Ibid 897.

sexual violence accountability norm, which may challenge socio-cultural national norms of tolerating impunity for sexual violence.

According to compliance theories, international norms set standards of behaviour for States, but their influence is necessarily filtered through domestic structures and norms, which can 'produce important variations in compliance and interpretation of these norms'.[59]

The more specific term **'legal norm'** is understood here as a norm that contains legal obligations and/or behavioural prescriptions issued by a legally authoritative source or articulated in a written international legal instrument, whether or not such prescriptions are backed by a dispute settlement or other enforcement system.[60] An international legal norm may or may not be an expression of a pre-existing (general) international norm. This thesis uses the term **'robustness'** to refer to a norm's rate of compliance; the more States that comply with a norm, the more robust it is. This nomenclature acknowledges that non-compliance by States is not always fatal to the existence of the norm, but that rates of compliance reflect a norm's relative weakness or strength. There is inevitably a period of indeterminacy when a new norm is emerging or nascent as to whether it has crystallised into a norm or has yet to attain norm status.[61]

The **key international legal norm** for this thesis is understood in the terms of the Preamble of the Rome Statute, although, as Chapter 2 discusses, the norm itself is sourced elsewhere. That is, it is 'the duty of every State to exercise its criminal

[59] Finnemore and Sikkink, above n 55, 893.
[60] Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) *Law and Social Inquiry* 229, 234.
[61] 'If a critical number of states share the same belief and practice, it may crystallize as a norm of customary international law, irrespective of the normative desirability of such as a norm': Cedric Ryngaert, 'Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations' in Morten Bergsmo (ed), *Complementarity and Exercise of Universal Jurisdiction for Core International Crimes* (2010), 165-200, 181. See also Harold Hongju Koh, 'Is International Law Really State Law?' (1998) 111 *Harvard Law Review* 1824, 1835. However, on how the ICC undercuts the expectations to discharge such a responsibility, which is yet to crystallise into a norm, see Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013), 344. However, Nouwen highlights the importance of State *acceptance* of the norm to its crystallization compared to State *compliance* with the norm.

jurisdiction over those responsible for international crimes'.[62] For the purposes of this thesis, the focus is on sexual violence crimes *committed* as war crimes, as crimes against humanity and as genocide. However, as discussed in Chapter 3, compliance with this norm does not require their *prosecution* as international crimes, since prosecuting conduct under OTP scrutiny as a national crime is sufficient to give rise to inadmissibility before the ICC.

Throughout the thesis, the norm requiring (or obliging) the State to genuinely investigate, prosecute and punish international crimes of sexual violence is referred to as the 'relevant' norm, or the **'sexual violence accountability'** norm. The phrases 'exercising criminal jurisdiction', 'investigating and prosecuting international crimes' or 'prosecuting international crimes' are all used to denote genuine investigation, prosecution and punishment by national criminal justice actors. However, the norm implicitly includes the proper exercise of discretion to discontinue an investigation or prosecution, or outcomes other than convictions (such as acquittals or partial acquittals) not attributable to inability or unwillingness.[63] Under the Rome Statute, *genuine* exercise of discretion resulting in any outcome other than a conviction may still constitute compliance with the norm.

Turning to other key terms, the distinction between sex and gender is integral to understanding the nature, intention and effects of violence perpetrated on either basis. While **sex** denotes the biological characteristics of men and women, **gender** refers to the 'socially constructed roles, behavio[u]rs, activities and attributes that a given society considers appropriate' based on an individual's assigned sex.[64] 'Gender draws attention to aspects of social relations that are culturally contingent and without foundation in biological necessity'.[65] The Rome Statute defines gender

[62] *Rome Statute*, Preamble [6].
[63] *Rome Statute*, art 17(1)(b).
[64] World Health Organisation, *Gender, Women and Health,* http://www.who.int/gender/whatisgender/en/. This definition is considered more appropriate than the Rome Statute definition, which is criticised as being a compromise between various parties participating in the drafting process in Rome: see Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court' (2014) 16(4) *International Feminist Journal of Politics* 563.
[65] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester United Press, 2000) 3.

more restrictively as 'the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above'.[66]

The Rome Statute does not define the phrase 'gender-based violence', so I use the definition of **gender-based crimes** contained in the 2014 OTP Policy Paper on Sexual and Gender-Based Crimes (SGBC Policy). These are crimes 'committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender'.[67] The distinction between gender-crimes and the narrower category of '**sexual violence crimes'** or '**sexual crimes'** is important, even though the focus of national and international criminal justice efforts, and therefore of this thesis, is on sexual violence crimes.[68]

Sexual violence in this thesis is defined according to the ICC Elements of Crimes, which define 'any other form of sexual violence' as:

> . . . an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.[69]

The term **'gender perspective'** is used as per the OTP SGBC Policy to mean an 'understanding of differences in status, power, roles and needs between males and females, and the impact of gender on people's opportunities and interactions'.[70] The

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[66] *Rome Statute* art 7(3). For a critique see Oosterveld, above n 51.
[67] ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) 3 https://www.icc-cpi.int/iccdocs/otp ('*SGBC Policy*').
[68] I acknowledge the problems inherent with this limited focus in Chapter 2.1.1.3.
[69] *Rome Statute* art 7(1)(g); (8)(2)(b)(xxii); 8(2)(e)(vi). Note that this international criminal definition is narrower than that proposed by the World Health Organisation in 2002, which is used more generally: 'any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or act to traffic, or otherwise directed at a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work': Etienne G. Krug et al, *World Report on Violence and Health* (2002) 149 <http://www.who.int/violence_injury_prevention/violence/world_report/chapters/en/>.
[70] ICC-OTP, above n 54, 3.

OTP SGBC Policy also defines the phrase **'gender analysis'** to mean examining 'the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes'.[71]

Adopting a gender perspective and using a gender analysis to understand sexual violence as a gender-based crime informs the '**gender-sensitive' approach** of the thesis, which focuses on sexual violence crimes against women and girls. This focus is grounded in feminist legal theory and literature, which recognises the relationship between criminal legal systems and broader structural gender inequalities, particularly in post-atrocity societies.[72] Broadening the enquiry to sexual violence committed against men, boys and non-cisgender groups would require independent gender analyses and interviewee groups for each of these categories, and is beyond the scope of the thesis. Chapter 2 applies a gender analysis to compliance theories of international law and to the engagement between States and international institutions that promote internalisation of international norms. Feminist critiques of criminal justice responses to gender-based violence inform Chapter 3's identification of challenges to achieving compliance with the sexual violence accountability norm. Chapter 4 acknowledges the implications of complementarity as a gender-neutral principle and how it intersects with the gender mandate of the ICC. The final four chapters apply a gender perspective to the analysis of preliminary examinations in Colombia and Guinea that generates recommendations for a range of actors to promote compliance with the sexual violence accountability norm.

The concept of a **regime** can be generally understood as 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international law'.[73] The **international**

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[71] Ibid 4.

[72] UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52-54 <http://www.unwomen.org >; Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'International and Local Criminal Accountability for Gendered Violence' in Ní Aoláin, Dina Haynes and Naomi Cahn (eds) *On the Frontlines: Gender , War , and the Post-Conflict Process* (Oxford University Press, 2011), 152-174, 165, 174; Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425, 431

[73] Stephen D. Krasner, *International Regimes* (Cornell University Press, 1983) 2.

criminal law regime comprises enforcement by municipal, regional and international courts or tribunals.[74] The phrase '**ICC treaty regime'** denotes the institution of the ICC seated in The Netherlands, activities of ICC organs, ICC constitutive documents and the principles, as well as norms and obligations contained within those documents. It also includes documents issued by the Assembly of States Parties (ASP), the Bureau of the Assembly and the Conferences of State Parties, because these contain institutional positions that determine or influence the ICC's operation. For clarity, this thesis uses the term OTP, unless the reference is to the ICC as an institution, in which case, 'ICC' or 'the Court' is used.

Compliance is used generally throughout the thesis to refer to norm-consistent State behaviour, irrespective of motives or reasons. However, when Koh's TLP framework is specifically discussed, compliance is used to denote State behaviour that is compliant (or consistent) with international norms for instrumental reasons (i.e., to avoid punishment or gain rewards), rather than because the international norm has been legally, politically and socially internalised (which Koh terms obedience or internalisation). With respect to the sexual violence accountability norm, compliance is achieved if national criminal justice actors effectively investigate, prosecute and punish international crimes of sexual violence. Since the relevant norm relates exclusively to national criminal processes, behaviour of the general public may influence, but is not constitutive of, internalisation.

Typically, international criminal prosecutions occur after conflict, or after a period of repression or a situation of serious human rights violations. While Colombia is considered a post-conflict context, the OTP's preliminary examination in Guinea focuses on large-scale human rights violations committed over a short time period rather than as an ongoing characteristic of a repressive regime. For this reason, the thesis uses the term '**post-atrocity'** to refer to the contexts in which national proceedings for international crimes occur. **'ICC situation countries'** denotes those under ICC investigation; '**the OTP'** and '**the Prosecutor'** are used interchangeably when referring to actions of the Office of the Prosecutor under the Rome Statute;

[74] Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (Cambridge University Press, 2005) 125-127.

however, there are some instances where 'the Prosecutor' refers to the individual holding the position of Prosecutor of the ICC.

'Catalysis,' or more specifically, the OTP's catalytic effect, is at the core of both the theoretical and empirical enquiries in this thesis. In scientific terms, catalysis is understood as the causing or accelerating of a chemical reaction by using a catalyst; in non-scientific terms, it is an action between two or more persons or forces, initiated by an agent that itself remains unaffected by the action.[75] In this context, it is the process of initiating or accelerating State compliance with the sexual violence accountability norm. However, as both Chapter 1.3 and Chapter 2 acknowledge, *proving* that the OTP's preliminary examination is *the* cause (that is, an exclusive direct causal relationship) for the existence or amelioration (quantitatively and qualitatively) of national proceedings relating to international crimes of sexual violence is methodologically challenging.[76]

Instead, the thesis triangulates historical, documentary and subjective data on international crimes committed in Colombia and Guinea, and events occurring during preliminary examinations, to determine whether the OTP's scrutiny and engagement may be *a* cause or contributing factor to catalysis of compliance with the sexual violence accountability norm. The data establishes a pre-existing track record (a baseline) of State responses to international crimes and crimes of sexual violence, as well as changes constituting or promoting the legal, political and social internalisation of the sexual violence accountability norm during the preliminary examination. Based on this data, it is possible to infer whether State responses to international crimes improve from the 'baseline' after they become subject to a preliminary examination.

Complete catalysis would be reflected in total legal, political and social internalisation of the sexual violence accountability norm, that is, high quality

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[75] Dictionary <http://www.dictionary.com/browse/catalysis>.

[76] This is another aspect of the thesis that benefits from feminist literature that identifies the need to actively search for 'silences': see Charlesworth, above n 10, 162-164; see e.g. Christine Chinkin and Hilary Charlesworth, 'Building Women into Peace: The International Legal Framework' (2006) 27(5) *Third World Quarterly* 937, 940, 942. In this case, the 'silence' is the prior lack of proceedings for sexual violence crimes.

investigations and proceedings and an increased number of convictions and adequate sentences (see Chapter 1.2 above). However, it is suggested here that any improvement in either proceedings or outcomes from what could reasonably be inferred as a baseline State response, which the evidence (including empirical data) indicates is partly attributable to the OTP, reflects some level of its catalytic impact.

The term '**criminal justice actors'** refers to individuals and institutions involved in criminal investigation, prosecution and trial processes, including but not limited to police officers, prosecutors, medical respondents, representatives of State protection and/or support services, judges, representatives of the Ministry of Justice engaged with the criminal justice system and the military police. The term '**national courts**' is used here interchangeably with the term '**domestic courts**' to encompass all judicial organs, including military courts, in the domestic legal order. Similarly, the terms '**national crimes'** and **'domestic crimes'** indicate crimes sourced in national criminal legislation, as opposed to 'international crimes' derived from international law (which can nevertheless be prosecuted in national courts once they are incorporated into national law). There is an additional complication because compliance with the norm regarding international crimes of sexual violence is considered achieved by ICC organs even if prosecuted as national crimes. Accordingly, references to prosecuting international crimes of sexual violence refer to conduct that satisfies the constituent elements of an international crime (*prima facie*), regardless of whether it is characterised and prosecuted as an international or national crime.

4. Methodology

Given the focus on the OTP's potential catalytic effect, it is important that this thesis also responds to compliance theorists' calls for empirical data to better understand patterns and predictors of compliance with international norms.[77] It therefore

[77] Harold Hongju Koh, 'Internalization through Socialization' (2005) 1(54) *Duke Law Journal* 975, 981; Thomas Risse and Kathryn Sikkink, 'Conclusions' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013)('*Persistent Power*') 275-295, 276.

surveys and builds on existing relevant empirical research on human rights prosecutions and on the catalytic effect of the ICC.[78]

The thesis used a qualitative case-study socio-legal research methodology, including empirical research, to explore the research questions described in Chapter 1.2. Qualitative research, which uses data sources such as direct observations, in-depth interviews and document analysis, is useful for identifying the presence or absence (rather than the extent) of a phenomenon; and for answering 'how' and 'why' questions through in-depth analysis in the field, where the researcher has little control over the situation.[79] Although generally associated with social science, a qualitative methodology was appropriate here because the focus was on *how* and *why* the sexual violence accountability norm was internalised or not (see Chapter 2.4.2).

A case-study strategy was appropriate because the thesis investigates 'a contemporary phenomenon within its real-life context'.[80] The thesis also employed a doctrinal legal research methodology in its analysis of international legal instruments, national laws, cases, rules, principles, norms, interpretive guidelines and values[81] to determine the extent of legal internalisation. Finally, empirical field research was used to accurately assess the OTP's catalytic effect vis-à-vis the sexual violence accountability norm compliance as reported and experienced by individuals engaging with the national criminal justice systems.

The preliminary examination phase was chosen because it is characterised by norm-interpretive interactions between a range of stakeholders and broad OTP discretion,

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[78] Kim and Sikkink, above n 6; Geoff Dancy and Kathryn Sikkink, 'Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance' (2012) 44 *NYU Journal of International Law and Politics* 751; Sarah Nouwen, above n 61, 8; Geoff Dancy and Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions* (2016) <http://www2.tulane.edu/liberal-arts/political-science/upload/Dancy-and-Montal-Unintended-Positive-Complementarity-AJIL.pdf>.

[79] Lisa Webley, *Qualitative Approaches to Empirical Legal Research* (2010) 15.

[80] Robert K. Yin, *Case Study Research Design and Methods* (Sage Publications, 2nd ed, 1994) 13.

[81] These are all elements of 'doctrine': Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2010) 197.

making it 'one the most powerful policy instruments of the OTP'.[82] Using two relatively heterogeneous contexts for cross-case analysis reduces contextual similarities but provides data and patterns capable of providing more robust conclusions to the research questions.[83] Both Colombia and Guinea accept the legitimacy of ICC scrutiny and their responses during the preliminary examination phase demonstrate their desire to avoid the 'sovereignty costs'[84] of a formal ICC investigation. In both jurisdictions, the commission of sexual violence as an international crime and the national criminal justice system's failure to prosecute sexual violence as national crimes are well documented.[85] Finally, both preliminary examinations span several years, with the result that there are several iterations of norm-interpretive interactions, and their effects, to observe.

The existence and extent of any catalytic effect is explored through secondary and primary research as described in Chapter 2.4.2 and current at 31 October 2017. Specifically, the thesis looked for changes that TLP would deem to be indicators of legal, political and social internalisation; that is, changes identified in Chapter 2.2.1 which are known to facilitate effective investigation and prosecution of sexual violence crimes. The interview data provided insights into the types of interactions occurring between a range of stakeholders, as well as perceptions of their effects and the treatment of cases of sexual violence by criminal justice actors within the scope of the preliminary examination. This methodology enabled comparative analysis between stakeholder observations and experiences, and documentary evidence about the commission of international crimes and their investigation. Most importantly for testing TLP's explanatory value, the socio-legal research approach

[82] Carsten Stahn, 'Damned If You Do, Damned If You Don't' (2017) *Journal of International Criminal Justice* 1; see also Chapter 5.1.
[83] John Gerring, 'The Case Study: What it is and What it Does' in Robert E Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 1133, 1151.
[84] These are the symbolic and material costs of diminished autonomy: Kenneth Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (2004) 36 *Studies in Transnational Legal Policy* 127; Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law' (2000) 54(3) *International Governance* 37.
[85] Chapters 5.1; 61; 6.3. See for a summary 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' (2013) 7(3) *International Journal of Transitional Justice* 455, 464-473.

captures important non-legal phenomena[86] essential to understanding whether, why and to what extent the sexual violence accountability norm is internalised in each context. The next section identifies some of the other consequences of the chosen methodology.

5. Qualifications, impetus and limitations

Significant research has established that legal systems are at best structurally 'gender-blind' or 'gender-neutral', but normally systemically patriarchal.[87] This is true of both Colombia and Guinea.[88] Gender-blind legal responses, including criminal prosecutions, are characterised by their assumption of gender neutrality in the issues and communities they attempt to regulate and by their failure to conduct a gender analysis. This explains their historical failure to respond adequately to gender-based crimes such as sexual violence, at both the national and international level.[89]

This thesis acknowledges there are valid feminist critiques of criminal justice responses to gender-based violence, including sexual violence, and that '[t]he criminal law has always been a contradictory site for feminist activism'.[90] Despite the progressive definitions in the Rome Statute, this remains the case in the ICC regime.[91] Such critiques temper our expectations of what prosecutions can deliver

[86] See Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005).
[87] For a discussion on how this permeates national constitutional laws see Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'Law Reform, Constitutional Design, and Gender' in *Frontlines*, 197-225, 197, 198, 206, 217; Charlesworth, above n 10, 180.
[88] Chapter 6.2.2.1 and Chapter 6.3.3.1.
[89] Ní Aoláin, Haynes and Cahn, above n 72, 212, 219.
[90] Some critiques suggest that focusing on improving international institutions may be at the expense of 'staking out more transformative claims' such as the 'peacetime' challenges of access to justice and equality: Vasuki Nesiah, 'Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption to Feminism' in Sari Kouvo and Zoe Pearson (eds) *Feminist Perspectives on Contemporary International Law* (Hart Publishing, 2011) 137-158, 151; Kiran Grewal, 'Rape in Conflict: Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 *Australian Feminist Law Journal* 57; Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11(3) *International Criminal Law Review* 409, 409.
[91] These reasons include a binary focus on the guilt or innocence of the individual perpetrator, the consequent erasure of the social context and exclusion of a range of gender-based harms, essentialising of the victims and harm caused; a failure to attribute responsibility to enabling social structures; trial procedures: Naomi Cahn, 'Beyond Retribution: Responding to War Crimes of Sexual Violence' (2005) 1 *Stanford Journal of Civil Rights & Civil Liberties* 217; Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing, 1998) 23; Rhonda Copelon, 'Surfacing Gender:

for women victims, and how much the OTP could realistically achieve in catalysing their improvement. Chapter 3 explores how historically-based inadequate criminal justice responses to sexual violence, both nationally and internationally, contribute to continuing impunity for such crimes generally.

Notwithstanding these significant limitations, a key premise of the thesis is that national prosecutions of sexual violence crimes offer important specific and unique value to victims and the broader community, so that improving their quality, number and efficacy is an inherently worthwhile goal. Further, challenging impunity for such crimes, like for other crimes, is expected to contribute to their reduction and prevention in the future.[92] Indeed, women in post-atrocity contexts consistently demand criminal prosecutions for sexual violence, even when other remedies for human rights violations exist and have been implemented.[93] Criminal prosecutions cannot in themselves challenge structural gender inequalities across political, economic and social spheres that facilitate the commission of sexual crimes.[94] However, criminal trials, convictions and sentences for these crimes are perceived as important to establish an official record and institutional condemnation of violence that may have been previously tolerated, to hold perpetrators accountable and deter future perpetrators, and to provide survivors with a voice to denounce the crimes and physical safety from perpetrators.[95] Conversely, impunity for sexual

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Reconceptualizing Crimes against Women in Times of War' in Lois Lorentzen and Jennifer Turpin (eds), *The Women and War Reader* (New York University Press, 1998), 73; Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'International and Local Criminal Accountability for Gendered Violence' in Ní Aoláin, Dina Haynes and Naomi Cahn (eds) *On the Frontlines: Gender , War , and the Post-Conflict Process* (Oxford University Press, 2011) ('*Frontlines*') 152-174, 153; Carine M Mardorossian, 'Toward a New Feminist Theory of Rape' (2002) 27(3) *Signs* 743, 749.

[92] *Rome Statute*, Preamble [6].

[93] See e.g. Patrick Vinck, *Living in Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo* (August 2008), 40–41 <http://www.law.berkeley.edu/HRCweb/pdfs/LivingWithFear- DRC.pdf>; Advocats Sans Frontières, *Lieutenant-Colonel Mutware (DRC) sentenced to 20 years imprisonment* (27 April 2011) <http://www.asf.be/blog/2011/04/27/lieutenant-colonel-mutware-drc-sentenced-to-20-years-imprisonment/>.

[94] UN, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (2014) <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>. See also Amrita Kapur, 'The Value of International-National Interactions and Norm Interpretations in Catalysing National Prosecutions of Sexual Violence' (2016) 6(1) *Oñati Socio-legal Series* 62, 67.

[95] Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425, 440; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Simon Chesterman, 'Never Again... and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond' (1997) 22(2) *Yale Journal of International Law* 299, 311-317. *Prosecutor v Kunarac*

violence compounds both the harms it has caused and the enduring sense of injustice, especially if there are prosecutions, convictions and sentences for other types of crimes.

Punishing sexual violence crimes also has broader societal benefits, which are amplified in post-atrocity contexts characterised by generalised rupturing of social relations and the need to 'rebuild' communities, and 'build' peace. Women play a critical role in post-conflict rebuilding; the continuing threat to physical integrity posed by impunity for sexual violence crimes jeopardises women's capacity to contribute to social reconstruction on an equal footing.[96]

In my focus on the ICC as an international institution capable of encouraging national proceedings, two qualifications should be noted from the outset. First, the Rome Statute's goal of ending impunity for perpetrators of the 'most serious crimes'[97] challenges historical practice. Typically, punishing those 'most responsible'[98] (those with the legal, economic and political power to plan and commit atrocities) has been the exception rather than the rule.[99]

This naturally limits the current enquiry to contexts in which the OTP *could* increase its influence on national proceedings. It necessarily excludes countries that are not Parties to the Rome Statute, that appear to be largely impervious to OTP influence, such as Kenya, or that have already indicated their preference for ICC investigations over national proceedings, such as Uganda, the DRC and the Central African Republic (CAR). Exploring how positive complementarity has operated or could operate where there is a division of labour (cases) between the ICC and State prosecutors, or in response to a hostile State, is not the focus of this research. While Chapter 4 acknowledges the critiques of the OTP's approach to positive complementarity, the

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(Transcript) International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos. IT-96-23-T and IT-96-23/1-T (30 March 2000) 1391 and (3 April 2000) 1501.

[96] SC Res 1325, UN SCOR, 4213th mtg UN Doc S/RES/1325 (31 October 2000) ('*Resolution 1325*'); *Resolution 1820*; Vinck, above n 93.

[97] *Rome Statute*, Preamble [4].

[98] See PEX Policy, above n 43, 3; ICC-OTP, above n 32, [22]; ICC-OTP, *Report on Preliminary Examination Activities 2013* (2013), 3.

[99] See Chapter 4.2. *Cf* Caitlin Reiger and Ellen Lutz (eds), *Prosecuting Heads of State* (Cambridge University Press, 2009).

thesis focuses on empirically testing its impact vis-à-vis international crimes of sexual violence in a context of formal State acceptance of the OTP's scrutiny and discretion to open an ICC investigation.

Second, the ICC's method of achieving its goal is indirect. Rather than physically stopping or preventing perpetrators from committing the crimes,[100] the ICC regime is designed to guarantee their post-facto punishment, either domestically or at the ICC, the achievement of which is in turn intended to help prevent international crimes.[101] However, without an express obligation on the part of States to incorporate Rome Statute crimes, procedures and principles into national law, it becomes more difficult to achieve and measure implementation of this guarantee. This is particularly the case since individual nations' laws, procedures and practices inevitably vary significantly from those of the ICC, and the ICC does not have a mandate to review national legal systems.[102] Post-atrocity national legal systems cannot be expected to match international criminal justice standards that have been developed largely through multi-million-dollar ad hoc tribunal projects. Thus, determining standards of acceptable justice to prevent such crimes is further complicated by the absence of a contextually relevant national benchmark. On the other hand, context-specific assessment of national proceedings creates space for the OTP to identify strategies to overcome the State-specific barriers to norm compliance on a case-by-case basis.

As Chapter 2.4.2.2 explains, the current research is limited to publicly available data and interviewee responses and does not include confidential norm-interpretive interactions. Relatedly, perceptions by actors (particularly non-State actors) as to motivations for State action or inaction (e.g. unwillingness) could not always be empirically tested or compared to statements from the relevant State actors.

[100] The term 'committing' in this context includes indirect forms of criminal responsibility for which individuals can be prosecuted such as aiding, abetting, joint criminal enterprise and command responsibility.
[101] *Rome Statute*, Preamble [4].
[102] Mahmoud Cherif Bassiouni and Douglass Hansen, 'The Inevitable Practice of the Prosecutor' in Mahmoud Cherif Bassiouni and Douglass Hansen (eds) *Contemporary Issues Facing the International Criminal Court* (2016) 309-325, 310.

Finally, proving empirically that national prosecutions are the result of interactions during a preliminary examination is notoriously difficult in such complex circumstances.[103] Existing empirical research on prosecutions of human rights violations has tended not to 'specify adequately the mechanisms by which global norms impact national and local actors,'[104] or the timing and degree of international influence.[105] Further, it is hard to infer motives from statistical correlations,[106] and States rarely express their motives for compliance explicitly.

Although examining specific processes in preliminary examinations aims to remedy this gap, the same limitations apply. While some objective facts allow inferences of partial causality to be drawn, these inferences are mediated by a range of independent variables and based, at least partly, on stakeholder perceptions rather than objective measurements. Moreover, the extent to which the findings are generalisable can only be determined through further research. Nevertheless, the empirical data provides a basis for both analysis and recommendations to enhance the OTP's impact on national proceedings relating to sexual violence within the scope of its preliminary examinations.

6. Intended contributions

Consistent with qualified results from other empirical research on the ICC's catalytic effect,[107] this thesis demonstrates that OTP engagements in preliminary examinations improve national investigations and prosecutions of international crimes of sexual violence, but only under certain conditions.

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[103] While this is the first empirical research on this particular relationship, the problem of attributing change in States' human rights practices to their accession to treaties compared to other political and economic factors is well established: Margaret E. McGuinness, 'Exploring the Limits of International Human Rights Law' (2005) 34 *Georgia Journal of International and Comparative Law* 393, 418. See e.g. Beth A Simmons, 'From Ratification to Compliance: Quantitative Evidence on the Spiral Model' in *Persistent Power*, 43-60, 43; see also Katherine Pistor, 'Launching a Global Rule of Law Movement: Next Steps November 10, 2005,' (2007) 25 *Berkeley Journal of International Law* 100, 103 (arguing the need for indicators capable of measuring processes).

[104] Ryan Goodman and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law: A Rejoinder to Roda Mushkat' (2009) 20(2) *European Journal of International Law* 443, 443.

[105] Sonia Cardenas, 'Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior' (2004) 6 *International Studies Review* 213, 213.

[106] Simmons, above n 103, 47.

[107] See above footnote 78. But on how complementarity's catalytic effect is compromised, see Nouwen above n 61, 337-405.

Drawing on feminist research, TLP was predicted to have limited explanatory value regarding internalisation of the sexual violence accountability norm because of its gender neutrality. Since international law is both built upon and reinforces gendered and sexed assumptions,[108] it is not surprising that a gender-neutral theory's account of State compliance has limited explanatory value vis-à-vis a gendered norm.

Chapters 5 and 6 apply a gender analysis to the research and suggest why TLP's explanation is not comprehensive as part of a broader explanation of the data. Chapter 7 suggests how the OTP, by varying its approach and therefore its interactions, can affect trends and practices of national justice systems in relation to sexual violence crimes. Understanding how pre-existing impunity and norms with respect to sexual violence are embedded in a broader gendered context is essential to overcoming the challenges to internalisation of the sexual violence accountability norm. Feminist critiques and the empirical data both suggest that explicitly articulating what action constitutes norm compliance vis-à-vis sexual violence crimes may enhance the impact of the OTP's implementation of positive complementarity; they also highlight factors that may limit this impact.

This thesis offers **three significant original contributions** building on research examining the catalytic effect of the ICC (and specifically the OTP), and on research that examines the gender dimension of ICC activities. **First**, the thesis applies TLP to demonstrate the process of norm internalisation within the ICC treaty regime.[109] The results mandate a gender-sensitive application of TLP to adequately explain when, and under what conditions, a gender-based international norm will be internalised by States. This suggests that compliance theories more generally must be gender-sensitive if they are to contribute to our understanding of, and capacity to, induce State compliance to gender-based international norms effectively.

[108] Charlesworth and Chinkin, above n 65.

[109] Note that this information does appear in previous publications drawn from the research for this thesis, e.g. Kapur, above n 94. *Cf* Joanne Lee, *The International Criminal Court State Cooperation Regime: Current Controversies in Historical and Theoretical Context* (PhD Thesis, Australian National University, 2012) on State cooperation in ICC investigations and prosecutions.

The **second** contribution builds on the first; the thesis offers a theoretical explanation, based on TLP, of how the OTP does or could promote State compliance with the sexual violence accountability norm. Its empirical findings go further, by demonstrating that gender-neutral norm interpretations will fail to promote internalisation of the sexual violence accountability norm. Although the OTP is one of several international institutional actors operating in complex socio-political and legal contexts, it nevertheless plays a unique role in articulating to State actors what action constitutes fulfilment of their obligation to exercise criminal jurisdiction over international crimes. The OTP also determines under what circumstances the failure to fulfil this obligation will trigger its intervention under the Rome Statute. Thus, a better understanding of the processes by which internalisation is achieved will influence how well the OTP can achieve its goal of positive complementarity.

Third, the empirical findings indicate both the perceived and potentially material impact of the OTP's engagement in preliminary examinations in Colombia and Guinea on national investigations and prosecutions of sexual violence. As the first qualitative empirical study to test a compliance theory from a gender perspective, these results are also significant for the explanatory power of other compliance theories. The data demonstrates that, notwithstanding other actors and variables, only when the OTP expresses specific concerns about impunity for sexual violence crimes do national criminal justice actors address them. This is consistent with feminist critiques of international and national criminal justice responses to sexual violence. The findings also confirm that gender-neutral compliance theories will necessarily limit our understanding of how internalisation of the sexual violence accountability norm can be maximised. Finally, the research suggests there may be indirect effects of the OTP's engagement in norm interpretations, such as increased political and legal space to demand and achieve gender-related criminal justice reform, and more general gender-focused improvements within and beyond the legal system.

7. Overview of thesis

This thesis is divided into eight chapters. Chapter 2 explores how the TLP's description of how international norms are internalised into national practices

through repeated cycles of norm-interpretive interactions explains the OTP's conduct during preliminary examinations. The chapter draws on the significant body of feminist research critiquing international law to foreshadow TLP's limitations as a gender-neutral compliance theory. The final section of Chapter 2 outlines the methodology used to conduct the empirical research, including the field research in Colombia and Guinea.

Chapter 3 first traces the inherent and historical inadequacies of national criminal justice responses to sexual violence before exploring the extent to which these are mirrored or have been overcome in international criminal law, including in the Rome Statute and the ICC's institutional features. It describes how these developments, and continuing challenges, have manifested in the ICC's practice with respect to crimes of sexual violence. Chapter 4 discusses complementarity and its potential to challenge impunity for international crimes. It describes the origins and evolution of complementarity, including both the ICC jurisprudence and the OTP's developing conception and practice of positive complementarity, including in relation to crimes of sexual violence.

Chapter 5 narrows the focus to the legal framework for preliminary examinations and the OTP's developing interpretation and implementation of its role during this phase. The chapter also traces the preliminary examinations conducted in Colombia and Guinea with a specific focus on sexual violence crimes. Chapter 6 describes and analyses the empirical research findings in Colombia and Guinea, including the extent to which legal, political and social internalisation occurred during the preliminary examinations, and the OTP's contribution to these developments.

Chapter 7 identifies common themes arising from the empirical case study research that suggest how to maximise the impact of norm interpretations during preliminary examinations, including on national proceedings for sexual violence crimes. Chapter 8 identifies the contributions made to TLP as well as compliance and empirical literature more generally and contextualises the findings within the compliance literature, before making empirically-based recommendations for the OTP to enhance its catalytic impact. It concludes by highlighting the importance of

gender to both compliance literature and the OTP's implementation of positive complementarity before considering directions for future research.

This thesis is an exploration of compliance with the international legal norm requiring States to investigate and prosecute international crimes of sexual violence within their jurisdiction. Through empirical research in Colombia and Guinea it examines whether and how OTP scrutiny and engagement with States in a preliminary examination phase can or does affect such compliance. The findings set out in the dissertation will contribute to our understanding of how international actors can enhance State compliance with international norms and treaty expectations, particularly when these norms challenge the interests of State actors or entrenched socio-cultural norms. Further, the empirical findings may encourage international actors to incorporate an explicit gender-sensitive approach in norm-interpretative interactions with national actors to enhance the prospects of gender-sensitive compliance with international norms.

CHAPTER 2. THEORY AND METHODOLOGY

1. Introduction

'Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[1]

In 1997, when Harold Hongju Koh asked the question, 'Why Do Nations Obey International Law?'[2] he precipitated a scholarly debate around State compliance with international legal obligations. While it may be true that most nations comply with international law most of the time, the reasons for non-compliance or compliance, and what motivates States to move from indifference or non-compliance to compliance in different areas of international law, have not been definitively determined. If they had, we would expect such factors to be effectively leveraged by actors seeking to enhance compliance. This in turn would be reflected in States' fulfilment of their obligations (even if inconvenient and potentially costly), such as those requiring investigations and prosecutions of international crimes.

Accordingly, this chapter addresses two broad questions. The first question is 'to what extent might the Transnational Legal Process (TLP) theory explain how to promote State compliance with the norms embodied in the Rome Statute?' The second question is 'how adequately does the TLP explain the role of the OTP during preliminary examinations in Colombia and Guinea in catalysing national criminal proceedings for international crimes of sexual violence?'. The chapter situates the TLP in the tradition of compliance theories and applies its features to conduct by the OTP, States and other stakeholders during preliminary examinations, while acknowledging TLP's likely limitations explaining internalisation of a gendered norm relating to sexual violence.

[1] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 2nd ed, 1979), 47.
[2] Harold Hongju Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

The remainder of this first section defines some key theoretical terms and introduces the TLP as a useful framework within which to assess the ICC's catalytic effect. The second section describes the TLP when it is applied to preliminary examinations, that is, the phases of the TLP cycle, the types of actors and the types of internalisation. The third section draws on feminist research that highlights the flaws of gender-neutral approaches to law and State behaviour to suggest how a gender-sensitive approach to international law, compliance theories, international criminal law and TLP is necessary to understand why the sexual violence accountability norm may or may not be internalised. Although I do not rely on a specific feminist legal theory, I use a gender perspective and gender analysis to identify how the TLP's assumptions about promoting compliance may not transfer to the sexual violence accountability norm. The final section explains the methodology adopted by the thesis, including for the field research conducted in Colombia and Guinea.

1.1 The interplay of international norms under the Rome Statute

As Chapter 1.3 identified, the term 'legal norms' denotes a subset of international norms that are articulated in international legal instruments and impose legal obligations on States. The first international norm relevant to this thesis is State sovereignty, or non-interference, which recognises the State's absolute power and exclusive jurisdiction over its territory, persons and acts within that territory, as well as the prohibition of interference by external parties in a State's internal affairs.[3] This norm was codified into a precisely-expressed international *legal* norm by the United Nations Charter. Article 2(4) of the United Nations (UN) Charter requires all members to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Article 2(7) of the Charter explicitly does not authorise 'the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...' Only limited exceptions to this prohibition are recognised in the UN Charter and customary international law.[4]

[3] Warner Levi, *Contemporary International Law* (Westview Press, 2nd ed, 1991), 9.
[4] Charter of the United Nations Charter of the United Nations (UN Charter), 26 June 1945, 1 UNTS XVI (entry into force 24 October 1945) art 51 and Chapter VII, respectively.

The norm of State sovereignty necessarily includes a State's right to respond to international crimes (including to initiate national criminal proceedings) committed within its jurisdiction or by its nationals.[5] Thus, while States may have ratified treaties that created an international legal norm requiring them to ensure certain acts are prosecuted (such as grave breaches of the Geneva Conventions, discussed below), there is no corresponding legal *norm* permitting or requiring external intervention if a State fails to fulfil this international legal obligation.[6] Accordingly, while impunity for international crimes within national boundaries has elicited criticism and occasional responses from the international community, concrete challenges to such impunity have been infrequent.[7] That is, exercising criminal jurisdiction over international crimes is still typically considered to be within a State's domestic jurisdiction and non-interference in domestic affairs is 'the standard for appropriate behaviour'.[8]

The second main international norm relevant to this thesis challenges the first by requiring States to investigate international crimes and prosecute those responsible for perpetrating them. As discussed below, this second norm is also a legal norm sourced in both customary international law and treaties, although the source varies across the three subject international crimes. For the purposes of this thesis, it is relevant that every Member State to the Rome Statute accepts a norm as legally binding: that is, it is 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'[9] - specifically war crimes, crimes against

[5] There may be more than one State with jurisdiction to criminally investigate international crimes but this does not contradict the norm that only States with jurisdiction over international crimes may investigate them; and that States without jurisdiction do not.
[6] Instances of universal jurisdiction suggest only a nascent norm contesting the pre-existing norm of State sovereignty: see *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No 3)* [1999] 2 All ER 97.
[7] Morten Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl, 2012) 36-44.
[8] Katzenstein, above n 3, 5.
[9] *Rome Statute,* Preamble [6].

humanity and genocide.[10] For this thesis, that duty is interpreted as the obligation to investigate, prosecute and punish international crimes and to do so genuinely.[11]

The treaty source for the legal norm vis-à-vis war crimes dates from the 1949 Geneva Conventions ('the Geneva Conventions'), which require State parties to them to search for persons alleged to have committed, or have ordered to have committed, grave breaches of the Conventions and to try or extradite them.[12] While grave breaches of the Geneva Conventions have increasingly been absorbed into what is defined as war crimes,[13] the customary international law norm applied here requires States to 'investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects [… and …] investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects'.[14] A total of 197 States have ratified the four Geneva Conventions, including all 193 UN member States.

The 149 State parties to the Convention on the Prevention and Punishment of the Crime of Genocide are similarly obliged to enact legislation to provide effective penalties for persons guilty of genocide,[15] and try individuals charged with acts of genocide before a competent tribunal of the State in the territory where the act(s)

[10] Aggression is excluded since the relevant provision of the Rome Statute has yet to come into force. Sexual violence crimes are included in each international crime, but the exact list varies across the three: Chapter 3.1 lists sexual violence crimes that are included as genocide, war crimes, or crimes against humanity, and are therefore encompassed in the international legal norm.
[11] As mentioned in Chapter 1.1, this encompasses legitimate decisions not to prosecute or convict.
[12] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), art 49; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,* opened for signature 12 August 1949, 75 UNTS 85, (entered into force 21 October 1950) art 50; *Geneva Convention Relative to the Treatment of Prisoners of War,* opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 129; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art. 146; see also Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes', 59 *Law and Contemporary Problems* (1996) 63.
[13] See Marko Divac Oberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91(873) *International Review of the Red Cross* 163, 167.
[14] ICRC, *Rule 158: Prosecution of War Crimes*, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158>.
[15] The Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*') art V.

were committed, or ensure this is done by an international tribunal.[16] This obligation is now recognised to extend beyond the States parties to this Convention, as an *erga omnes* obligation on all States.[17] There are a number of other treaties obliging States to investigate and prosecute other crimes under international law.[18] There is no comparable treaty regarding crimes against humanity, war crimes other than grave breaches or against war crimes in a non-international armed conflict. However, the ICRC's position is that there is 'sufficient practice [] to establish the obligation under customary international law to investigate war crimes allegedly committed in non-international armed conflicts and to prosecute the suspects if appropriate'.[19]

While the International Law Commission (ILC) completed a draft of treaty articles on crimes against humanity in June 2017,[20] it has previously declined to conclude whether there is a relevant customary international norm, noting in 2014 that the International Court of Justice had yet to address the issue.[21] There is significant

[16] Genocide Convention, art VI. For a discussion on the content of the obligation under the Rome Statute, see William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2nd ed, 2004), 99-107.

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Judgment)* [2007] ICJ Rep 43 [162]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Judgment)* [1996] ICJ Rep 104 [31].

[18] See e.g. Convention for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956), art 28; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entry into force 26 June 1987) art 7; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature 3 September 1992, 1974 UNTS 45 (entered into force 29 April 1997) art VII(1).

[19] ICRC, *Rule 158: Prosecution of War Crimes*, <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158>.

[20] International Law Commission, Crimes Against Humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (26 May 2017) <http://legal.un.org/docs/?symbol=A/CN.4/L.892>. This built on the work by the Crimes Again Humanity Initiative, which proposed a draft convention in August 2010: <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>.

[21] International Law Commission, *The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)* (2014), 7. For the substance of this obligation, see *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (*Judgment*) [2012] ICJ Rep 422, 454 and 456. A treaty on crimes against humanity was added to the drafting agenda of the United Nations International Law Commission on 18 July 2014: see <http://legal.un.org/ilc/sessions/66/>. The obligation to extradite or prosecute, *inter alia*, genocide, war crimes and crimes against humanity was articulated in Article 9 of the 1996 Draft Code of Crimes against the Peace of Mankind, but represented progressive development of international law at the time: *Draft code of Crimes against the Peace of Mankind*, Official Records of the General Assembly, 51st sess, Supplement No. 10 (A/51/10) vol II. (2014).

explicit acceptance of the norm vis-à-vis crimes against humanity, even without authoritative recognition of its status, by 80 of the 121 States party to the Rome Statute, which have some form of national legislation prohibiting crimes against humanity.[22] More relevantly to this thesis, through ratification of the Rome Statute all Member States of the ICC have accepted their pre-existing duty to investigate and prosecute crimes against humanity in their jurisdiction, as one of the international crimes subject to ICC jurisdiction. Whether the existence of a customary international legal norm can be inferred from acceptance through ratification of the legal obligation by 121 States is a question beyond the scope of this thesis.

The *legal status* of the norm obliging investigation and prosecution of international crimes is reflected both by the fact that no States contest it and by the fact that States, NGOs and international and regional organisations voice their criticism when States fail to prosecute international crimes in compliance with that norm. UN Security Council Resolution 2170 calling on States to bring individuals or entities associated with the Islamic State of Iraq and the Levant (ISIL) to justice is one recent example.[23] This contrasts with earlier instances of extensive human rights violations likely to constitute international crimes in Somalia, Eritrea, Ethiopia and Myanmar, all of which failed to elicit similar calls for prosecution of those responsible.

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[22] However the definitions of the crime diverge across jurisdictions: The George Washington University Law School International Human Rights Clinic, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction* (2013) 12 <https://www.law.gwu.edu/sites/www.law.gwu.edu/files/downloads/CAH_Final_Web.pdf>.

[23] SC Res 2170, UN SCOR, 7242 mtg, UN Doc S/RES/2170 (15 August 2014). See for example: Human Rights Watch, *Flawed Justice: Accountability for ISIS crimes in Iraq* (5 December 2017) https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>; Council of Europe Parliamentary Assembly, *Resolution 2190: Prosecuting and punishing the crimes against humanity or even possible genocide committed by Daesh (12 October 2017)* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24219&lang=en>. On the duty to extradite or prosecute the international crime of torture see for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [201] ICJ Rep 422. As acknowledged in Chapter 1.3, it is difficult to determine the precise date a norm is 'crystallised' as such, and this would vary for each of the international crimes within the ICC's jurisdiction. While crystallisation is likely to have occurred in some cases prior to 2002, assuming crystallisation for each of the crimes from the date of entry into force for the Rome Statute (1 July 2002) is sufficient for the purposes of this thesis.

Accordingly, it would be inaccurate to term this an emerging, or a not-yet-crystallised norm. However, low rates of compliance[24] and highly visible instances of State failures to investigate and prosecute international crimes in their own jurisdictions and selectivity in UN intervention undermine the norm's *robustness*.[25] For example, Kenya has conspicuously failed to investigate those most responsible for international crimes, despite its ratification of the Rome Statute and the evidence available that proves their commission and indicates possible suspects.[26] Moreover, the Kenyan government has explicitly and repeatedly challenged the method of norm enforcement, namely, investigations at the ICC in the absence of domestic proceedings. Concurrent failures of the ASP and the Security Council to enforce the Rome Statute obligations that require States to cooperate with the ICC, including the execution of ICC arrest warrants, further weaken the ICC's efficacy in promoting norm compliance.[27] Importantly, States opposing the ICC do not repudiate the norm requiring investigation and prosecution of international crimes itself, just as failure to intervene is no longer accompanied by a failure to condemn the breach of international law. Instead, their objections are directed towards the ICC as the institution assessing State compliance and independently intervening in States it

[24] Beyond this, States have also disregarded their obligations under the Rome Statute to cooperate with the ICC, especially with regard to executing arrest warrants against ICC indictees in their jurisdiction: Annika Jones, 'Non-Cooperation and Efficiency of the International Criminal Court' *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill, 2016) 185-209.

[25] As defined in Chapter 1.3, robustness of a norm refers to the rate of State compliance with it.

[26] The ICC Prosecutor's withdrawal of the second and remaining Kenya case due to insufficient evidence was attributed to a failure to access evidence linking President Kenyatta to crimes with which he was charged; this contrasts to the wealth of available evidence demonstrating that crimes against humanity were in fact committed in Kenya: ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta* (5 December 2014) <https://www.icc-cpi.int/>. Note, however, that the Kenyan Commission of Inquiry for the Post-Election Violence had already provided evidence of perpetration and potential suspects: *Report of the Commission of Inquiry into Post-Election Violence* (15 October 2008) 472-45 <https://reliefweb.int/>.

[27] Prominent examples include Sudanese President Omar Al-Bashir's visits to South Africa, Kenya and Uganda without being arrested, despite these States' obligation to do so pursuant to Article 59 and Part 9 of the Rome Statute: Philomena Apiko and Faten Aggad, 'The International Criminal Court, Africa and the African Union: What way forward?' *European Centre for Development Policy Management, Discussion Paper 21* (November 2016) 10.

determines are non-compliant.[28] Alternatively, States trivialise the norm in contrast to the more urgent demand for peace or concerns for national security.[29]

The norm's status is similarly enforced even as its robustness is undermined by Security Council resolutions that call for investigations and prosecutions without including any method of monitoring or enforcement.[30] Thus, the Rome Statute was drafted to create an effective system of enforcing the legal norm that obliges States to exercise criminal jurisdiction over international crimes. This is made clear by its Preambular recognition of the duty as pre-existing, and its admissibility provisions that determine only the circumstances in which cases come under ICC jurisdiction. This norm necessarily includes international crimes of sexual violence. Accordingly, the relevant contestation of norms in this thesis is that between non-interference regarding international crimes of sexual violence and the norm obliging their investigation and prosecution, the validity of which is well established in legal instruments and by the absence of State denials of the norm's existence. This interaction between norms (non-interference vs investigation and prosecution) is the impetus to analyse whether and how the OTP operates or could operate to promote 'voluntary obedience' to the sexual violence accountability norm, manifested in national prosecutions of international crimes of sexual violence.

As referred to in Chapter 1, and reiterated here because of its specific relevance to this chapter, the other key term is 'compliance'. Harold Koh uses 'compliance' to refer specifically to State behaviour consistent with international obligations *in order* to gain rewards or avoid punishments – that is, instrumental obedience.[31] This contrasts with other theorists' use of the term as observable State behaviour consistent with international obligations, regardless of motives. In the discussion

[28] Library of Congress, *African Union: Resolution Urges States to Leave ICC* (10 February 2017) <http://www.loc.gov/law/ >.
[29] Ibid; Sikkink draws the same conclusion in examining the justice cascade: Kathryn Sikkink, *The Justice Cascade* (W.W. Norton & Company Ltd, 2011) 240-241.
[30] See e.g. with respect to Syria: SC Res 2268, UNSCOR, 7634th mtg, UN Doc S/RES/2268 (26 February 2016); Sri Lanka - see SC/9659 (13 May 2009); and on North Sudan see SC Res 2148, UNSCOR, 7152nd mtg, UN Doc S/RES/2148 (3 April 2014).
[31] While State intentions are frequently relevant to observable compliant behaviour compliance theorists primarily focus on the latter.

below, I use the term 'compliance' in this more general sense, unless specific reference is made to the TLP.

1.2 The TLP as a compliance theory

Compliance is a central question of international law because it deals with the connection between international law and State action.[32] Early international law theories of compliance assumed compliance automatically followed from the existence of a binding obligation.[33] Initially, these theories were also less developed and coherent than compliance theories developed by international relations scholars.[34] Over time, theories across the two traditions have increasingly similar and/or complementary features; this is particularly the case for theories that resemble constructivist norm-based theories of behaviour, such as Koh's TLP.[35]

For these reasons, and after briefly describing the TLP, this section conducts an interdisciplinary survey of compliance theories that address human rights norms,[36] as this often equates to prosecutions of gross human rights violations, including international crimes.[37] The survey highlights the TLP's comparative explanatory value vis-à-vis the ICC's complementarity regime, especially during preliminary examinations.

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[32] Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90(6) *California Law Review* 1825, 1826.

[33] '[F]oreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations': Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998), 3.

[34] Guzman, above n 32, 1826.

[35] Oona A Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics* (Foundation Press, 2005), 112. For a survey of compliance literature across the two disciplines, see Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds) *Handbook of International Relations* (Sage Publications, 2002).

[36] See e.g. Harold Hongju Koh, 'Internalization through Socialization' (2005) 1(54) *Duke Law Journal* 975, 979.

[37] Kim and Sikkink identify the 'core set of human right violations' as torture, summary execution, disappearances, and political imprisonment, genocide, war crimes, and crimes against humanity. Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939, 942. See also, Geoff Dancy and Kathryn Sikkink, 'Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance' (2012) 44 *NYU Journal of International Law and Politics* 751–790; Ellen Lutz and Kathryn Sikkink, 'Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1.

The benefit of conceptualising the ICC's catalytic or influencing potential in terms of norm compliance is grounded in the tradition of compliance theory, which seeks to explain why and when States comply with or violate international law.[38] In this thesis, such literature is useful to understand why States may assert their commitment to the international legal norm requiring prosecution of international crimes but fail to comply with it in practice, and why a non-compliant State may choose to change its behaviour to become compliant. The possibility of increasing compliance is valuable to victims, as it represents an unexploited opportunity to bring individual perpetrators to account for such crimes. Understanding how to maximise the ICC's potential to promote compliance with the sexual violence accountability norm is one avenue to achieve the goal of eliminating impunity for these crimes.

Like other compliance theories, the TLP's underlying premise is that voluntary or 'internalised' obedience is preferable to instrumental compliance performed to avoid costs or gain benefits.[39] That is, compliance will be best achieved when legal, social and political internalisation produce norm-consistent State behaviour without the need for external enforcement mechanisms. At its broadest, the TLP conceives international law as a 'product of a constructivist, dynamic, non-statist, and highly participatory process requiring an interdisciplinary approach'.[40] It is 'the theory and practice of how public and private actors – nation-states, international organisations, multinational enterprises, non-governmental organisations, and private individual – interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalise the rules of transnational law'.[41]

[38] Henkin, above n 1, 5.
[39] Koh, above n 2, 2645.
[40] TLP is developed in the constructivist tradition because it proposes that state identity and interests can change through a process of interaction: Harold Hongju Koh, 'Is There a 'New' New Haven School of International Law ?' (2007) 32 *The Yale Journal of International Law* 559, 570; Caleb J Stevens, 'Hunting a Dictator as a Transnational Legal Process: The Internalization Problem and the Hissene Habre Case' (2012) 24 *Pace International Law Review* 190, 204-205.
[41] Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181.

Koh argues that repeated cycles of a three-phase 'interaction-interpretation-internalisation' through 'mechanisms of "vertical domestication" cause international norms to "trickle down" and become internalised into domestic legal systems'.[42] Through this repeated cycle, international law acquires its 'stickiness', States acquire their identity and subsequently promote the rule of international law as part of their national self-interest.[43] Koh contends that other legal process theories do not account for 'the complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalised* in domestic legal systems'.[44]

The TLP goes beyond description; it is a normative blueprint for action to promote greater compliance with international law.[45] Similarly, the complementarity regime creates a blueprint to promote norm-compliant investigations and prosecutions; positive complementarity has an overt agenda to catalyse such proceedings. This shared normative agenda[46] enhances the TLP's explanatory value vis-à-vis the OTP's purpose of catalysing national proceedings in preliminary examinations.

State practice demonstrates that prosecuting international crimes is generally not considered materially or nationally beneficial. This makes realist and rational theories predicated on State self-interest less able to explain how to encourage compliance with the norm that requires such prosecutions.[47] As a constructivist

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[42] Harold Hongju Koh, '1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623, 627. Vertical domestication refers to the source of the norm only; as described further below, the norm interpretations flow in both directions.

[43] Koh, above n 41, 204. This concept of change in identity resembles that proposed in the spiral model in relation to human rights more generally.

[44] Koh, above n 2, 2602; emphasis in original.

[45] Harold Hongju Koh, 'Why Obey International Law?' (2003) 97 *American Society of International Law Proceedings* 111, 112. Indeed, in 2017 Koh invoked TLP as a counter-strategy to Trump's "disengage–black hole–hard power" approach to international law: Harold Hongju Koh, 'The Trump Administration and International Law' (2017) 56 *Washburn Law Journal* 413, 420.

[46] One of the normative assumptions about complementarity is that it brings about State compliance with Rome Statute obligations through the threat of ICC intervention: Chapter 4.2.1; Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87, 96-97; Carsten Stahn, 'Taking Complementarity Seriously' in Carsten Stahn and Mohammed M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) ('*The Complementarity Volume*') 233, 252-3.

[47] Realism, which seek to explain State compliance on the basis of material needs, incentives and power, and rationalism which proposes States behave on an instrumental basis after calculating costs and benefits are better suited to global areas of trade and arms control, where States are the primary actors pursuing their own interests and avoiding sanctions at the international level. See Jack L

theory, the TLP is better able to explain compliance with norms that do not yield a material benefit[48] but instead involve complex goals pursued through interactions with a variety of actors beyond the State.[49] This impression is reinforced by other authors' application of TLP to the impact of the Inter-American Court of Human Rights on domestic constitutional law,[50] the role of human rights clinics in TLP,[51] and Koh's recent application of transnational public law to the law of armed conflict in the twenty-first century.[52] Koh's application of the TLP to human rights norms, such as those contained in the Convention on the Elimination of Discrimination Against Women (CEDAW) and women's suffrage, further reinforces its relevance since these gender-based norms are also not well explained by national economic or political interests.[53]

Further, the TLP's normative focus is on achieving voluntary obedience, not coerced or instrumental compliance.[54] While the ICC's complementarity regime represents a concession to State sovereignty,[55] its ultimate goal can still be described in TLP terms, namely, that States internalise the norm of investigating and prosecuting international crimes so that the ICC is not required as an external 'enforcement mechanism'. OTP engagements during preliminary examinations are expressly intended to promote this outcome, through monitoring situations, sending missions,

Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 15, 225; Stevens, above n 40, 196-7.

[48] Koh, above n 40, 570; Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', (1992) 46 *International Organization* 391, 395. See also Koh, above n 2, 2632, 2649; Kenneth N Waltz, 'Realist Thought and Neorealist Theory' (1990) 44 *Journal of International Affairs* 21; James G March and Johan P Olsen, 'The Institutional Dynamics of International Political Orders 52 *International Organisation* (1998) 943, 949-952; Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan Journal of International Law* 345, 353.

[49] Koh, above n 2, 2649.

[50] Marcelo Torelly, 'Transnational Legal Process and Fundamental Rights in Latin America: How Does the Inter-American Human Rights System Reshape Domestic Constitutional Rights?' in Pedro Rubim Borges Fortes et al (eds) *Law and Policy in Latin America: Transforming Courts, Institutions and Rights* (Palgrave Macmillan UK, 2017), 21-38.

[51] Arturo J Carillo, 'Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process' (2004) 35 *Columbia Human Rights Law Review* 527.

[52] Harold Hongju Koh, 'Keynote Address: Emerging Law of Twenty-First Century War' (2017) 66 *Emory Law Journal* 487.

[53] Harold Hongju Koh, 'Why America Should Ratify the Women's Rights Treaty (CEDAW)' (2002) 34 *Case Western Reserve Journal of International Law* 263, 269.

[54] Koh, above n 2, 2645.

[55] Chapter 4.2.1.

requesting information and assisting stakeholders to better identify the steps required to meet obligations identified in the Statute.[56]

The TLP is also particularly useful because its focus on interactions and processes, rather than on the composition and identity of the State, means it can account for illiberal State compliance with the international norm requiring prosecutions of international crimes.[57] This contrasts with liberal and rational theories and their neo-variants, which treat actors and their interests as separate from processes of interaction,[58] presume illiberal States may be impervious to the ICC's legal influence even through interaction[59] and do not offer normative guidance on how to promote compliance in non-compliant illiberal States.

Relatedly, Koh argues that process theories other than the TLP, which do not attribute the success of discourse in achieving compliance to the 'shadow' of sanctions, even in part, are less able to explain non-compliant behaviour.[60] Similarly, by explaining 'the pathways whereby a "managerial" discourse or "fair" international rule penetrates a domestic legal system, thus becoming part of that nation's internal value set',[61] the TLP distinguishes itself from other legal process theories in its capacity to explain how non-compliant States may become compliant.[62]

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[56] ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) 10 <http://www.icc-cpi.int> ('*PEX Policy*') 10.

[57] Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: the State of the Art* (Cambridge University Press, 2011) 119, 130-131.

[58] Jutta Brunnée and Stephen J Toope, 'Persuasion and Enforcement: Explaining Compliance with International Law' (2002) 13 *Finnish Yearbook of International Law* 273–298, 276-7.

[59] Ibid.

[60] For example, the managerial approach claims compliance is promoted through interactive processes of justification, discourse, and persuasion, with fear of loss of reputation, rather than sanctions as incentives. While these processes match those in the ICC treaty regime, the Chayes' attribution of non-compliance to inadvertence is less applicable in the context of State failure to prosecute international crimes. See Chayes and Chayes, above n 33, 15, 25, 109-111.

[61] Koh, above n 2, 2639.

[62] See Chayes and Chayes, above n 33, 15, 25, 109-111. Conversely, Thomas Franck's focus on legitimacy focuses on aspects of the law itself to account for compliance also fails to consider how non-compliant States may through certain processes, become compliant: see e.g. Thomas M Franck, 'The Power of Legitimacy among Nations' (1990) 86 *The American Journal of International Law* 175.

By way of summary, the TLP's explanatory value comparative to other compliance theories derives from the following: its consideration of human rights norms, its applicability to both liberal and illiberal States, its goal of voluntary compliance as mirrored in the Rome Statute, its consideration of social, political and legal steps that are all necessary to achieve effective prosecution of sexual violence crimes, and its focus on interactions between stakeholders, including non-State actors, as a method to induce compliance, which is a key characteristic of preliminary examinations. The next section describes the TLP's features as applied to the ICC.

2. Transnational Legal Process (TLP) as applied to the ICC

Notwithstanding Koh's characterisation of the TLP as a response to the question, 'Why do nations obey international law?', the TLP is an account of *how* international norms can be internalised through an iterative cycle of engagement, in the case of this thesis, between the OTP and a range of stakeholders. The TLP predicts that States will comply with international norms if transnational legal processes are 'aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalisation'.[63] Preliminary examinations opened by the OTP can be understood as an aggressive trigger for the transnational legal process because they stimulate interactions between the OTP, State institutions and actors and non-State norm entrepreneurs around what constitutes genuine investigations and prosecutions of international crimes within the jurisdiction of the Rome Statute.

The TLP's explanatory power is increased by incorporating non-State actors who can and do influence laws, policies and social acceptance of norms; and by conceiving transnational law as dynamic rather than static because it 'transforms, mutates, and percolates up and down' from the national to the international.[64] This aspect is particularly relevant to understanding how States interpret their obligation to *genuinely* prosecute those most responsible for international crimes, including crimes of sexual violence. The ambiguity of the term 'genuinely' allows for competing interpretations by different actors at different levels, which is precisely

[63] Koh, above n 41, 206.
[64] Ibid 184.

why this thesis focuses on how OTP interpretations can influence national prosecutions.

2.1 Promoting internalisation within the ICC treaty regime

As mentioned in Chapter 1, the TLP identifies three forms of internalisation.[65] '*Legal internalisation* occurs when an international norm becomes domestic law through executive action, legislative action, judicial interpretation and action, or some combination of the three'.[66] Koh refers to the US President's incorporation of international coastal norms as executive action; incorporation into binding domestic legislation or the constitutional law as legislative action; and litigation-provoked incorporation of international norms into 'domestic law, statutes, or constitutional norms' as judicial internalisation.[67] In the case of international crimes of sexual violence, examples of legal internalisation include the adoption of progressive laws that define them consistently with international standards, the adoption of regulations for prosecutors and police that promote their prosecution, and judicial decisions and judgments that accurately characterise and convict such crimes, ensuring they receive adequate sentences.

Political internalisation occurs when political elites accept, adopt and publicly advocate for an international norm to be incorporated into government policy and allocate sufficient resources for effective implementation.[68] Political elites are necessarily individuals within State institutions who, by virtue of their position, are legally and structurally empowered to advocate for or determine the contents of government policy and/or allocate resources to ensure its implementation. This may occur through prosecutorial policies and procedures that prioritise investigating and prosecuting sexual violence crimes by trained personnel and allocate appropriate technical expertise and resources for their implementation. Note that regulations are a form of legal internalisation, as they determine enforceable legal obligations of relevant actors. In contrast, policies and procedures

[65] Koh, above n 42, 642; Harold Hongju Koh, 'How Is International Human Rights Law Enforced?' (1999) 13 *Indiana Law Journal* 1397, 1400.
[66] Koh, above n 42, 642.
[67] Ibid 643.
[68] Ibid 642.

reflect the discretionary use of political powers to achieve compliance with the law (which includes legal regulations).

'Social internalisation occurs when a norm acquires sufficient public legitimacy that there is widespread general adherence to it'.[69] In the case of an international legal norm obliging criminal investigation and prosecution, it is national criminal justice actors who engage with victims and crimes of sexual violence who must adhere to the norm for social internalisation to occur. This would manifest in an increased number of sexual violence charges initiated or progressed (particularly if there is pre-existing available evidence but no, or fewer, previously initiated charges or cases), more sensitive treatment, interviews and support of victims, in-trial protection measures to minimise re-traumatisation, and high conviction rates accompanied by appropriately severe sentences. While individual judgments can constitute a form of legal internalisation, widespread incorporation of the norm by judges because they regard it as legitimate reflects social internalisation. The sequencing of internalisation can vary; in some cases, social internalisation paves the way for legal internalisation, while in others, legal internalisation (particularly through executive action) will precipitate social internalisation. Societal attitudes and behaviour (including of norm entrepreneurs) may affect aspects of social internalisation and explain why national criminal justice actors have not socially internalised the sexual violence accountability norm. However, statements and behaviour consistent with the sexual violence accountability norm by actors outside the national criminal investigation and prosecution process are not constitutive of norm compliance.

Koh identified four kinds of relationships between stated norms and observed conduct along a spectrum of internalisation. The first is *coincidence*, where there is no causal relationship between norms and behaviour; the second is *conformity*, where norm-consistent behaviour derives from convenience rather than a perceived legal or moral obligation; the third is *compliance*[70] with the norm to gain

[69] Ibid.
[70] The term compliance in this instance indicates State behaviour consistent with international norms – in this case, prosecution of international crimes.

reward or avoid punishment consciously; and the fourth is *obedience* or *internalisation*, where the norm is incorporated into an internal value system,[71] thereby reducing the need for reward or punishment to maintain norm-consistent behaviour. The only difference between compliance and obedience is the motivation for norm-consistent behaviour – internalisation or coercion/instrumental reasons, respectively - which subsequently affects whether a State will revert to norm-violating behaviour.

Movement across the spectrum corresponds to a shift from external to internal compliance with the norm, from instrumental to normatively-driven conduct and from coercive to constitutive motivation. Koh suggests that the 'most effective legal regulation thus aims to be *constitutive*, in the sense of seeking to shape and *transform personal identity*'.[72] This spectrum and the repeated cycles explain how States may shift from non-compliance to compliance over time and further distinguishes the TLP from previous compliance theories, which do not attempt to explain the underlying factors for such transitions.

Koh identifies the mechanisms through which this transition occurs as 'interaction, interpretation, and internalisation. Those seeking to embed certain norms into national conduct seek to trigger *interactions* that yield legal *interpretations* that are then *internalised* into the domestic law of even resistant nation states'.[73] More specifically, Koh proposes that interactions within law-declaring fora force an interpretation of the global norm applicable to the situation, with the purpose of promoting internalisation of the new *interpretation* of the international norm into its normative system. 'The provoking actor's aim is to "bind" the State to obey the new interpretation as part of its internal value set. The coerced party's perception that it now has an internal obligation to follow the international norm leads it to step four: obedience to the newly interpreted norm'.[74] Applying this to the ICC framework, the OTP as the instigator of a preliminary examination will assess

[71] Koh, above n 42, 628.
[72] Ibid.
[73] Harold Hongju Koh, 'Jefferson Memorial Lecture - Transnational Legal Process after September 11th' (2004) 22 *Berkeley Journal of International Law* 337, 339 (emphasis added).
[74] Koh, above n 42, 644.

whether a State is genuinely investigating and prosecuting international crimes falling within the ICC's jurisdiction. This assessment, conducted periodically, acts as a norm interpretation that can then guide the State to modify its behaviour (legally, politically and socially) to be consistent with the OTP's interpretation of what State activity qualifies as norm-compliant.

The difference between compliance and obedience is particularly relevant in States under OTP scrutiny in a preliminary examination. For example, although it may be strategically valuable, it is rarely convenient for a post-conflict country to invest financial, technical, political and human resources in prosecutions. This means that State behaviour that conforms with ICC expectations is likely attributable to instrumental reasons (compliance) or internalisation of the international norms promulgated by the ICC. In the context of generalised high-level impunity, State compliance, manifested in national prosecutions of the most senior perpetrators of international crimes, is likely to be motivated by the desire to avoid the 'punishment' of losing control over the prosecution process rather than the 'reward' of praise for norm adherence. This rationale is most applicable in States in which the domestic demand for accountability is either low or ignored; that is, States that *prima facie* seem unwilling to comply with norm-conforming prosecutions for international crimes.

ICC investigations and prosecutions are materially advantageous to States because all the costs are outsourced. However, in contexts where senior perpetrators either still wield political power or have the capacity to undermine the government, there may be concerns that national criminal processes and punishment will be either disproportionately (or inappropriately) harsh or lenient. The Libyan challenge to ICC investigations on the grounds of domestic capacity and willingness is an example of the former situation, evidenced by significant violations of due process rights in the *Gaddaffi* trial.[75] The complex Colombian 'non-prison' punishment

[75] Chapter 4.3.2. For a critique of the ICC's treatment of the Libyan cases see Michele Tedeschini, 'Complementarity in Practice: The ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions' (2015) 7 *Amsterdam Law Forum* 76, 76; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'' (2012) 10 *Journal of International Criminal Justice* 325.

proposed for Revolutionary Armed Forces of Colombia (FARC) combatants resembles the latter situation.[76]

In the ICC treaty regime context, obedience to the sexual violence accountability norm would be reflected in effective genuine prosecutions of sexual violence due to complete legal, political and social norm internalisation, rather than for instrumental reasons (compliance). Koh uses obedience as a synonym for internalisation, but internalisation is also a stage in the process; the problems this poses are detailed in Chapter 2.3 below.

Table 2.1 below identifies the various actors involved in each TLP phase.

Table 2.1 Actors in TLP phases related to the sexual violence accountability norm

TLP Phase	**Relevant Actors Involved**
Interaction	ICC Office of the Prosecutor Executive government Civil society and victims' organisations Judiciary Prosecutors
Interpretation	ICC Office of the Prosecutor Executive government Civil society and victims' organisations Judiciary Prosecutors
Internalisation	Executive government Legislature Judiciary Civil society and victims' organisations Police Military

[76] For an analysis of the conditions of punishment proposed and their compliance with international law see Human Rights Watch, *Human Rights Watch Analysis of Colombia-FARC Agreement* (21 December 2015) <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>.

The TLP has not yet been applied to demonstrate internalisation of international norms within the ICC treaty regime;[77] this is a contribution to the literature offered by this thesis. The TLP captures the relevant types of relationships between States and the ICC, motivations along the spectrum from coincidence to obedience, and how the transition between compliance and obedience may occur. States that are instrumentally compliant may agree to initiate investigations to avoid ICC intervention (an undesirable consequence because it entails losing control over proceedings). However, through repeated cycles of interaction-interpretation-internalisation, these States may, over time, investigate and prosecute the relevant crimes without the active threat of an ICC investigation. Additionally, by describing how States transition from compliance to obedience in terms of process, the TLP's inclusion of different types of internalisation also captures the preconditions necessary for effective prosecutions. This offers concrete avenues for both testing the TLP and measuring empirical change in a more nuanced manner across the three dimensions. The next section describes the key agents for promoting internalisation through norm-interpretive interactions.

2.2 Identifying the actors promoting internalisation

Koh identifies six types of key agents that promote internalisation by provoking interactions: (1) transnational norm entrepreneurs, (2) governmental norm sponsors, (3) transnational issue networks, (4) interpretive communities and law-declaring fora, (5) bureaucratic compliance procedures and (6) issue linkages.[78] 'Provoking interactions'[79] is achieved by expanding the participation of those in transnational issue networks, increasing norm-elaborating fora to promote norm interpretations and creating new techniques for legal internalisation that can promote compliance even in the absence of formal legal commitments.[80] For Koh,

[77] *Cf* Joanne Lee, *The International Criminal Court State Cooperation Regime: Current Controversies in Historical and Theoretical Context* (PhD Thesis, Australian National University, 2012) on the TLP's relevance to State cooperation in ICC investigations and prosecutions.
[78] Koh, above n 42, 647; Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24(4) *Pennsylvania State International Law Review* 745, 746. I note that the last two 'agents' are not entities comprising individuals who could be typically defined as agents, but for consistency use Koh's terminology in describing the TLP.
[79] Koh, above n 42, 677.
[80] Ibid 679.

norm entrepreneurs are non-governmental organisations (NGOs) or individuals *outside the State apparatus* who mobilise popular opinion and political support both within their host country and abroad, as well as stimulate and assist in the creation of like-minded organisations in other countries.[81]

Koh identifies Henry Dunant, who founded the International Committee of the Red Cross (ICRC), former UN High Commissioner for Human Rights and former Irish President Mary Robinson, and the Dalai Lama as examples of norm entrepreneurs who, without a governmental portfolio, created new fora to develop new international norms, namely humanity and respect for human rights.[82] Examples relevant to this thesis include human rights NGOs focusing on impunity such as Sisma Mujer and Humanas in Colombia, the Victims' Association and the Organisation Guinéenne de Défense des Droits de l'Homme (OGDH) in Guinea, and the International Federation for Human Rights (FIDH), Human Rights Watch and Amnesty International at the international level. While the ICC is not an NGO, Koh's identification of Dunant, and by extension the ICRC, as a norm entrepreneur suggests he would also consider the ICC and its constituent organs, when they behave as norm entrepreneurs, to be in the same category. The OTP acts as a norm entrepreneur in its implementation of positive complementarity to catalyse national proceedings for international crimes during preliminary examinations; the Assembly of States Parties (ASP) plays a similar role when articulating its position on the appropriate activities of other ICC organs. This contrasts with the ICC judiciary's role as a law-declaring forum (see the fourth type of agent below) in its delivery of decisions and judgments declaring and explaining the content of legal obligations under the Rome Statute.

Transnational norm entrepreneurs seek *governmental* norm sponsors (the second type of key agent) to 'act as allies and sponsors for the norms they are promoting'[83] *within* internal bureaucratic and government structures. These relationships are leveraged so that governmental norm sponsors generate internal pressure to

[81] Ethan A. Nadelmann, 'Global Prohibition Regimes: The Evolution of Norms in International Society', 44 *International Organisation* (1990) 479, 482.
[82] Koh, above n 42, 648; Koh, above n 65, 1413.
[83] Koh, above n 42, 648.

comply with the norm; this pressure in turn complements the external pressure exerted by nongovernment transnational norm entrepreneurs.[84] For example, the two members of Congress in Colombia who proposed a bill in 2013 recognising certain sexual violence acts as crimes against humanity are governmental norm sponsors.[85]

Together, transnational norm entrepreneurs and governmental norm sponsors develop the third type of key agent, transnational issue networks. Drawing on Kathryn Sikkink's work on 'transnational advocacy networks',[86] Koh identifies government agencies, intergovernmental organisations, international NGOs, domestic NGOs, academics and private foundations as common participants in transnational issue networks.[87] The Coalition of the International Criminal Court (CICC) (comprising 2,500 civil society organisations across 150 countries), the International Criminal Law Bureau, relevant United Nations Special Rapporteurs, and the global campaign 'Stop Rape Now' are all examples of transnational issue networks focused on the norms considered by this thesis.

The fourth type of key agent are law-declaring fora, or 'interpretive communities', within which these transnational actors interact include 'treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; commissions of international publicists; and non-governmental organisations'.[88] Relevant international criminal law-declaring fora include the ICC (in its traditional court functions), other international criminal tribunals, courts in Colombia and Guinea and other national or regional courts, to the extent these are relied upon by national justice actors in Colombia and Guinea. More specifically, formal visits to States by ICC staff, which include meetings with

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[84] Ibid.

[85] The two members are Congresswoman Ángela Robledo and Congressman Iván Cepeda: Amnesty International, *Colombia: new law aims to address impunity for conflict-related crimes of sexual violence* (19 June 2014) <http://www.refworld.org/pdfid/53a92cbe4.pdf>.

[86] These are broadly defined as 'networks of activists distinguished largely by the centrality of principled ideas or values in motivating their formation': Margaret E Keck and Kathryn Sikkink, 'Activists beyond Borders: Transnational Advocacy Networks in International Politics' (1999) 51(159) *International Social Sciences Journal* 89, 89, 91-92.

[87] See Kathryn Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) 47 *International Organisation* 411, 411; Koh, above n 42, 649.

[88] Koh, above n 42, 650.

executive government, institutional agencies, civil society representatives and victims, also create norm-elaborating fora.[89]

The fifth type of key agents are standard operating procedures and other internal mechanisms to ensure government policies that conform to international standards have become embedded in domestic law.[90] Over time, domestic decision-making becomes enmeshed with international legal norms, because such norms are entrenched in domestic legal and political processes.[91] Examples include gender mainstreaming in all criminal justice policies and gender-sensitive budgeting within the security and criminal justice sectors.

The sixth agent – issue linkages – is important because strong process linkages across different issues promote internalisation and international legal obligations are often closely inter-related.[92] Thus, domestic bureaucracies develop institutional habits of compliance, because deviations from international commitments in one area may result in violations in related areas.[93] One example is the ongoing review of Uganda's 1951 Penal Code by its national law reform commission. This was triggered by civil society activism around a 'double standard' of justice for sexual violence crimes after Uganda passed the ICC Act in 2010, which incorporated the Rome Statute into domestic law. This created the legal possibility that while all the sexual violence acts listed in the ICC Act could be prosecuted as international crimes, only rape (and no other sexual violence crimes) could be prosecuted as a national crime under the out-dated 1951 Penal Code. The issue-linkage here provided a platform for women's NGOs to advocate for law reform to recognise a broader range of sexual violence crimes under national laws.[94]

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[89] See e.g. Sang-Hyun Song, 'Preventive Potential of the International Criminal Court' (2013) 3(2) *Asian Journal of International Law* 203.
[90] Koh, above n 42, 652.
[91] Robert O Keohane, 'Compliance with Commitments' (1992) 86 *Proceedings of the Annual Meeting (American Society of International Law)* 176, 179.
[92] This is not an 'agent' so much as it is a feature of the TLP's explanation: Koh, above n 42, 654.
[93] Koh, above, n 42, 654.
[94] Refugee Law Project, *Comments on the ICC Draft Policy Paper on Sexual and Gender Based Crimes* (2014), 13 <https://www.law.berkeley.edu/files/RLP_Commentary_on_ICC_Policy_Paper_FINAL_140226.pdf>.

These features suggest that OTP scrutiny and norm-interpretive interactions during preliminary examinations are more likely to increase prosecutions for international crimes when there is greater engagement with transnational norm entrepreneurs and cultivated transnational issue networks, not least because they also scrutinise State action. For example, increased scrutiny by the OTP of national prosecutions of sexual violence necessarily invites increased opportunities for norm entrepreneurs to articulate the meaning of the relevant norms, and these can promote their internalisation. If the OTP explicitly expresses concerns about evidence and events suggesting non-compliance vis-à-vis crimes of sexual violence in norm-interpretive interactions, it is more difficult for States to assert their compliance and to *not* prosecute international crimes of sexual violence. Alternatively, it makes non-compliance much more conspicuous than it would otherwise be, and can (or should, according to the TLP) invoke modifications in State behaviour that promote compliance. This is because States will need to respond to any statement by the OTP that it has not complied with the relevant norm because it has failed to prosecute sexual violence crimes. These implications of the TLP framework as applied to preliminary examinations are revisited and tested in light of the empirical research in Chapters 6 and 7.

2.3 Converting non-compliance into compliance

The TLP emphasises participation of civil society in transnational interactions and within interpretive communities because it assumes their engagement with State actors may cause States to modify their decisions and behaviour accordingly. This assumption is less likely to hold true in illiberal States, where governments are less sensitive and more likely to stifle civil society criticism and activism. Further, illiberal States may be less likely to internalise norms relating to the prosecution of human rights violations either because State agents are complicit or because human rights are simply not valued or respected by the State. Koh suggests that illiberal State resistance to internalising norms is attributable to ineffective vertical norm-internalisation processes.[95] This feature reinforces TLP's explanation as to why

[95] Koh does not identify which processes are absent in illiberal states, but the absence of civil society norm entrepreneurs, or spaces for dialogue and interpretation of norms would limit the opportunities for internalisation.

States do *not* obey international law, rather than undermining its explanation of the factors that contribute to obedience.[96]

Nevertheless, Koh contends that internalisation occurs even in illiberal third-world States with weaker legal traditions and judicial institutions, fewer legally empowered citizens and less open governments,[97] because internalisation depends more on the relevant international norm than on the domestic legal system. '[E]ven resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in Transnational Legal Process':[98] through interaction, international legal norms seep into, and become embedded in, domestic legal and political processes.[99] This can precipitate changes in the perception of national interests and national identity, even in illiberal regimes.[100] South Africa's transition from apartheid, and many Eastern European States' efforts to meet international standards to gain admission to the European Union, are two examples of 'illiberal' State internalisation.[101]

This capacity to account for illiberal State non-compliance and the promotion of compliance is important in the context of the ICC treaty regime, where international crimes under the ICC's jurisdiction are at least as (or more) likely to occur in illiberal States compared to liberal States. This is important in States that engage with the ICC, and perhaps even undergo some 'cosmetic' legal internalisation passing laws and creating special criminal mechanisms, continue to fail to investigate or prosecute those implicated in international crimes.[102] I would make a more nuanced

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[96] Koh, above n 42, 677.
[97] *Cf* Anne-Marie Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907 (suggesting liberal States are more likely to engage and comply with international law compared to illiberal States). Open government is defined by the OECD as 'the transparency of government actions, the accessibility of government services and information and the responsiveness of government to new ideas, demands and needs': OECD, *Modernising Government: The way forward* (OECD Publishing, 2005) 29.
[98] Koh, above n 41, 199.
[99] Ibid 205.
[100] Koh, above n 42, 675.
[101] Ibid 675-676.
[102] For example, Kenya and Uganda both passed legislation implementing the Rome Statute and created specialised judicial mechanisms ostensibly to prosecute international crimes of interest to the ICC. However, there have been no trials completed. See also Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013) 12, 284, 289-90.

claim: that the obligations associated with treaty ratification facilitate norm-elaborating fora and transnational issue networks, which in turn provide platforms for norm entrepreneurs to advocate more aggressively for State compliance with international norms.

Koh applies the TLP to a number of treaty regimes, including the *Land Mine Convention*, but this thesis is the first work to test the explanatory and predictive capacity of the TLP with respect to the international norm of prosecuting those most responsible for international crimes, as reinforced through the ICC treaty regime.[103] This thesis therefore contributes to compliance literature, and the development of legal process theory, by testing the TLP's explanatory capacity in the preliminary examination context. The application of the TLP confirms (1) that the three types of internalisation can be mapped onto OTP engagement with national actors during preliminary examinations, (2) that the TLP's key agents are represented in norm interpretations around international crimes and (3) that all three forms of internalisation are necessary to catalyse genuine investigations and prosecutions into international crimes of sexual violence. Further, although illiberal States may be more resistant to human rights norms (including accountability for international crimes), the TLP theory suggests how they may internalise these norms into domestic laws, procedures and practices over time.

2.4 The contribution of testing TLP to human rights empirical research

The norm requiring investigation and prosecution of international crimes is 'nested' in a larger human rights movement seeking criminal accountability for gross human rights violations.[104] To this extent, empirical research on prosecutions of human rights violations, which often constitute international crimes,[105] offers insights

[103] While Koh refers to litigation of the Guantanamo cases before national courts and the Inter-American Court of Human Rights as an example of the TLP he does not comprehensively address prosecutions more generally: Harold Koh, 'The Value of Process' (2005) 11 *International Legal Theory* 27, 36-37.

[104] Sikkink, above n 29, 16.

[105] For example, Beth Simmons' empirical research demonstrated that ratification of a human rights treaty is socially motivated by the ratification practices of other States in the same region: Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009), 16-17, 85, 183; Beth A Simmons, 'From Ratification to Compliance: Quantitative Evidence on the Spiral Model' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2016) ('*Persistent Power')* 43-60, 53-55.

relevant to the OTP's goal of catalysing genuine national prosecutions of international crimes in preliminary examinations.[106] This section, therefore, briefly surveys the empirical literature to contextualise the features that the TLP shares with other approaches, and to underscore the TLP's unique value in explaining how compliance can be promoted within the ICC treaty regime.

The TLP is a legal variant of Finnemore and Sikkink's formative contribution on international norm dynamics. Elaborating on Cass Sunstein's concept of 'norm cascades', Finnemore and Sikkink proposed a three-stage 'life cycle' process involving norm emergence, a norm cascade and domestic internalisation.[107] Their description shares several features with TLP including norm entrepreneurs such as the ICRC, and 'organisation platforms' that resemble 'transnational issue networks'.[108] Finnemore and Sikkink attribute State compliance to the peer pressure effect on States' identities as members of an international society; non-compliance means they risk losing their reputation, trust, credibility and a sense of belonging.[109] While these themes explain *why* States may be compliant, they do not explain *how* to induce compliance in States that remain non-compliant despite existing legitimacy, reputation, esteem and conformity factors.

Human rights empirical scholarship has also described socialisation as a spiral process, comprising five stages: repression by norm-violating States, followed by denial of violations, tactical concessions, claims of norm acceptance and finally, norm-consistent behaviour.[110] An eleven-country study found that human rights norm diffusion depended on linking international regimes with both domestic and

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[106] Koh, above n 40, 81; Thomas Risse and Kathryn Sikkink, 'Conclusions' in *Persistent Power*, 275–295, 276.

[107] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 895; Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96 *Colombia Law Review* 903.

[108] See e.g. Finnemore and Sikkink, above n 108, 899.

[109] Ibid 902-904.

[110] Three causal mechanisms (explaining the *why*) were identified: instrumental adoption, argumentation (persuasion), and institutionalisation/habitualisation. Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999), 17-33. On empirical research on enforcement of human rights violation punishment in Latin America see Sikkink, above n 29, 10-18.

transnational networks; [111] and that 'norms initially adopted for instrumental reasons, are later maintained for reasons of belief and identity'.[112] Both these elements can be found in Koh's explanation of how the TLP results in internalisation.

Kathryn Sikkink similarly identified norm entrepreneurs – public interest lawyers, jurists, and activists – as key actors promoting socialisation (or in TLP terms, internalisation), which occurs because:[113]

> It is hard for a state that has ratified any of these treaties to argue that its officials should not be tried abroad and that they will not be prosecuted at home either.
>
> It is this dynamic that converts the one-level prosecution game into a more complicated two-level game and changes the interests of the players in question. In these circumstances, foreign and international prosecutions may alter the calculations of past and current members of the security forces to make them more favourable to domestic prosecutions than they would otherwise have been.[114]

The logical next question is, 'Is it possible to ensure these domestic prosecutions are "genuine"?' More relevantly, how can the ICC leverage the two-level game in relation to resistant States (that may or may not be democratic) to promote genuine national prosecutions?

Risse and Ropp revisited the spiral model in 2016, with a focus on how commitment (acceptance of international human rights norms as valid) results in compliance (sustained behaviour and domestic practices that conform to these norms).[115] The data identified four mechanisms that induce or prevent compliance: coercion (including the use of force and legal enforcement), changing incentives (such as sanctions and rewards), persuasion and discourse; and capacity building.[116] Ability (dependent on capacity and issue centralisation) and willingness (regime type and

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[111] Thomas Risse and Kathryn Sikkink, 'The Socialisation of Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1-16.
[112] Sikkink above n 108.
[113] Sikkink makes the important, but limiting, conclusion that since the justice cascade followed the global wave in democratisation, it *will not* extend to regions that have not undergone democratic transition: ibid 23-24, 98, 247.
[114] Ibid 242.
[115] Thomas Risse and Stephen C Ropp, 'Introduction and Overview' in *Persistent Power,* 3, 10.
[116] Ibid 15.

target vulnerability) were two other key factors of compliance.[117] That is, democratic States were found to be more willing to comply with human rights norms, as were States that were more sensitive to pressure ('social vulnerability') or to material benefits or sanctions ('economically vulnerable').[118] In reflecting the admissibility test in Article 17, these findings highlight the value of examining *how* to increase compliance with the sexual violence accountability norm.

Other empirically-identified factors that induce human rights trials include proactive litigants, enabling courts in the context of treaty obligations around individual criminal accountability,[119] the existence of democratic institutions and a strong civil society.[120] Results from the few quantitative studies on the deterrent effects of human rights trials are mixed.[121] These findings confirm the value of qualitative empirical research to explore the mechanisms by which inability and unwillingness can be overcome, and the relevance of the TLP's application to the ICC treaty regime to broader empirical human rights research.

Notwithstanding the resonance across disciplines and between theoretical and empirical research, this thesis seeks to address a few gaps in the literature. First, it tests the TLP in a treaty regime that is focused on legal processes, systems and outcomes (that is, genuine criminal investigations and prosecutions), specifically within a context of preliminary examinations designed to provoke interactions around what State action constitutes compliance. Second, it tests the TLP's explanatory capacity as a constructivist theory focused on interactions. In other words, whether norm-interpretive interactions with States that had not voluntarily initiated relevant proceedings before the OTP opened a preliminary examination can encourage norm-compliance.

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[117] Risse and Sikkink, above n 107, 286-287.
[118] Ibid 287-291.
[119] Dancy and Sikkink, above n 37, 789.
[120] Eric Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights? (2005) 49 *Journal of Conflict Resolution* 925.
[121] Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106(1) *American Journal of International Law* 1, 30; Kim and Sikkink, above n 39, 957-958. On factors affecting conflict recurrence see United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict—Main Messages and Emerging Policy Directions* (2017) <https://openknowledge.worldbank.org/>.

By testing the TLP through empirical research, this thesis situates itself in its approach to compliance in the legal process tradition, and builds on empirical research into prosecutions for international crimes. Empirically, the qualitative research in this thesis contributes to emerging scholarship on compliance with international norms, and to human rights research that has thus far focused more on *why* rather than *how* States come to comply. More specifically, it explores the extent to which the OTP has affected national investigations and prosecutions for international crimes of sexual violence through interactions during preliminary examinations with national authorities, and the factors that may inhibit or promote this influence. Thus, the TLP is a particularly useful framework within which to assess the impact of the OTP empirically during preliminary examinations in relation to internalisation of the sexual violence accountability norm.

3. Limitations of the TLP

On the other hand, a few key limitations affect the TLP's explanatory force in relation to the sexual violence accountability norm. As a matter of internal logic, Koh uses internalisation to both define and explain obedience; this means that the TLP explains neither why nor when States comply with international norms; it merely describes 'a pathway to norm incorporation into domestic law – and details the ways in which transnational actors and practices influence this process'.[122] This critique highlights two factors: the first is that, as mentioned in the previous paragraph, the TLP describes only *how*, not *why*, States comply with international norms. Even on this front, Eric Posner suggests that Koh's rationale for assuming that the world influences States' interests is unclear. He suggests Koh's focus on litigation and courts does not fully account for *how* TLP may occur.[123]

The second criticism is that, by describing an empirical pathway, the TLP's validity, or at least its robustness, depends on empirical testing. Koh's description does not identify why States move from compliance to internalised obedience. Indeed, others

[122] Raustiala and Slaughter, above n 35, 544.
[123] Eric Posner, 'Transnational Legal Process and the Supreme Courts 2003-2004 Term: Some Skeptical Observations' (2004) *Tulsa Journal of Comparative and International Law* 12(1) 23, 25.

have also criticised the TLP for its failure to explain *why* international legal norms are internalised[124] and offer their own determinative factors such as the nature of the norm, the actors and contextual factors.[125]

Further, and despite his description of the local processes involved, Koh suggests that the degree of internalisation is a function of the international rule in question, and minimises the importance of domestic attributes of the subject State.[126] However, as noted in other compliance theories and in the empirical research described above, domestic attributes, such as whether a State is a democracy and whether it has a strong civil society, are known to affect compliance with international human rights law.[127]

Consequently, the TLP fails to capture fully the degree of local resistance to the international norm as part of its explanation for compliance, non-compliance or partial compliance. Further, determining whether local resistance stems from political interests, cultural or social norms, or from competing security or other demands, may explain further how entrenched local resistance is to the internalisation of an international norm, and what is required to overcome this resistance. These aspects are relevant when considering international crimes as a more extreme manifestation of human rights violations and when there are political or other motivations for resistance to their prosecution, especially with respect to sexual violence.

More recently, Gregory Shaffer similarly critiqued Koh's metaphors for reducing TLP's complexity since, 'in practice, the processes are multi-fold, simultaneous, and iterative, involving disparate actors, applications, and flows in multiple directions'.[128] He further notes,

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[124] Stevens, above n 40, 193.
[125]See e.g., Stevens, above n 40, 220, 211; Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) *Law and Social Inquiry* 229, 248.
[126] Robert Keohane, 'When Does International Law Come Home?' (1998) *Houston Law Review* 35(3) 699-713.
[127] See e.g., Simmons, above 106; Neumayer, above n 125, 925; Risse and Sikkink, above n 112, 287-291.
[128] Shaffer, above n 126, 235.

> Koh did not provide a framework for assessing the conditions and factors determining the extent, location, and limits of transnationally induced legal change. Likewise, he never engaged in extensive empirical study of them. Moreover, he did not assess the source of transnational legal norms and whether transnational legal norms reflect a structural tilt in favor of some interests over others.[129]

Shaffer responds to the need for conceptual clarification and empirical study by suggesting a typology of five dimensions of state change that are empirically assessable, and factors that determine the extent, location, timing and limits of transnational legal processes.[130] Shaffer's empirical case studies mostly relate to areas traditionally addressed by realist theories of international law: bankruptcy, patent and competition law, anti-money laundering, and primary education law.[131] This mirrors others' considerations of TLP in relation to international commercial arbitration,[132] global economic development,[133] and international investment law.[134] Shaffer suggests useful supplementary explanatory factors that are nonetheless potentially relevant to the ICC treaty regime, and are referred to in later chapters where they arise.[135] Similarly, Michael Barnett and Raymond Duvall's framework of four conceptions of power in international governance (agency, institutional, structural, and productive power) provide further nuance to Koh's understanding of the interactive processes, interpretive communities and *why* these may affect State behaviour.

Similarly, this thesis incorporates considerations of power and governance when considering the ICC's and norm entrepreneurs' varying levels of influence on State prosecutions for international crimes and the social discourse around obligations to

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[129] Ibid.
[130] Shaffer, above n 126, 230.
[131] Ibid; Maira Machado, 'Similar in Their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina' (2012) *Law & Social Enquiry* 37(2), 330
[132] These include Yves Dezaley and Bryant Garth: Maya Steinitz, 'Transnational Legal Process Theories' in Cesare P. R. Romano, Karen J. Ater and Chrisanthi Avgerou (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013) 340, 350.
[133] For example, Jens Dammann and Henry Hansmann: ibid 346.
[134] For example, Gus Van Harten: ibid.
[135] These include: the legitimacy, clarity and coherence of the transnational legal order and norm; the relation of the transnational legal order and receiving State; and to context of the receiving State (including cultural frames, configurations of power and domestic demand): Shaffer, above n 126, 248-251.

prosecute international crimes of sexual violence. Accordingly, Koh's TLP, despite its explanatory and empirical limitations, provides a useful framework within which to explore these phenomena. TLP's focus on norm-interpretive interactions, inclusion of non-State actors and non-legal elements of internalisation opens up space to empirically explore how compliance with an international legal norm can be encouraged in non-compliant States. This is particularly relevant to promoting internalisation of a gender-based norm within national criminal law systems.

3.1 A feminist critique of international law

There is another main conceptual limitation of the TLP. As mentioned in Chapter 1, given the focus of this thesis on the gendered topic of sexual violence, a gender perspective[136] is necessary to understand when and how States comply with the sexual violence accountability norm. This thesis examines international law, as well as theoretical approaches to international law; both have been the subject of feminist critique. Thus, while the thesis does not intend to cover feminist theory comprehensively, it does draw upon foundational research that foreshadows the need for a feminist critique in relation to this research.

It does this with respect to international law itself, theoretical approaches to international law, how international law operates to influence State behaviour, how States interpret and comply with their international legal obligations, and responses by the international community to such State behaviour. A gender analysis is applied throughout the thesis, so this section demonstrates how it will be incorporated into subsequent analysis.

While it is neither necessary nor possible to conduct a comprehensive survey of the feminist literature for the purposes of this thesis, [137] the main premises used for subsequent analysis of the empirical findings are outlined. Notwithstanding claims

[136] This term is defined in the introduction according to the OTP SGBC Policy as 'understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people's opportunities and interactions:' ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) 3 https://www.icc-cpi.int/iccdocs/otp ('*SGBC Policy*'), 3.

[137] See e.g., Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005); Sari Kouvo and Zoe Peerson, *Feminist Perspectives on Contemporary International Law* (Hart Publishing, 2011) ('*Feminist Perspectives')*.

of conceptual incoherence within feminist legal research,[138] there is a range of critiques that confirm that both international law and national legal systems normalise the exclusion of women and their interests/experiences.[139]

International law, like all law, is based on and reflects values and expectations held by those who conceptualise, articulate and ultimately 'enforce' the law that dictates how its subjects should relate to one another. The acknowledged historical 'absence of women from the processes of international law, starting with the organs of the State, and extending to the make-up of international organisations, international courts and tribunals'[140] has 'legitimated the unequal position of women around the world rather than challenged it'.[141] Indeed, many gendered critiques of the legal system claim the substantive, procedural and conceptual dimensions of legal discourse are inherently masculinised and/or patriarchal.[142]

International criminal law has proved to be no exception. We can observe this in the sophisticated 'objective and neutral' fair trial procedures at international criminal tribunals that have nevertheless resulted in disproportionately low numbers of sexual violence prosecutions and convictions.[143] For some scholars, this is inevitable, since the legal system is 'designed to protect men from the superior power of the State but not to protect women or children from the superior power of men. It therefore provides strong guarantees for the rights of the accused but essentially no guarantees for the rights of the victims'.[144] The following chapter discusses this to the extent that this also reflects the inadequacies of criminal justice responses to gender-based violence.

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[138] Vanessa E Munro, 'Navigating Feminisms: At the Margins, in the Mainstreams or Elsewhere?' in *Feminist Perspectives* 13-16; for an example in contexts of international crimes, see Vasuki Nesiah, 'Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption to Feminism' in *Feminist Perspectives,* 137-158.
[139] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester United Press, 2000), 8.
[140] Ibid x.
[141] Ibid 1.
[142] Ibid 3; see also Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103(4) *Harvard Law Review* 829
[143] Charlesworth and Chinkin, above n 142, 328.
[144] Judith L Herman, *Trauma and Recovery* (New York, Basic Books, 1992), 72.

The inherently gendered effects of international law are mirrored in, and a product of, entrenched national-level legal discrimination in nationality laws, property rights, inheritance, marriage, divorce and custody of children, enjoyment of fundamental civil and political rights, participation in and access to law and policy-making, courts and legal remedies, and access to certain types of employment and government rights.[145] As discussed in Chapter 3, this inequality matters because it affects the likelihood, tolerance and sanctioning of sexual violence against women during armed conflict or social disruption. It also highlights the need for post-atrocity legal reform, as well as social and cultural transformation to prevent recurrence.[146]

Feminist approaches engage with and critique international law structures, substance and processes in varying ways: from seeking equality through law reform (liberal feminism),[147] to arguing that law's structure and founding principles of rationality, objectivity and abstractness render it a patriarchal institution (cultural feminism),[148] that keeps women 'out and down',[149] to deconstructing the law to reveal how gender is constructed and reconstructed in discourse (post-modern feminism),[150] to focusing on how gender intersects with race and imperialism, particularly in relation to issues of poverty, economic opportunities and development (third world feminism).[151]

Each of these approaches offers particular insights and strategies to challenge international law's propagation of gendered values that disadvantage women.[152] I apply a feminist analysis throughout the thesis to deconstruct the values embedded

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[145] Charlesworth and Chinkin, above n 142, 10.
[146] On the need for transformative reparations to overcome structures of equality and discrimination see: UN, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence* (2014) <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>, 6.
[147] Charlesworth and Chinkin, above n 142, 39.
[148] For a discussion on how this approach fits within feminist theory see Linda Alcoff, 'Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory' (1988) 13(3) *Signs: Journal of Women in Culture and Society* 405.
[149] Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), 39.
[150] See Charlesworth and Chinkin, above n 142, 44-6.
[151] Ranjoo Seodu Herr, 'Reclaiming Third World Feminism: Or Why Transnational Feminism Needs Third World Feminism' (2014) 12(1) *Meridians: Feminism, Race, Transnationalism* 1.
[152] Charlesworth and Chinkin, above n 142, 50.

in international criminal law and the ICC as an international institution, and to suggest how concepts and implementation can be understood (or 'rebuilt') to ensure international criminal law does not merely re-entrench the impunity that has historically characterised crimes of sexual violence.[153] Rather than applying a specific version of feminism I use a 'situated judgment' and apply different techniques particularly relevant to improving compliance with the sexual violence accountability norm.[154] I advocate using existing mechanisms and principles wherever possible to improve women's lives, and recommend reforming the law to respond more adequately to women's concerns, while insisting on women's equal participation in national and international law-making platforms.[155] This is done in the context of a '"sympathetic critique" that acknowledges feminist achievements but also exposes the gendered obstacles and power asymmetries that blunt reformist potential'.[156]

3.2 Foreshadowing the need for gender analysis

All the identified feminist challenges in international law apply with equal force to any theory attempting to explain the diffusion of international norms into national contexts, or to address the situation of women more generally.[157] For example, the gendered consequences of liberal theory's traditional distinction between public and private domains also apply to international law, where the 'private' is left to national regulation[158] which 'reflects male priorities'.[159] This is certainly true of international standards regarding particular forms of gender-based violence rejected by States on cultural, religious and social grounds.[160]

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[153] Ibid
[154] Charlesworth and Chinkin, above n 142, 162.
[155] Charlesworth and Chinkin, above n 142, 336.
[156] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016), 9.
[157] Charlesworth and Chinkin, above n 142, 25.
[158] Kristen Walker, 'An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/private Distinction in International Law' (1994) 26 *NYU Journal of International Law and Politics* 173; Doris Buss, 'Austerlitz and International Law: A Feminist Reading at the Boundaries' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 87, 94-100.
[159] Charlesworth and Chinkin, above n 142, 18.
[160] Female genital mutilation, early and forced marriages of girl children are some examples.

Theories of compliance with international law similarly reflect the androcentric and State-centric conceptions of international law,[161] even though gender is always relevant to compliance.[162] Indeed, contesting sexual politics when States are negligent or complicit in international crimes of sexual violence requires more than formal international authority, and 'a more complex form of transnational socialization than compared to civil liberties or even labour rights'.[163]

Meagan Louise Pearce argues that interest-based theories, rationality, norm-based theories and persuasion, and acculturation, must engage with feminist insights in order to explain and address the persistence of violence against women despite legal advances.[164] Pearce explicitly discusses Koh's TLP as a norm-based theory embedded in the constructivist tradition that explains how 'states might be persuaded by the content of norms prohibiting gender violence, but fail[s] to acknowledge that individual perpetrators and society as a whole must be persuaded'.[165] Further, conceptualising international norms as causes that produce effects (or not) within domestic contexts fails to account for push back from State domestic polities that may undermine domestic implementation of an international norm.[166] Ní Aoláin goes further to claim that, notwithstanding their identification, the limitations of legal process in challenging practices of gendered violence are underestimated.[167]

Pearce proposes two changes to the TLP to better understand why legal progress vis-à-vis violence against women has not translated into real change. First, that constructivist accounts 'theorise the process of domestic norm "translation" to

[161] Megan Louise Pearce, 'Gendering the Compliance Agenda: Feminism, Human Rights, and Violence against Women' (2015) 21 *Cardozo Journal on Law and Gender* 393.
[162] Raewyn Connell and Rebecca Pearce, *Gender: In World Perspective* (Polity, 2014) 10.
[163] Alison Brysk, 'Changing Hearts and Minds : Sexual Politics and Human Rights' in *Persistent Power*, 259-274, 261-262.
[164] Pearce, above n 164, 395.
[165]Pearce, above n 164, 416-7, 424; Benjamin Stachursky, *The Promise and Perils of Transnationalization: NGO Activism and the Socialization of Women's Rights in Egypt and Iran* (Routledge, 2013), 39.
[166] Pearce, above n 164, 424, citing Susanne Zwingel, 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective' (2012) 56 *International Studies Quarterly* 115.
[167] Fionnuala Ní Aoláin, 'Rethinking the Concept of Harm and Legal Categorisations of Sexual Violence During War' (2000) 1 *Theoretical Inquiries in Law* 308–340, 308.

properly describe how norms prohibiting violence against women are implemented – or not'.[168] Second, that these accounts make explicit how gender and power influence the content of norms and their relative influence.[169] While Pearce's critique of TLP from a gender perspective focuses on the norm prohibiting violence rather than the norm requiring criminal accountability for international crimes, Chapters 6 and 7 illustrate how her recommendations apply equally to the empirical findings of this thesis.

More specifically, this thesis answers Hilary Charlesworth's question, 'Is Harold Koh's account of the Transnational Legal Process (by which international norms are internalised) limited because it does not pay enough attention to the sexed identity of the players in the internalisation process?'[170] in the affirmative. It specifically examines these gender-based limitations regarding the internalisation of the norm obliging investigation and prosecution of international crimes by focusing on the subset of international crimes of sexual violence.

First, the TLP does not consider the relationship between the different types of internalisation and how this ultimately affects State compliance; this interaction across spheres is particularly important when the international norm challenges deeply ingrained national socio-cultural norms. The TLP does not describe how actors can influence whether internalisation or its absence in one sphere can promote or inhibit internalisation in another sphere. For example, the criminalisation of domestic violence (legal internalisation) may not lower its incidence, if the population views domestic violence as a strictly private affair to be resolved among family members (lack of social internalisation). For example, in a range of countries including Uganda, Kenya, Colombia and the DRC, rape has long been criminalised but remains largely unprosecuted. That is, long-standing legal internalisation has not led to significant political and social internalisation.

[168] Pearce, above n 164, 425.
[169] Ibid 425-6.
[170] Hilary Charlesworth, 'Feminist Ambivalence about International law' (2005) 11 *International Legal Theory,* 1, 8.

Second, although the engagement between international and national actors is dynamic, the historical reliance on actors diffusing an international norm in a gender-blind manner will perpetuate the gendered impacts of so-called gender-neutral norms.[171] The feminist critiques of international law and actors illustrate how pervasive gender neutrality has been, which explains why internalisation of international norms through interactions and interpretations have been similarly gender-neutral. Consequently, State responses to international crimes have perpetuated the historically criminal justice neglect of sexual violence.

This critique applies to each of the different TLP phases; if the actors interacting, interpreting and internalising are gender neutral[172], then their internalisation of the norm is likely to be gender neutral as well. That is, if the OTP does not explicitly include the need to prosecute sexual violence crimes in its interpretation of the general norm requiring investigations and prosecutions of international crimes, then the pre-existing failure to prosecute such crimes due to 'gender neutrality' in the State (which in fact privileges masculine conceptions of justice) will persist.

This section has highlighted that, despite its usefulness in analysing the preliminary examinations and its comprehensive approach to relevant actors who can influence the norm internalisation process, the TLP's explanatory value will be limited with respect to gendered norms. Feminist legal research suggests that explaining the empirical findings and making data-driven recommendations based on them will require incorporating gender analysis into the TLP. Chapters 5, 6 and 7 analyse whether the empirical data collected is consistent with this prediction, while the next section outlines the nature and method of the field research.

4. Methodology

In testing the TLP, this thesis is a response to calls for empirical research to assess both the conditions under which international criminal law (ICL) prosecutions are

[171] As of 1 January 2017 only 23.3 per cent of all national parliamentarians were women: <https://www.ipu.org/resources/publications/infographics/2017-03/women-in-politics-2017>.
[172] This characterisation considers that while international law has traditionally been dominated by men, it is possible that men will be gender-sensitive just as it is possible that women may be gender-neutral in their attitudes, opinions and implementation of international norms.

more likely to have positive effects;[173] and 'the causality between rule of law initiatives and gender-oriented goals'.[174] It is also intended to complement empirical research on the complementarity regime and international norms, which have tended to focus on human rights prosecutions generally rather than on crimes of sexual violence.[175]

The impetus also stems from the limited empirical research conducted in relation to the TLP. With respect to gender-related norms in the admissibility regime of the Rome Statute, Ní Aoláin raised the question of whether 'unavailability of national legal process will include the gendered effects of an insecure environment and its consequences for accountability'.[176] She concluded, 'Only distinct country-specific and comparative [research and] analysis will yield data on the faithfulness of the translation from ICL norms, or indeed progressive/expansive development beyond the State-agreed content of the ICC Statute'. [177]

4.1 Testing the TLP

Empirical research is needed to test the link 'between tactical concessions [treaty ratification] and the increased propensity for governments to actually begin to 'talk the talk'.[178] Thus, the thesis uses qualitative research methods, typically used to 'attempt… to capture and categorise social phenomena and their meanings'.[179] A case-study approach is used because it is most appropriate for exploring 'how' and 'why' questions through in-depth analysis when the researcher had little control over the situation, or when the researcher wished to test a hypothesis based on a broadly accepted theory (i.e., when the theoretical underpinning of the hypothesis is not itself the subject of the enquiry).[180] Triangulation of multiple data sources was used to enhance the robustness of conclusions. Relying on all three methods of direct observation, in-depth interviews and analysis of documents, the thesis

[173]Shaffer and Ginsburg, above n 122, 30.
[174] Fionnuala Ní Aoláin and Michael Hamilton, 'Rule of Law Symposium: Gender and the Rule of Law in Transitional Societies' (2009) 18(2) *Minesota Journal of International Law* 380, 381.
[175] Chapter 2.2.2.4.
[176] Fionnuala Ní Aoláin, 'Gendered Harms and Their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622, 630.
[177] Ibid.
[178] Simmons, above n 106, 52. The more appropriate colloquial phrase may be 'walk the walk'.
[179] Lisa Webley, *Qualitative Approaches to Empirical Legal Research* (2010) 15, 16.
[180] Ibid 15.

examines whether OTP engagement in preliminary examinations contributes to internalisation of the sexual violence accountability norm.[181]

The TLP framework includes actors, types of internalisation and various types of interactions that give rise to norm interpretations. Accordingly, the empirical research was designed to identify changes that the TLP would deem to be indicators of political, social and legal internalisation; that is, changes that are known to facilitate effective investigation and prosecution of sexual violence crimes.

These indicators encompass legislative reform that permits prosecution of a broader range of crimes of sexual violence, improves procedural protections for victims and reinforces the seriousness of sexual violence crimes, including through sentences or prohibiting amnesties, for example. Other key changes include, but are not limited to, policies that prioritise the prosecution of these crimes that increase the number of sexual violence charges laid and cases initiated or progressed (particularly if there is pre-existing available evidence but no previously initiated charges or cases), procedural improvements such as more sensitive treatment and support of victims, and in-trial protection measures to minimise re-traumatisation.

For example, prosecutors and NGO lawyers were asked during the research interviews for this thesis whether and how the process for prosecuting sexual violence crimes had changed in recent years, whether they had encountered difficulties in prosecuting and if they perceived the OTP had had any impact on national prosecutions. Women victims of sexual violence were asked how their cases came into the justice system, and whether they had encountered any difficulties engaging with criminal justice actors or participating in national proceedings. ICC staff members were asked about the conduct of preliminary examinations, and their perceptions of State responses to ICC engagement.

The empirical research captured the following: (1) women's experiences of the criminal justice system, (2) other stakeholder perceptions of prosecutorial practices

[181] Ibid 2.

and changes, and the factors to which these could be attributed, including the extent to which OTP actions were perceived to correlate to changes in State behaviour, and (3) interviewee opinions of the OTP's effect on preliminary examinations based on personal professional experience in the relevant political, legal and social contexts.

4.2 Empirical research methodology

As outlined in Chapter 1.4, the thesis adopted a qualitative case-study socio-legal research methodology, which included empirical research during preliminary examinations held in Colombia and Guinea. The empirical research was used to both supplement and test the validity and accuracy of the TLP framework and the desk research, particularly the OTP's reports and conclusions during preliminary examinations. Colombia and Guinea were chosen for several reasons, described in greater detail in Chapter 5.1, but briefly mentioned here to provide the necessary context. First, States under preliminary examination have active and unambiguous obligations to investigate and prosecute international crimes. Second, the extent to which they fulfil this obligation is under OTP scrutiny and the basis for the OTP's discretionary decision to open an ICC investigation or not. Third, States under preliminary examination may be able to avoid an ICC investigation altogether if the OTP is convinced their national proceedings are genuine and thus fulfils their obligation to investigate and prosecute international crimes. In terms of the TLP, preliminary examinations are characterised by interactions between the OTP and stakeholders around what constitutes norm compliance[182] intended to achieve genuine national investigations and prosecutions of international crimes.

As noted in Chapter 1.4, a case study approach was appropriate for several reasons, notwithstanding the methodological issues that arise with a small sample size to generate tentative more generalizable conclusions.[183] In fact, applying Robert Yin's classic matrix of three conditions and five major research methods, a case study

[182] It is also the phase in which the OTP has the greatest influence on national prosecutions: Paul Seils, 'Putting Complementarity in Its Place' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 305, 309.

[183] Jason Seawright and John Gerring, 'Case Selection Techniques in Case Study Research' (2008) 61(2) *Political Research Quarterly* 294. For more general reasons explaining the shift towards case study research see John Gerring, 'The Case Study: What it is and What it Does' in Robert E Goodin (ed) *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 1133, 1134-5.

methodology emerges as the only appropriate method. This is because the thesis explores explanatory 'how' and 'why' questions regarding contemporary events in contexts with no control over behavioural events such as is the case in this thesis.[184]

The case study contexts were selected to achieve a '(1) representative sample and (2) useful variations on the dimensions of theoretical interest'.[185] Using triangulation of different data collection methods and two case studies instead of just one enhances the links between empirical information and the theoretical proposition: this raises the level of confidence in the robustness of the method.[186] However, the very small sample size is better suited to exploratory rather than confirmatory research, and lends itself to stronger analysis of causal mechanisms and deeper causal inferences.[187] As Chapters 5 and 6 describe, there is a high degree of contrast between the two contexts including: in legal and civil society advocacy sophistication, the geographical, political and security context within which the crimes were committed, the perpetrators investigated, and the number of victims, perpetrators and proceedings. However, as noted in Chapter 1.4, this increases the external validity of common trends across the case studies, and it also provides two sources of data within which to explore causal mechanisms.[188]

Admissibility is being assessed in preliminary examinations in Afghanistan, Colombia, Guinea and Nigeria; the table encapsulating the phases, progress and outcomes of all preliminary examinations is shown and discussed in Chapter 5.2.[189]

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[184] These conditions are (a) the type of research question posed, (b) the extent of control an investigator has over actual behavioural events, and (c) the degree of focus on contemporary as opposed to historical events; and the five research methods are experiments, surveys, archival analysis, histories, and case studies: Robert K Yin, *Case Study Research: Designs and Methods* (2nd ed) (Sage Publications, 1984), 4-9. On the appropriateness of case study methodology see also Simon Halliday and Patrick Schmidt, *Beyond Methods: Law and Society in Action* (Cambridge University Press, 2009); Bronwen Morgan, *Rights and Regulation in the Transnational Governance of Urban Water Services* (Cambridge University Press, 2012); Donna M Zucker, 'How to Do Case Study Research' (2009) *Teaching Research Methods in the Social Sciences,* 2.

[185] Seawright and Gerring, above n 186, 296.

[186] Robert K Yin, *Applications of Case Study Research* (Sage Publishing, 2011), 13.

[187] Gerring, above n 186, 1140. It is hoped that this this thesis' findings pave the way for larger sample-size cross-studies to verify the generalisability of the analysis and conclusions in Chapters 7 and 8. See also Douglas Dion, 'Evidence and inference in the comparative case study' (1998) 30 *Comparative Politics*, 127; Joe Gerring, 'Causation: a unified framework for the social sciences' (2005) 17 (2) *Journal of Theoretical Politics*, 163.

[188] Gerring, above n 186, 1145.

[189] ICC-OTP, *Report on Preliminary Examination Activities 2015* (2015) 1.

In the matrix of cases under examination, the OTP has identified international crimes of sexual violence in all but Afghanistan. However, the OTP first addressed admissibility in Nigeria in its 2013 Preliminary Examination Report, while the OTP has been assessing admissibility in Colombia and Guinea since its first public preliminary examination reports on these two countries in 2011. Accordingly, because of the higher number of iterations of the TLP cycle in both countries, Colombia and Guinea represented the best case-study contexts within which to analyse and evaluate interactions vis-à-vis international crimes of sexual violence. Three case studies would have restricted the time, financial and human resources to gather data, and the depth of analysis within and between contexts.

The specific aims of the empirical research were to:

a. Analyse the nature and content of the norm-interpretive interactions between the OTP, the State actors and the non-State actors in relation to the sexual violence accountability norm in two specific national contexts.
b. Identify the extent of and limits to legal internalisation, namely:
    i. whether substantive legal provisions adequately address sexual violence
    ii. the nature of legal reforms to the domestic criminal justice system regarding crimes of sexual violence since engagement with the OTP, and
    iii. whether the OTP is considered to have contributed to any legal internalisation of the sexual violence accountability norm
c. Identify the extent of and limits to political internalisation, namely:
    i. whether there are procedural regulations and policies that promote effective investigations into sexual violence
    ii. the nature of new policies and procedures promoting such investigations since engagement with the OTP, and
    iii. whether the OTP is considered to have contributed to any political internalisation of the sexual violence accountability norm
d. Identify the extent of and challenges to social internalisation, namely:
    i. to what extent sexual violence crimes are prosecuted in the two national criminal justice systems

ii. whether and to what extent police, prosecutor, judges and other criminal justice actors' compliance with sexual violence crimes laws and procedures has improved since engagement with the OTP
iii. whether and to what extent any other behaviours in criminal investigations and prosecutions under scrutiny by the OTP, particularly those relevant to sexual violence crimes, have improved
iv. to what extent conviction rates and sentences for sexual violence crimes are appropriate and proportionate, or have become more appropriate and/or proportionate, and
v. whether the OTP is considered to have contributed to any social internalisation of the sexual violence accountability norm.

The thesis surveys legislation, judgments, investigations, prosecutions and convictions. It also surveys State documentation on policies, priorities and practices, as well as non-State documentation of the extent and nature of sexual violence crimes, their treatment by the justice system, and relevant State activity or inactivity. This data reveals institutional positions (which can be compared to data about processes and outcomes in practice), including in what light sexual violence crimes are considered by different State entities.

Empirical data was collected in 2013 in accordance with UNSW ethics approval through individual interviews in Colombia and Guinea with prosecutors, judges, State and NGO representatives, as well as women victims who had been involved in sexual violence crime investigations. Interviews were also conducted in The Hague with ICC staff engaged in preliminary examinations. One month was spent in both Bogota, Colombia and Conakry, Guinea. One week was spent in The Hague to interview ICC staff.

Semi-structured interview questions were designed for each group of the following interviewees (see Annexures 1-4):
Interviewees included:

a. women victims of crimes of sexual violence experienced as war crimes or crimes against humanity under OTP scrutiny, who are or have been

witnesses in criminal investigations for those crimes (8 in Colombia, 11 in Guinea)

b. NGO staff and lawyers who have worked on sexual violence cases, including if possible, as war crimes or crimes against humanity, and including those representing victims in such cases (6 in Colombia, 5 in Guinea)
c. Prosecutors or members of prosecution teams who have prosecuted these types of crimes, such as investigators or advisers (2 in Colombia and the principal prosecutor assigned to the stadium case[190] in Guinea)
d. Court actors who have managed these types of cases (the Presiding judge of the stadium case and the complementarity representative from the ICC Presidency Chambers)
e. Government representatives involved in issues of justice, violence against women or engaging with the ICC (a representative from the Ministry of Foreign Affairs in Colombia engaged in the preliminary examination correspondence with the ICC, the Minister of Foreign Affairs in Guinea)
f. Four ICC staff in the Jurisdiction Co-operation and Complementarity Division of the Office of the Prosecutor who were directly involved in the preliminary examinations.

Table 2.1 identifies the number of interviewees in each category

Table 2.2 Interviewees

	Women	NGO staff	Prosecutors	Court actors	Government
Colombia	8	6	2	0	1
Guinea	11	5	1	1	1
ICC	N/A	N/A	4	1	N/A

In both countries, the interviewee numbers indicate it was easier to access women and NGO representatives than it was to access prosecutors, court actors and the government. Nevertheless, the State representatives who were interviewed were

[190] This is the one case initiated in the Guinean legal system to investigate and prosecute crimes committed in relation to events on and shortly after 28 September 2009, which are commonly referred to as the 'stadium massacre'.

well-placed to provide relevant information about specific aspects of the preliminary examination. The data was used to assess the perceived and actual impact of OTP norm-interpretive interactions on State laws and policies and practical steps taken by national criminal justice actors to investigate and prosecute international crimes of sexual violence. Narratives from NGO staff and women witnesses provided important perspectives to compare with those from State institutions, and with impressions and opinions held by ICC staff.

The sample size varies across interviewee categories for several reasons. With respect to women interviewees, the intermediary NGOs contacted women who could speak to the issues raised in the survey and women who wanted to be interviewed attended the NGO's office for interviews. While concerns of risks and re-traumatisation were raised with the NGOs, it was clear from comments before or after interviews, that women generally found sharing their stories to be an empowering experience.

With respect to NGO staff, the numbers were determined by the number of staff members who could speak to the issues in the survey and were available to be interviewed. Given the partnering NGOs supported women through the criminal justice process, the number of NGO interviewees was considered sufficient to ensure an accurate 'snapshot' of the relevant context. With respect to prosecutors, while there was only one relevant prosecutor in Guinea (since the thesis focuses on a single legal proceeding), there were many more Colombian prosecutors who could have spoken about their experiences prosecuting international crimes of sexual violence. The low number of prosecutors interviewed in Colombia (relative to the number of prosecutors with relevant experience) is counter-acted by two factors.

The first factor is that one of the prosecutors was the Gender Adviser in Bogota, whose thematic management of gender-related issues provided cross-cutting insights across different prosecutorial units. The second factor is that the other prosecutor was an international prosecutor specialising in sexual violence embedded in the Fiscalía's office. Accordingly, information from this interview was very specific, relevant and more objective, particularly in relation to engagement with the ICC. It provided an important internal and systemic insight into the

practical challenges and processes to norm internalisation within the Fiscalía that other prosecutors could not have offered. Accordingly, while higher numbers of prosecutor interviewees would have increased the anecdotal data on individual investigations and prosecutions, the more systemic aspects that affect internalisation particularly relevant for this thesis were still captured.

The questions asked in each interviewee category varied, but were consistent within each category across countries, to ensure a minimum amount of directly comparable data was collected. The semi-structured format of the interview provided for additional or alternative questions depending on interviewee responses. Additionally, as interviewees mentioned specific concerns or features about proceedings, subsequent interviewees in the same categories were also asked about these concerns to strengthen data robustness. The analysis of interviews in Chapters 5 and 6 also refer to direct observations made throughout interviews in Colombia and Guinea.

Using a deductive approach, the qualitative content analysis of the data encompassed descriptions of the manifest content (close to objective data such as laws, regulations, written policies and judgments), and interpretations of the latent content (distant from the objective data, but still close to the participants' lived experiences).[191] Since qualitative analysis is not linked to a particular science its methods are not well formulated.[192] Given the purposive sampling of the interviewees and the intention to compare official State records of proceedings against individuals' experiences engaging with the criminal justice system, content analysis was supplemented by discourse analysis. Content analysis was used both descriptively (delineating the codes and the relationships between them) and also to explain or to develop a theory or theories.[193] It involved pulling out emerging themes from the texts and analysing 'how they are used, the limits of their use, and

[191] Ulla H Graneheim, Britt-Marie Lindgren, and Berit Lundman, 'Methodological challenges in qualitative content analysis: A discussion paper' (2017) 29 *Nurse Education Today,* 29, 30.
[192] Mathew B Miles, 'Qualitative Data as an Attractive Nuisance: The Problem of Analysis,' (1979) 24 *Administrative Science Quarterly*, 590. For a discussion on methodological approaches see Graneheim, Lindgren and Lundman, above n 194.
[193] Webley, above n 182, 941.

the context within which they appear'.[194] Discourse analysis was used to uncover phenomena as understood by the interviewees, rather than phenomena that the texts themselves revealed.[195] The semi-structured quality of the interviews ensured consistency in the number and topics of themes emerging from the interviews, while the application of TLP's framework structured the analysis of all data to align with the different forms of internalisation.

4.2.1 Ethics, confidentiality and OH & S issues

Approval to conduct interviews with individuals was granted by the UNSW Human Research Ethics Advisory Panel prior to fieldwork under approval number HC12254. My qualifications prior to conducting these interviews included experience as a prosecutor and legal aid defence lawyer interviewing child and adult victims of sexual assault pursuant to strict guidelines at the NSW Office of the Director of Public Prosecutions and the NSW Legal Aid Commission and field experience with East Timorese women with similar experiences. A mental health first aid course was completed prior to commencing fieldwork to ensure interviews did not trigger previous trauma, that full and proper consent was properly communicated and that risks of harm were identified and mitigated in advance.

It is important to note here that my intention when interviewing women was *not* to ask or talk about the crime itself, but about their experiences interacting with the criminal justice actors after the crime.[196] The consent form described the scope and content of the interview questions, which covered the following experiences:

a. police treatment, interviewing approach and procedures
b. treatment, questioning approach and explanations by the State prosecution service
c. treatment by any other service providers
d. experience in court and treatment by court actors (if relevant).

[194] Webley, above n 182, 941-2.
[195] Webley, above n 182, 942.
[196] While some women chose to share aspects of their experiences of the crimes, there was no evidence of re-traumatisation, and women who expressed emotion communicated their appreciation for the chance to share their experiences.

In both Colombia and Guinea, a female interpreter was present for interviews with women victims, given the patriarchal context, the nature of the violence experienced by the women and advice from NGO intermediaries.[197] All interviews lasted over 30 minutes, averaged over 60 minutes and some were up to 90 minutes in duration. They provided a substantial amount of qualitative data beyond the answers to questions asked in the semi-structured interview format. There were no interviewees who requested to discontinue the interview, and while several interviewees requested to pause the interview to recover composure, these interviewees indicated on their own initiative that they wanted to resume the interview.

As women victim interviewees were contacted through intermediaries familiar with their situation and possible risks to their security, the need to mitigate such risks was discussed with partnering NGOs. The NGOs then managed any perceived risks when arranging interviews. A methodological choice to approach NGOs as partners for conducting the field interviews was made on the basis that it best served the interests of interviewees, ensured there was fully informed and voluntary consent for participation, and that interviewees were in fact women who had sought justice for international crimes of sexual violence. Time constraints limited the interview locations to the capital cities in each country but this was not a material limitation in Guinea since the stadium massacre occurred in Conakry. In Colombia, interviewing NGO representatives working with women victims in regional Colombia provided insights into variations between practices and experiences in Bogota compared to regional Colombia.

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[197] See e.g. Sara Ferro Ribeiro and Danaé van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (2nd ed) < https://iici.global/0.5.1/wp-content/uploads/2017/08/International_Protocol_2017_2nd_Edition.pdf>; WIGJ, *Gender in Practice: Guidelines & Methods to address Gender Based Crime in Armed Conflict* (2005), 31 http://www.iccwomen.org/whatwedo/training/docs/Gender_Training_Handbook.pdf; International Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014) 14, <http://w.unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf>.

Interviews have been kept confidential, and interviewee identities will not be disclosed in any published material. Permission to quote interviews in the thesis was granted by all interviewees whose responses are included in the thesis. As required by the UNSW ethics protocol, the interview content is stored separately and securely from any information linking interviews with individuals, in a secure data storage area on the UNSW campus.[198]

4.2.2 Challenges, strengths and limitations

The two main challenges were accessing the relevant actors in the limited time available and ensuring integrity in interpretation. Notwithstanding the limited number of interviews with prosecutors, significant data was collected from interviews with these actors. In Colombia, this was because the interview lasted for over an hour, and in Guinea the interview was with the prosecutor for the stadium case under OTP scrutiny so it revealed critical aspects of the relevant national proceedings. While certain statements by interviewees could not be empirically tested, there were numerous instances of conflicting narratives or justifications that offered interesting insights into the intra-State and international interactions taking place.

The second challenge of interpretation was most salient in Guinea, because the female interpreter engaged for interviews with women victim interviews was not particularly experienced. However, she spoke a local dialect in most of the interviews, which clearly made the women interviewees more comfortable sharing their experiences. Moreover, the interviews for which she interpreted did not involve any legal or technical terminology that would be more difficult to interpret. The other interpreters used were all experienced, including in relation to working with human rights NGOs and victims of human rights violations.

A third challenge, common to any research on OTP conduct during preliminary examinations, is that material exchanged by OTP and a range of stakeholders is not publicly available.[199] This precludes the ability to confirm the full scope of

[198] Annexure 6, *UNSW Ethics Safety Protocol*.
[199] Note that most of the confidential communication consists of requests for information from the OTP, and the provision of information by the State, rather than norm interpretations, as such. That

interactions, how the States and the OTP interpreted the norm on an iterative basis and the extent to which the States responded to specific requests or statements from the OTP, which would demonstrate a causal relationship, or attribution. Accordingly, the research relies on the triangulation method, whereby different kinds of data from different sources were compared to see whether they corroborated each other[200] and to make inferences of partial causality or contribution.

Some interesting insights and comparisons can be drawn in analysing the interview data (obtained in 2013) against the subsequent development of preliminary examinations. The data, particularly around national proceedings, has been updated where possible using other material, which also serves as an additional triangulation method to improve the robustness of the findings. Overall, the qualitative approach yielded information-rich narratives that extended well beyond responses to the interview questions. Further, the semi-structured approach permitted the exploration of issues that emerged from previous interviews with other actors. For example, once one Guinean woman mentioned a question from the judges about compensation, a specific question on that issue was included in subsequent interviews. Finally, the higher number of interviews with women and NGO representatives proved important in revealing the full range of experiences 'on the ground' compared to official or institutional narratives and to varying elements of OTP preliminary examination (PEX) reports.

5. Conclusion

Despite the existence of the international norm obliging States to investigate and prosecute international crimes for several decades, compliance has been generally elusive. This is unsurprising, considering that State actors will act to preserve their own interests, including by tolerating impunity for international crimes, and that such impunity will inhibit the norm's robustness. Until recently, both compliance theories and empirical researchers have focused little attention on what factors may

is, the correspondence contains information requests and responses, and the OTP's conclusions are contained in the public report: interview I4.

[200] Clive Seale, *Researching Society and Culture* (Sage Publications Ltd, 2000), 231: Robert Yin, above n 187, 13.

induce non-compliant States to comply when the typical incentives are absent and when compliance may threaten self-interest.

While the TLP does not answer this question comprehensively, it does describe detailed processes and agents to explain how this conversion process may occur. This chapter has discussed why, as a legal process compliance theory, TLP has particular explanatory value in exploring the OTP's potential, especially during preliminary examinations, to promote compliance with the sexual violence accountability norm. By focusing on how norm-interpretive interactions among a diverse range of actors can lead to legal, social and political socialisation, TLP captures the framework of dialogue during preliminary examinations and the range of legal and non-legal changes required to achieve compliance. Conversely, based on feminist legal research, TLP's gender neutrality is predicted to limit its explanatory power with respect to the gender-based sexual violence accountability norm.

The chapter has established how the empirical research tested norm-interpretive interactions during the preliminary examinations in Colombia and Guinea and whether they had any effect on State compliance with the sexual violence accountability norm. The research methodology, designed to obtain qualitative data on both the concrete changes to facilitate such prosecutions and the perceived or expressed motivations for the changes, also reflects TLP's articulation of the various forms of internalisation. Thus, there is a clear theoretical framework within which to evaluate OTP influence during its preliminary examinations in Colombia and Guinea, and to empirically assess whether and how the OTP can catalyse national prosecutions for sexual crimes in these contexts. The next chapter traces the historical development of criminal justice responses to sexual violence in general, and the ICC's institutional track record with respect to this category of crime.

CHAPTER 3. CHALLENGES TO EFFECTIVELY PROSECUTING CRIMES OF SEXUAL VIOLENCE

1. Introduction

This thesis examines the potential of one institutional actor – the Office of the Prosecutor (OTP) of the ICC – to catalyse[1] national investigations and prosecutions for international crimes of sexual violence in national jurisdictions. The previous chapter outlined the theoretical framework within which this potential can be understood and tested. This chapter describes the impetus for this thesis, namely, (1) the reasons impunity for international crimes of sexual violence endures, (2) the recognised need to challenge this impunity more effectively and (3) how the ICC's design and practice can contribute to achieving this goal.

Based on feminist legal research, TLP's gender neutrality is predicted to limit its explanatory power in relation to norms relating to gender-based violence, such as the sexual violence accountability norm. In other words, without including sexual crimes in norm-interpretive interactions, they are not expected to be affected by any general catalytic effect on national criminal proceedings for international crimes.

Understanding how and why gender-neutral norm-interpretive interactions during a preliminary examination may or may not improve national prosecutions of sexual violence crimes is predicated on knowing the reasons these crimes enjoy the impunity they do. The historically flawed criminal justice responses to sexual violence inform our identification of the changes required to challenge such impunity. The failures of the national and international legal systems in this regard are a product not just of inadequate laws and procedures, but also of deeply entrenched social, political and cultural values, norms, attitudes and hierarchies.[2]

[1] The term 'catalysing' is as defined in Chapter 1.3.

[2] *In-depth Study on all Forms of Violence Against Women: Report of the Secretary-General*, UNGAOR, 61st sess, Agenda Item 6(a) UN Doc. A/61/122/Add.1 (6 July 2006) 28 [70]; Alice Edwards, *Violence Against Women and International Human Rights Law* (Cambridge University Press, 2011) 165; Hilary

This context raises the two dimensions of this thesis addressed in this chapter. First, what challenges to effective national investigations and prosecutions of sexual violence have already been identified, and to what extent have and can these be overcome? Second, how has the ICC sought to address these issues in its own legal framework, policies and practice; and to what extent could these efforts facilitate improvements in national prosecutions? The answers to these two questions temper our expectations of national investigations in two ways. First, they temper expectations about what national prosecutions can and should be expected to achieve for victims of international crimes of sexual violence. Second, they temper the realistic capacity and ambitions of the OTP to contribute to compliance with the sexual violence accountability norm during preliminary examinations. These answers also inform the content of the norm interpretations required to achieve the legal, political and social internalisation necessary for compliance with the sexual violence accountability norm, as described in Chapter 2. As noted in Chapter 1, although an acknowledged goal of the ICC treaty regime, this thesis does not investigate the extent of any deterrent effect (or the communicative function) of such investigations and prosecutions on the subsequent *commission* of sexual violence crimes.

The first part of the chapter examines the historically entrenched and continuing failures of national investigations and prosecutions of sexual violence crimes to investigate, prosecute and appropriately punish convicted offenders. The second part traces the history of international criminal law (ICL), particularly with respect to sexual crimes, to demonstrate the extent to which national limitations are replicated, or have been overcome, in ICL. This material anchors our expectations of the level of compliance with the sexual violence accountability norm the OTP can realistically be expected to catalyse in light of the strengths and weaknesses of ICL jurisprudence, policies, resources, priorities and practices around sexual violence. It also contextualises the arguments made in this thesis about how the OTP can most

Charlesworth, 'What are 'Women's International Human Rights'?, in Rebecca J. Cook (ed) *Human Rights of Women* (University of Pennsylvania Press, 2012), 58-84, 64.

effectively challenge the impunity enjoyed by perpetrators of international crimes of sexual violence through catalysing genuine (and effective) national proceedings.

The third part of the chapter examines the ICC's record vis-à-vis sexual violence, first, in its progressive legal framework and second, in its less progressive jurisprudence, policies and practice. As explored in Chapter 4, these standards filter through to OTP engagement in preliminary examinations and affect how norm entrepreneurs, government sponsors and issue networks can innovate and apply pressure for necessary reform at national level to improve criminal justice outcomes for sexual violence.

2. Challenges to effective national criminal justice responses to sexual violence

The OTP's capacity to facilitate improved national criminal justice outcomes for sexual violence during preliminary examinations depends on accurately identifying the barriers to prosecuting sexual violence in national courts and suggesting solutions where necessary to overcoming them. Understanding whether these solutions constitute legal, political or social internalisation assists in targeting the appropriate parties for norm-interpretive interactions.

Accordingly, it is necessary to understand why national criminal justice actors continue to struggle to define sensitively and effectively, investigate, prosecute, convict and punish appropriately those accused of perpetrating sexual violence crimes, particularly crimes other than rape. Despite the historical prevalence of sexual violence in times of conflict and of peace,[3] prosecutions of both individual and systemic sexual violence remain disproportionately challenging and are frequently unsuccessful.[4] It is well established that in contrast to other crimes, sexual violence crimes are disproportionately underreported, often inadequately

[3] For a historical account of rape and its consequences see Susan Brownmiller, *Against Our Wills: Men, Women and Rape* (Ballantine Books, 1993); Kelly D Askin, *War Crimes against Women* (Martinus Nijhoff, 1997); Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 *Case Western Reserve Journal of International Law* 305; Henry T King, 'The Legacy of Nuremberg' (2002) 34 *Case Western Reserve Journal of International Law* 335.

[4] Doris Buss, 'Is International Criminal Law Feminist?' (2011) 11(3) *International Criminal Law Journal* 409. See Chapter 3.2.1 on the attrition rate for sexual violence crimes in national legal systems, and Chapter 3.2 for the attrition rate at the ICC.

investigated, less likely to reach court, and more likely to result in an acquittal or a disproportionately lenient sentence that undermines the value of criminal punishment.[5] This section identifies how each type of internalisation can help overcome the above challenges to achieving compliance with the sexual violence accountability norm.

As explained in Chapter 2.2.1, legal internalisation depends on the existence of laws and procedures that facilitate prosecution of sexual violence crimes; political internalisation would be reflected in political elites advocating for governments to adopt policies that promote compliance, and social internalisation occurs when the relevant actors – in this case, State agents involved in investigating and prosecuting crimes of sexual violence - consistently adhere to the norm because they perceive it as legitimate. While not exhaustive, this section identifies the main challenges across the three dimensions of internalisation of the sexual violence accountability norm.

2.1 Legal internalisation

The key initial *legal* challenge in many national jurisdictions is restrictive legislation, such that only a limited sub-range of sexually violent acts are criminalised. The definition of the crime of rape varies across national legal systems, may be restrictive and may not necessarily extend to other forms of sexual violence, or rape in particular contexts (e.g., within marriage).[6] As a representative example of a restrictive definition, rape in the 1951 Ugandan Penal Code (still in force) is located in the chapter entitled 'Offences Against Morality', and defined as 'unlawful carnal knowledge of a woman or girl'.[7] The definition is limited to penetration of the penis into the vagina of a woman or girl and does not explicitly include forced oral sex, rape with an object, anal rape and other common forms of sexual violence; these can be prosecuted only as the lesser offence of indecent assault (also only against females), and have a lower maximum sentence of 14 years.[8]

[5] See UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 49 <http://www.unwomen.org>.
[6] Ibid 33.
[7] Uganda Penal Code Act, art 123.
[8] The maximum sentence for indecent assault under Article 128 of the Uganda Penal Code is 14 years, compared to the maximum sentence of death (Article 124) for an offence under Article 123.

According to this law, rape or other forms of sexual assault against men are not crimes,[9] and penetration by a penis is considered more serious than penetration by an object. Beyond being discriminatory on the basis of sex and creating a gravity ranking of penetration methods without evidentiary basis, this definition is also inconsistent with international legal definitions of rape (see Chapter 3.4.1 below)[10] and contrary to the trend across national jurisdictions to recognise the equivalence of acts that involve penetration by any object, rather than only penile penetration of the vagina.[11] In addition, by characterising rape as an 'offence against morality', the Ugandan Penal Code fundamentally obscures the violation of physical integrity as experienced by the victim,[12] trivialises its gravity and infers that the victim's dignity is tarnished, validating fears of stigmatisation and shame that may extend to family members.[13]

Challenging impunity in post-atrocity contexts meaningfully also depends on prosecuting those in command. Most States have ratified the Geneva Conventions, the Convention against Torture and the Genocide Convention, all of which require the prosecution of responsible commanders.[14] However, while some military manuals and national laws include provisions to hold commanders responsible for crimes committed by their subordinates,[15] this is not a typical feature of national

[9] Article 124 creates the offence of indecent assault of boys under the age of 18; and Article 145 criminalises male homosexual acts. The criminalisation of homosexuality in Uganda obscures efforts to prosecute sexual violence against men. See Amrita Kapur and Kelli Muddell, *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts* (2016), 12.

[10] See e.g. *Elements of Crimes*, art 7(1)(g), in which the element of rape is described as when 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.

[11] This equivalence is recognised in Uganda only in relation to the offence of defilement (sexual assault against a minor): Ugandan Penal Code Amendment Act 2007, art 7(2), replacing Section 129 of the Penal Code 1951.

[12] On the importance of characterising rape as a violent act see: UN Women, above n 5, 33; Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425, 432; Doris E Buss, 'Rethinking 'Rape as a Weapon of War'' (2009) 17 *Feminist Legal Studies* 145, 151.

[13] Aoláin, Haynes and Cahn, above n 12, 440; Priya Gopalan, Daniela Kravetz and Aditya Menon, 'Proving Crimes of Sexual Violence' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) 111, 113-114.

[14] Note that the Genocide Convention does not explicitly include indirect modes of liability but it has since been interpreted this way in the ad hoc tribunals; on how this has been done and its challenges, see William Schabas, *Genocide in International Law* (Cambridge University Press, 2000) 361-369.

[15] For examples of military manuals, see ICRC, *Customary Rule 153* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153#Fn_65_4>.

criminal law and it is difficult to know how regularly these are applied to sexual violence crimes.[16] Certainly, the evidentiary burden to prove command responsibility is recognised as difficult and one that requires specialist skills.[17] Given the historic tolerance of sexual violence in military structures during times of armed conflict, senior commanders are unlikely to face military prosecutions for international crimes of sexual violence, even if there are provisions that establish command responsibility. Chapters 3.3 and 3.4.2 below illustrate how this is borne out in the challenges of prosecuting sexual violence at both the international and national levels. Notwithstanding, the existence of such laws is a pre-requisite for legal internalisation of the sexual violence accountability norm vis-à-vis commanders.

A subtler hurdle to prosecuting sexual violence is the legal concept of consent or non-consent, which varies significantly across jurisdictions. These variations stem from the shift in the last few decades in some jurisdictions from a consent-based model that relied on evidence to demonstrate lack of consent to a coercion-based model of consent whereby a range of coercive circumstances may vitiate meaningful consent.[18] Similarly, national jurisdictions display considerable diversity regarding issues such as the admissibility of evidence of previous sexual behaviour, the criminal status of marital rape, [19] and whether recklessness satisfies the *mens rea* element of sexual violence offences,[20] all of which remain controversial in many

[16] The ICRC Customary Rule 153 refers to only a handful of jurisdictions with command responsibility provisions: ibid.

[17] Kevin J Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53(1) *Harvard International Law Journal* 85, 103, and 124 (on the difficulties of achieving accountability to render cases inadmissible before the ICC without command responsibility). On the need for specialist skills to investigate and prove this mode of liability see Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers* (2011), 60-61; Morten Bergsmo and William H Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes' in Siri Skåre, Ingvild Burkey and Hege Mørk (eds), *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers* (Norwegian Human Rights Centre, 2008) 1, at 7.

[18] K Alexa Koenig, Ryan Lincoln and Lauren Groth, 'The Jurisprudence of Sexual Violence' (Working Paper, Human Rights Center Univerisity of California Berkley, 2011), 44-47. *Cf* on the problems with this approach in international criminal law, Kiran Grewal, 'The Protection of Sexual Autonomy under International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 373.

[19] By April 2011, 52 States had explicitly outlawed marital rape in criminal laws: UN Women, above n 5, 17.

[20] For consideration of this, see *Prosecutor v Sesay (Judgment)* (Special Court for Sierra Leone, Trial Chamber I, Case No. SCSL-04-15-T, 2 March 2009) *('Sesay Judgment'*) 145.

jurisdictions.[21] Each of these reflect the legacy effects of a gender-neutral criminal justice tradition that has failed to account for how gender-based imbalances in power and in the autonomy between men and women affects how and when violence is perpetrated and how it is experienced.

Procedural laws are equally important for legal internalisation; for instance, the ICC's Rules of Procedure and Evidence ensure the victim complainant does not encounter the defendant at court and that she is not questioned on irrelevant issues, such as her sexual history or the failure to physically resist the violence.[22] It also eliminates the requirement of corroboration to prove crimes (particularly crimes of sexual violence)[23] and precludes the inference of consent in a range of circumstances.[24] Without these measures, victims are more reluctant to report and participate in the criminal investigation and re-traumatisation is more likely, which in turn may affect the presentation or believability (but not reliability) of testimony, and therefore the likelihood of a conviction.[25] Thus, law reform that enables the full range of sexual crimes to be prosecuted and that removes legal substantive and procedural requirements that inhibit prosecution is a pre-requisite for compliance with the sexual violence accountability norm.[26]

2.2 Political internalisation

Evidence that *political* internalisation has taken place would be that police and prosecutorial policies: guarantee that trained women officers conduct witness interviews with female victims of sexual violence in private; ensure that male officers and personnel are trained to respond sensitively to sexual violence victims; prioritise and expedite the investigation of sexual violence compared to less serious crimes; ensure continuity of personnel who manage sexual violence cases; ensure

[21] See Richard D. Klein, 'An Analysis of Thirty-Five Years of Rape Reform' (2008) 41 *Akron Law Review* 981.
[22] See ICC RPE 71; Christine Chinkin and Hilary Charlesworth, 'Building Women into Peace: The International Legal Framework' (2006) 27(5) *Third World Quarterly* 937, 949.
[23] ICC RPE 63(4).
[24] ICC RPE 70.
[25] Liz Kelly, Jo Lovett and Linda Regan, 'A gap or a chasm? Attrition in reported rape cases' *Home Office Research Study 293* (UK Home Office Research, Development and Statistics Directorate, 2005).
[26] See e.g. Kim Thuy Seelinger, Helene Silverberg and Robin Mejia 'The Investigation and Prosecution of Sexual Violence' (Working Paper, Human Rights Center Univerisity of California Berkley, May 2011).

the provision of adequate psycho-social support; establish appropriate criteria and decision-making processes regarding protection measures. Implementation of these policies, including by establishing the necessary programs, depends on ensuring adequate resources and comprehensive training. Political internalisation also requires political elites to endorse the norm; this is a significant challenge for international crimes, sexual violence or otherwise, when political leaders' interests are often threatened by prosecutions. Further, in patriarchal or conservative communities where political leaders and judges are predominantly male, even the adoption of policies to promote investigation and prosecution of international crimes in general are likely to be gender-neutral, or susceptible to socio-cultural attitudes that ultimately fail to overcome challenges specific to sexual violence crimes.

2.3 Social internalisation

Even where there are appropriate national criminal laws and legal procedures to enable prosecutions and convictions for a wide range of sexual violence crimes, adherence to these by criminal justice actors (*social* internalisation of the sexual violence accountability norm) depends on overcoming multiple intersecting social barriers affecting women victims of sexual violence crimes. Accordingly, while social internalisation requires norm adherence by national criminal justice actors, the extent to which this results in effective investigations and prosecutions also partly depends on attitudes, behaviours and norms of the broader community.

For example, if victims are unaware that sexual violence is a crime because it is not perceived as such by their society for cultural reasons, they will simply not consider their experience as a violation of rights that they can report to the authorities for either protection or investigation/prosecution.[27] It is important to acknowledge that this phenomenon and those listed below are both mediated and exacerbated by illiteracy, poverty, lack of education, child-rearing responsibilities and insecure

[27] This is less common when sexual violence is committed as an international crime. However, the perception that the authorities will not treat the crime seriously still impedes reporting: this is particularly complicated in cases of forced marriage within societies that do not recognise marital rape and the 'wives' are associated with the enemy. See Virginie Ladisch, *From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda* (2015) <https://www.ictj.org/sites/default/files/ICTJ-Report-Uganda-Children-2015.pdf>.

employment, all of which affect women to a greater extent than men.[28] These factors are compounded further for women in remote localities, in areas with ongoing hostilities, or in communities where traditional remedies, such as compensation to the victims' family or arranged marriage to the perpetrator, are brokered by authorities in lieu of criminal proceedings.[29]

Even when victims are aware of the criminal nature of an act of sexual violence, women are still reluctant to report sexual violence to authorities, particularly in patriarchal cultures.[30] Well-founded fears of possible retaliation, police hostility, social ostracism, the possible loss of custody of children or property rights, and reputational damage and their socio-economic consequences[31] are compounded in post-conflict situations and other contexts in which normal legal and social orders are disrupted.[32] These factors also contribute to the trend whereby victims delay reporting sexual violence crimes to authorities, sometimes by up to several years. Delayed complaints and their effect on the availability of material evidence complicate investigations and contribute to authorities considering such cases as 'too hard'[33] or less credible[34], because there is no objective or corroborative

[28] Committee on the Elimination of Discrimination Against Women, *General Recommendation on Women's Access to Justice,* 61st sess, CEDAW/C/GC/33 (23 July 2015) 4 (*'CEDAW Comment 33').* <http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf>

[29] UN Women, above n 5, 31.

[30] See e.g. Susan Estrich, *Real Rape* (Harvard University Press, 1988) 10-11; CEDAW Comment 33, 4; Seelinger, Silverberg and Mejia, above n 28, 10-11.

[31] See e.g. Adrienne Katherine Wing and Sylke Merchin, 'Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America', (1993) 25(1) *Columbia Human Rights Review* 24, at 24-25; Samantha I Ryan, 'From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crime' (1999) 1 *Pace International Law Review* 447, 477.

[32] Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law* (Boston: Kluwer Law International, 2001); UN Deputy Secretary-General Asha-Rose Migiro, *Remarks at the Women's International Forum in New York*, U.N. Doc. DSG/SM/440-WOM/1711 (20 February 2009) <http://www.un.org/News/Press/docs/2009/dsgsm440.doc.htm>.

[33] For common rape myths and challenges that contribute to this, see David Wells, 'Guidelines for Medico-Legal Care for Victims of Sexual Violence' (2003) *World Health* 10-11; Seelinger, Silverberg and Mejia, above n 26, 19-21.

[34] Termed the 'fresh complaint' doctrine, this myth assumes that a truly innocent/virtuous woman would report a sexual violation immediately: Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'International and Local Criminal Accountability for Gendered Violence' in Ní Aoláin, Haynes and Cahn (eds) *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press, 2011) ('*Frontlines*')152-174, 164-165.

evidence and because the testimony of sexual violence victims may be perceived as unreliable.[35]

In many countries, reporting sexual violence to police may result in re-traumatisation, mistreatment or intimidation by the authorities[36] and in threats or injuries in the absence of protection measures,[37] which in turn can lead to victims recanting their testimonies or refusing to give evidence at trial.[38] Sexual violence cases may be de-prioritised (including because of cultural and social value systems and structural gender inequality), and therefore not investigated at all or investigated poorly; or they may be compromised if State agents fail to preserve privacy or choose to initiate reconciliation between the perpetrator and victim.[39]

Lack of gender sensitivity on the part of judicial actors may heighten the victims' sense of blame or shame, and lead to failures to follow gender-sensitive procedures, which thus results in incomplete or inconsistent evidence.[40] These challenges reflect which behaviours need to change to achieve social internalisation, according to the TLP. Gender-sensitive attitudes and conduct of police officers, prosecutors, judges and other investigative agents that facilitate investigation and successful prosecution are as necessary as the laws and procedures. Achieving social internalisation for an international norm that challenges socio-cultural entrenched attitudes is predicated on legal and political internalisation. In other words, accomplishing widespread adherence depends on how well legal reform targets or

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[35] Nicola Henry, 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice' (2010) 16(10) *Violence against women* 1098, 1108-1109; Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerve: Oxford University Press, 2005) at 262.

[36] See e.g. ABColombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process* (2013) 13-15 <http://www.abcolombia.org.uk>.

[37] See e.g. Amnesty International, *Colombia: Human Rights Activist's Death Controversial Death Amid Waves of Threats* (27 February 2013) <https://www.amnesty.org/>.

[38] Sahla Aroussi, 'Women, Peace and Security: Addressing Accountability for Wartime Sexual Violence' (2011) 13(4) *International Feminist Journal of Politics* 576, 579.

[39] For example, invoked traditional justice processes typically further disempower the victim because they are not involved in the decision-making around the justice or reconciliation. Se e.g. Erin Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1(1) *International Journal of Transitional Justice* 91, 107-108.

[40] Fox, S. G., and Walters, H. A, 'The impact of general versus specific expert testimony and eyewitness confidence upon mock juror judgment' (10(3)) *Law and Human Behavior* (1986) 215-228.

promotes behaviours and outcomes that constitute compliance with the sexual violence accountability norm, and how effective resourcing and training policies are implemented.

Given this range of factors, it is unsurprising that only a small proportion of reported sexual violence cases reach trial stage.[41] Attrition occurs at every stage, from reporting sexual violence incidents, through whether they are recorded as a crime and whether charges are laid, all the way through to prosecutions and convictions. This is true even of jurisdictions with comprehensive legal frameworks, gender-sensitive procedures and training programs in place.[42] For instance, a 15-year study across Australia, Canada, England and Wales, Scotland and the United States found that only 30% of the estimated 14% of sexual violence incidents reported to police proceeded to prosecution; of these, 20% were adjudicated in court; of these, 12.5% resulted in a conviction of at least one sexual offence; only 6.5% of the original offences reported resulted in convictions. Further, in the thirty-five years prior to 2010, average conviction rates in these five countries declined from 18% to 12.5%.[43] Such consistent and significant attrition confirms how entrenched and formidable the challenges are, even in contexts with adequate legislation and support services in place. For illustration, Table 3.1 below graphically demonstrates the attrition rate from the estimated incidence of sexual violence across the populations. To provide greater comparative insight into attrition rates once criminal proceedings are initiated, Table 3.2 shows the attrition rate from the time of reporting, ignoring the fact that many incidents are unreported. While Table 3.1 indicates that the highest

[41] See e.g. UN Women, above n 5, 49.

[42] A comparison between the UK and Canada suggests a 94% attrition rate: Holly Johnson, 'Limits of a criminal justice response: Trends in police and court processing of sexual assault', in Elizabeth A Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (University of Ottawa Press, 2012) 633-654. In the UK, the figure was 1070 of 15,670 reports: Ministry of Justice, *Sexual Offending Overview* (UK Home Office, 2013) <https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales>. See e.g. Kathleen Daly and Brigette Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis' (2010) 39 *Crime and Justice* 565; Kelly, Lovett and Regan, above n 27, x-xi. For attrition rates in a few African countries see Seelinger, Silverberg and Mejia, above n 26, 5-6.

[43] Daly and Bouhours, above n 42, 565. Comparisons of attrition rates across different crimes are fraught with methodological problems, but there is evidence to suggest the rate is higher for sexual violence crimes: Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford, Hart Publishing: 2008) 21, 23; NZ Ministry of Justice, *Public Discussion Document: Improvements to Sexual Violence Legislation in New Zealand* (2008), 2 <http://www.justice.govt.nz/>.

attrition rate occurs between the incident and reporting it, Table 3.2 illustrates the comparative attrition from reporting onwards; and that the second highest rate of attrition occurs between the trial and conviction. The prosecution's case at trial incorporates all the strengths and weaknesses of the investigation, which highlights how important gender-sensitive investigations are to norm internalisation.

Table 3.1

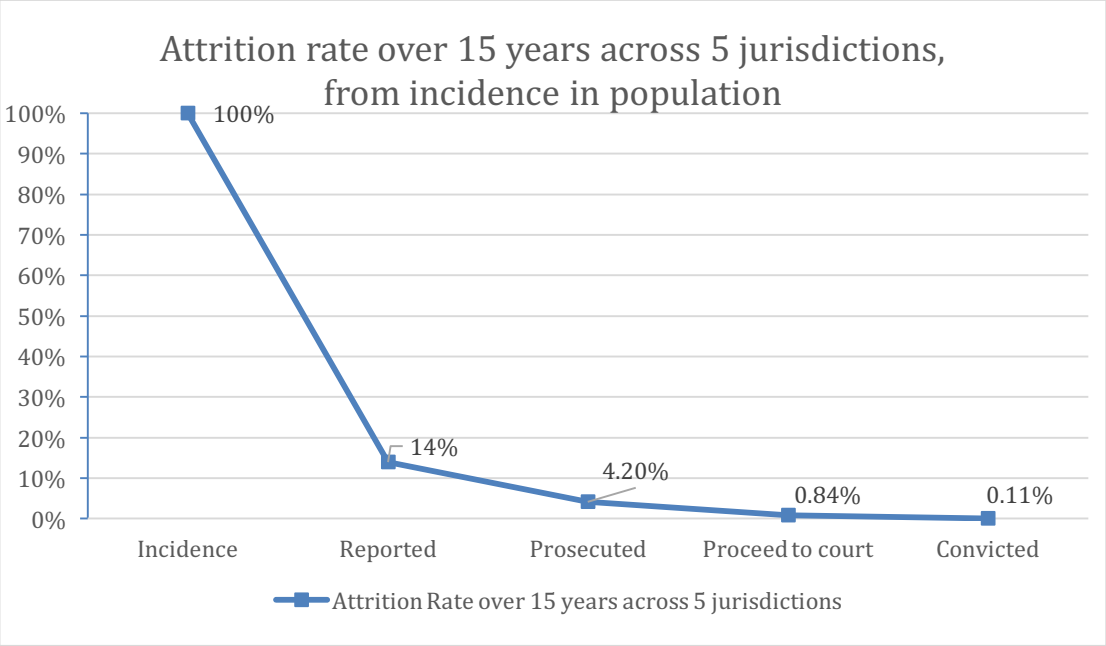
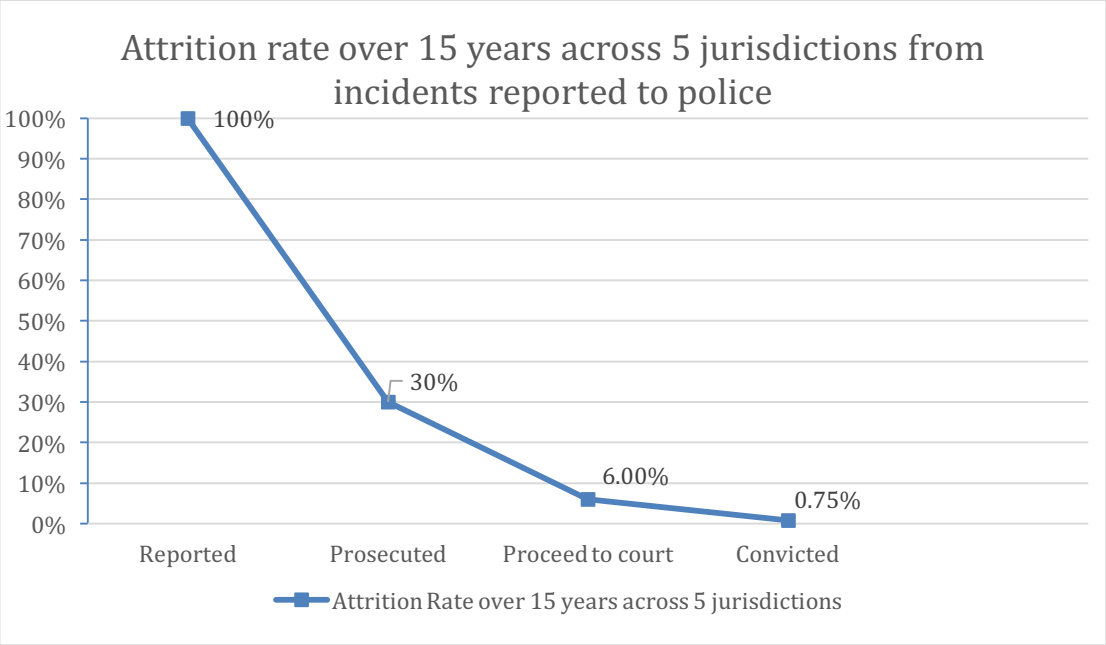


Table 3.2



In countries under ICC investigation or preliminary examination, support and protection frameworks frequently either do not exist, or are so under-resourced

they are incapable of challenging the attrition rate. For instance, in Guinea there are no witness protection laws or established programs to prevent witness intimidation and in Colombia, while these programs exist, few women victims of sexual violence benefit from them.[44]

Finally, in the event of a conviction, there is still a risk the penalty will be disproportionately low; this trivialises the impact of the crime on the victim and reduces the punishment's deterrent value. In the case of a non-custodial sentence, the safety of the victim from the perpetrator cannot be guaranteed. Without explicit minimum sentences, sentencing guidelines and significantly higher sentence ranges, particularly for more serious sexual crimes, judges may continue to deliver sentences that, while culturally acceptable, are inadequate to deter offenders or ensure victims' safety.[45] This concern reflects the need for legal internalisation to guarantee sentences do not trivialise the crime, political internalisation through policies that provide guidance to judges and other actors, and social internalisation, reflected in adherence to such guidance and general social support for such adherence.

In post-atrocity situations, pre-existing structural and social inequalities and the vulnerabilities of women all facilitate and heighten the incidence of sexual violence, partly because of the lesser likelihood of punishment.[46] Extremely scarce financial, human and technical resources, collapsed or dysfunctional institutions, and an

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[44] Chapter 6.2.3.

[45] On how sentences for sexual violence crimes may still be more lenient than the 'minimum sentence' see Jill Thompson and Felly Nkweto Simmonds, *Rape Sentencing Study Part II: Review of Literature on Minimum Sentencing* (Population Council, 2012). <https://www.popcouncil.org/uploads/pdfs/2012RH_RapeSentencingStudy.pdf>. See also Allison de Smet and Dianne Hubbard, *Substantial and Compelling Circumstances' in Rape Cases* (Legal Assistance Center, 2009); Nicole J Kubista, 'Substantial and compelling circumstances: Sentencing of rapists under the mandatory sentencing scheme (2005)18 *South African Journal of Criminal Justice* 77; Kristina S Baehr, 'Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa' (2008) 20 *Yale Journal of Law and Feminism* 213. On sentencing law reform as a response to this perception in a multi-country study on East, Central and Southern African sentencing regimes, see Thomson and Simmonds, above n 45. For an example in Colombia, rape offenders with no criminal record are historically likely to receive a suspended sentence: Pamela Mercer, 'Colombia's Legal System Puts Few Rapists in Prison', *New York Times* (New York), 1 September 1996.

[46] Mary Caprioli, 'Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict' (2005) 49 *International Studies Quarterly* 161, 163; Joanna Bourke, *Rape, A History from 1860 to the Present* (Virago, 2007).

overwhelmed justice system render the prospects of appropriate punishment for sexual violence even more remote.[47]

Ending impunity for international crimes of sexual violence requires prosecutions, convictions and adequate sentences in national courts, and these depend on addressing each of the challenges above. As discussed in Chapter 4, the OTP actively engages national legal actors through its implementation of positive complementarity during preliminary examinations. This section has indicated the legal, social and political reforms the OTP may need to focus on or to prioritise in its norm-interpretive interactions with national actors in preliminary examinations to catalyse effective national prosecutions of sexual violence crimes. The next section traces the development of international criminal law responses to sexual violence committed as international crimes to identify the extent to which challenges in national systems are mirrored and/or have been remedied by international criminal institutions.

3. Tracing international criminal responses

Contradicting the long-standing prohibition of rape under international law, particularly during wartime,[48] is the typical historical acceptance of rape as an 'incidental by-product'[49] or worse, 'a fringe benefit of war, an unspoken perk'.[50] This is an unsurprising legacy of overwhelming male dominance in roles of State

[47] For example, despite the concerns around the absence of protective and support measures for victims arising in the pilot of the *gacaca* system in Rwanda, in 2008 the law was changed to include rape in the *gacaca* traditional justice system in Rwanda because of the case backlog in the overburdened justice system: Meghan Brenna Morris, 'Achieving Justice and Rights through Social Development: Suggestions from Rwandan Women Survivors of Rape during Genocide' (2016) 1 *Social Development Issues,* 38. See also HRW, *Struggling to survive: barriers to justice for rape victims in Rwana* (2004) <https://www.hrw.org/reports/2004/rwanda0904/5.htm>.

[48] David S Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine,' (2005) 15 *Duke Journal of International and Comparative Law* 237. In fact, some first century warrior codes prohibited rape: Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, 7 <http://www2.ohchr.org/>.

[49] Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21(2) *Berkeley Journal of International Law* 288, 297; Kelly Dawn Askin, 'The Quest for Post-Conflict Gender Justice', 41 *Columbia Journal of Transnational Law* (2002-2003) 509; Jan Ruff O'Herne, 'Fifty Years of Silence: Cry of the Raped', in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, 2005) 3.

[50] Beth Stephens, 'Humanitarian Law and Gender Violence: An End To Centuries of Neglect?', (1999) 3 *Hofstra Law and Policy Symposium* (1999) 87, 89. See also Askin, above n 49, 298.

leadership, military command and, more generally, as combatants in traditional State-vs-State warfare.[51] This section broadly sketches the evolution of international criminal responses to sexual violence to understand (1) what they can offer women victims of sexual violence, including in national courts and (2) the progress the ICC has made in responding to these crimes. The OTP's position and its norm-interpretive engagements in preliminary examinations are framed by this legal evolution and by the ICC's track record vis-à-vis sexual violence crimes. These developments also indicate the likely challenges to effective investigations, and how these may be overcome to catalyse legal, political and social internalisation.

Until as recently as the 1990s, international law mirrored the problematic tendency at the national level to regard sexual violence crimes as crimes of honour or dignity.[52] For example, IHL[53] requires women to be 'especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.[54] Protection is a lower-status obligation compared to prosecution, which is required when a violation is designated as a 'grave breach' of the Geneva Conventions.[55] The contemporaneous prosecution of rape as an international crime committed in World War II (WWII) contrasted these IHL definitions.[56] While neither of the charters of the two post-WWII tribunals mention

[51] See Ní Aoláin, Haynes and Cahn, above n 34, 153.
[52] Radhika Coomaraswamy, *UN Special Rapporteur on Violence Against Women*, Lecture delivered at the Third Minority Rights Lecture (25 May 1999) http://www.sacw.net/Wmov/RCoomaraswamyOnHonour.html.); Cate Steains, 'Gender Issues' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999) 357, 360. It is important to note, however that in many ethnic conflicts, including the genocides in Bangladesh, Rwanda and Yugoslavia, sexual violence was also strategically *perpetrated* as crime of honour against the community not just the physical integrity of the individual victim: Coomaraswamy, above n 54. Similarly, a soldier's perceived 'honour' in armed conflict, derived from defeating the enemy, may depend on the active destruction of the 'honour' vested in women of the adversarial party. See e.g. Sesay Judgment.
[53] *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('Protocol I') art 76(1) and art 85.
[54] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 27(2) ('*Fourth Geneva Convention*'). On protection being less effective than prohibition, see Judith Gardam, 'Women and Armed Conflict: The Response of International Humanitarian Law' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff, 2005), 114-123, 117.
[55] Fourth Geneva Convention, art 146, 147.
[56] Mark S. Ellis, 'Breaking the Silence: Rape as an International Crime,' (2007) 38 *Case Western Reserve Journal of International Law* 227.

rape or sexual violence, Control Council No. 10, which was later used to prosecute WWII crimes, included rape committed against the civilian population as a crime against humanity.[57] However, convictions for sexual violence crimes under Control Council No. 10 were on the basis of honour, which reinforced rather than eradicated the shame victims felt in relation to sexual violence and obscured the nature of harm experienced.[58] Moreover, the failure to address the abduction, rape and enslavement by the Japanese military of up to 200,000 'comfort women'[59] highlights both the scale of sexual crimes committed and the absolute neglect of them by international criminal law practitioners involved in post-WWII accountability measures.[60]

For several decades following the closure of the post-WWII tribunals, international criminal law developed incrementally and sporadically through national prosecutions. Then, in 1993 and 1994, the Security Council established respectively two *ad hoc* tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Many authors

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[57] Article II(1)(c) of the Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,* Official Gazette Control Council for Germany (20 December 1945) 50-55. Control Council Law No. 10 is claimed to have established three important principles: '(1) that rape on a wide scale could be prosecuted as a war crime; (2) that crimes of sexual violence committed during peacetime could constitute crimes against humanity; and (3) that responsibility for such crimes could not be limited to military personnel and…liability could attach to persons occupying other key positions:' Catherine N. Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia,' (1995) 17 *Human Rights Quarterly* 672. Note that in this case national level proceedings were more comprehensive: Daniel Plesch, Susana Sácouto and Chante Lasco, 'The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today', (2014) 25(1-2) *Criminal Law Form* 349.

[58] See *United States v Karl Brandt et al. (The Medical Case),* 1 NMT 694–738 (1947); Askin, above n 5; Richard J Goldstone and Estelle A Dehon, 'Engendering Accountability: Gender Crimes Under International Criminal Law,' (2003-4) 19(1) *New England Journal of Public Policy* (2003-2004) 121.

[59] Note that there were convictions for rape as a war crime and crime against humanity, particularly as part of the Nanking massacre, but these trials did not include testimony from any of the women victims of rape: Ni Aoláin, Dina Haynes and Naomi Cahn, above n 32, 157; R John Pritchard and Sonia M Zaide (eds), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East* (Garland Publishing, 1981) 31, 111-117; Niarchos, above n 57, 666; Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95 *American Journal of International Law* 335; Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law,' (2000) 46(1) *McGill Law Journal* 217, 221–223.

[60] While Japan's moral and legal responsibility for these crimes was confirmed by a UN report, no criminal justice measures have been implemented since the post-WWII tribunal: Radhika Coomaraswamy, *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, 52nd sess, Agenda Item 9(a), E/CN.4/1996/53/Add.1 (4 January 1996).

have discussed comprehensively the gender aspects of the two institutions' statutes and jurisprudence, including with respect to sexual violence.[61] For current purposes, it is important to note that the tribunals were progressive in identifying a range of sexual violence as types of war crimes, crimes against humanity and genocide.[62] Both tribunal statutes recognised rape as a crime against humanity[63] and created procedures, rules and organs to support victims involved in proceedings.[64] While neither statute included other sexual violence crimes explicitly as a crime against humanity or as a war crime, rape and enforced prostitution were considered by the judiciary as war crimes under the category of 'outrages upon personal dignity'.[65]

Procedurally, both tribunals included rules that (1) aimed to protect victims that were to apply, particularly in cases of rape or sexual assault,[66] (2) determined the circumstances in which the defence of consent was prohibited in sexual violence cases,[67] (3) provided that corroboration of the victim's testimony was not required and (4) precluded the admission of evidence of prior sexual conduct of the victim.[68] The ICTR established that non-consent could be inferred from the relevant and admissible evidence of the background circumstances, such as an ongoing genocide

[61] For a comprehensive summary from the ICTY see Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016); the ICTR published a best practices manual two years earlier: ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014).

[62] For the goals of the Women's Caucus regarding definitions of the war crimes, crimes against humanity and genocide see Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016) 94-97.

[63] Article 5 of the ICTY Statute recognised rape as a crime against humanity: SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex ('ICTY Statute') arts. 3-4 recognised rape as a crime against humanity; rape and enforced prostitution as war crimes; and rape, enforced prostitution and any form of indecent assault as violations of Common Article 3 of the Geneva Conventions. 4. Note the ICTY Statute did not include rape as a grave breach of the Geneva Conventions or as a violation of the laws or customs of war.

[64] International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, UN Doc No. IT/32/Rev.44 (adopted 10 December 2009) ('*ICTY RPE*') r 34; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* UN Doc No. ITR/3/REV.1 (adopted 29 June 1995, as amended 13 May 2015) ('*ICTR RPE*') r 34.

[65] See Steains, above n 52, 362.

[66] Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 UN Doc. S/25704 (3 May 1993) [108]: ICTY Statute, art 22; ICTR Statute art 21.

[67] ICTY RPE r 96; ICTR RPE r 96.

[68] ICTY RPE r 96.

campaign or detention of the victim; however, it did not go so far as to create a presumption that such circumstances were inherently coercive.[69]

Ad hoc tribunal jurisprudence also recognised sexual violence against men[70] and sexual slavery;[71] that rape is a crime of violence, not honour and that rape can be a form of torture,[72] an act of genocide[73] and a crime against humanity.[74] Both tribunals confirmed that the prohibition of rape is a principle of customary international law, and raised the possibility of it being a *jus cogens* norm.[75] However, because much of this jurisprudence went beyond definitions and procedures in tribunal documents, it was developed on a discretionary and at times inconsistent basis. This evolutionary path meant both tribunals encountered, and to varying extents overcame, challenges like those confronted by national criminal justice actors. For instance, a comprehensive volume encompassing lessons learned in this regard at the ICTY[76] identified similar misconceptions in the ICTY OTP about sexual violence as in national jurisdictions, including perceptions of sexual violence as a crime of honour[77] and personally motivated.[78] Barriers to prosecution, namely, under-

[69] *Prosecutor v Gacumbitsi* (*Judgment*) (ICTR, Trial Chamber, Case No ICTR-2001-64-T, 17 June 2004) [153]. This understanding was affirmed in *Prosecutor v Mahimana* (ICTR, Appeals Chamber, Case No. 99-52-A, 28 November 2007).

[70] See eg. *Prosecutor v Simic (Judgment)* (ICTY, Trial Chamber, Case No. ICTY-95-9-T, 12 October 2003) [1015], [1017]; *Prosecutor v Brdanin (Judgment)* (ICTY, Trial Chamber, Case No. ICTY-96-36-T, 1 September 2004) [498], [500], [524], [1006], [1050]; *Prosecutor v Niyitegeka (Judgment)* (ICTR, Trial Chamber, Case No. ICTR-96-14-T, 16 May 2003) [462] (upheld on appeal).

[71] *Prosecutor v Kunarac (Judgment)* (ICTY, Trial Chamber II, Case No. IT-96-23/1-T 22 February 2001) ('*Kunarac Trial Judgment')* [4]-[8], [685]-[727], [782], [822]. *Prosecutor v Kunarac (Judgment)* (ICTY, Appeals Chamber, IT-96-23-A and IT-96-23/1-A, 12 June 2002) [125].

[72] See *Prosecutor v Delalic (Judgment)* (ICTY, Appeals Chamber, Case No. IT-96-21-A, 20 February 2001).

[73] *Prosecutor v Akeyesu (Judgment)* (ICTR, Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998) ('*Akayesu Judgment')* [731]. While rape has been charged as a crime of genocide at the ICTY, it has not been convicted as such. See Laurel Baig et al, 'Contextualizing Sexual Violence: Selection of Crimes' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) 172, 209-212.

[74] *Prosecutor v Furundzija (Judgment*) (ICTY, Trial Chamber, Case No. IT-95-17/1-T, 10 December 1998) [185].

[75] *Kunarac Trial Judgment*; *Akayesu Judgment*. *Cf* Patricia Viseur Sellers who demonstrates the contrary: Patricia Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape' (2002) 34 *Case Western Reserve Journal of International Law* (2002) 287, 294-305.

[76] Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) 33, 36-37.

[77] See fn 54 above and accompanying text. See also Francisco Jose Leandro, 'Gender Based Crimes as 'Tools of War' in Armed Conflicts' in *Gender Violence in Armed Conflicts* (Instituto da Defesa Nacional, 2013) 148, 150.

[78] See on the misconceptions around sexual violence, Jarvis and Vigneswaran, above n 76, 35-42.

reporting, uncoordinated investigative approaches, re-traumatisation of the witnesses, the exercise of prosecutorial discretion in selecting conduct and charges given time pressures, the need to prosecute senior commanders and funding constraints, were also similar.[79] Unsurprisingly, the ICTY pressure points for sexual violence mirror those in national jurisdictions, including the risk of not detecting sexual violence in investigations, the risk of excluding or improperly characterising sexual violence charges in indictments, and the risk of not adducing sufficient evidence or of over-reliance on written evidence.[80]

Catherine Mackinnon notes 'the ICTY's rape prosecutions were marked by missteps and missed opportunities'[81], particularly around the need to prove non-consent in coercive circumstances,[82] and the relative reluctance to conclude that rape was performed as an act of genocide.[83] Mackinnon attributes some of these failings, at least in the early years, to investigator attitudes that rape was incidental to armed conflict and less serious than murder.[84]

At the ICTR, the landmark characterisation of sexual violence as genocide in the *Akayesu* judgment was possible only because of intensive NGO lobbying and intervention by one of the judges on the incongruity between the volume of evidence of sexual violence and the absence of any charges for these crimes.[85] *Akayesu* also found '[s]exual violence is not limited to physical invasion of the human body and

[79] Ibid 42-53.
[80] Ibid 53-67.
[81] Catherine MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu' (2006) 44 *Columbia Journal of Transnational Law* 940, 944-946; see also Evelyn W Kamau, 'Domestic Adjudication of Sexual and Gender-Based Violence in Armed Conflict: Considerations for Prosecutors and Judges' (2011) 4 *African Journal of Legal Studies* 85, 101-105.
[82] This was most apparent in the case of *Prosecutor v Kunarac*, which included an enquiry into consent and knowledge of non-consent by the perpetrator, rather than implying consent from the coercive circumstances: Kunarac Trial Judgment [460], [457].
[83] MacKinnon, above n 81, 947.
[84] Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 35 *Case Western Reserve Journal of International Law* 305, 310-311.
[85] *Akayesu Judgment* [507], [509], [731], [733]. On the catalysing effect of NGO lobbying, see The International's Women's Human Rights Clinic of the City University of New York, *Gender Justice and the constitution of the War Crimes Tribunal Pursuant to Security Council Resolution 808* (April 1993); Susana Sácouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17(2) *American University Journal of Gender, Social Policy and the Law* 337, 349.

may include acts which do not involve penetration or even physical contact'.[86] On the other hand, institutional failings inhibited the number and success of rape prosecutions.[87] Further, similar to the factors identified as challenges in national jurisdictions, women were reluctant to disclose details of sexual violence, there were evidentiary weaknesses linking commanders to perpetrators of sexual violence and there was an inadequate system to manage victims.[88]

Drawing on national criminal practice, the *ad hoc* tribunals also developed jurisprudence around different modes of criminal liability. Joint criminal enterprise and command responsibility are two modes particularly relevant to international crimes but are more restrictively defined in the Rome Statute than in the *ad hoc* jurisprudence.[89]

The statutes and jurisprudence of both tribunals were foundational for subsequent hybrid and national criminal tribunals with jurisdiction over international crimes. At the Special Court for Sierra Leone, for example, key developments included distinguishing between rape, sexual slavery, and forced marriage;[90] and using acts of gender-based violence to charge seemingly gender-neutral crimes, such as the war crime of cruel treatment or the crime against humanity of other inhumane acts.[91] Like the *ad hoc* tribunals, the Extraordinary Chambers of the Court of

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[86] *Akayesu Judgment* [688].
[87] Buss, above n 12, 151-156.
[88] ICTR, above n 61, 9-10; *Prosecutor v Gacumbitsi*, (ICTR, Trial Chamber, Case No. ICTR-2001-64-T, 17 June 2004) [329]; *Prosecutor v Kajelijeli (Judgment)* (ICTR, Case No. ICTR-98-44A-T 1 December 2003) [680] Buss, above n 12, 152. Michelle Jarvis and Elena Martin Selgado, 'Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice' in Anne-Marie de Brouwer et al (eds) *Sexual Violence as an International Crime: An Interdisciplinary Approach* (Intersentia, 2013) ('An Interdisciplinary Approach'), 101-122; Linda Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR' in *An Interdisciplinary Approach,* 123-150, 134-136.
[89] Chapter 3.4.1.
[90] Judgment, *Prosecutor v Brima (Judgment)* (Special Court of Sierra Leone, Appeals Chamber, Case No. SCSL-04-16-T, 22 February 2008); Sesay Judgment. For a review and critique of this jurisprudence see Valerie Oosterveld, 'The Special Court of Sierra Leone's Consideration of Gender-Based Violence: Contributing to Transitional Justice?', 10 *Human Rights Review* (2009) 73.
[91] *Prosecutor v Fofana (Judgment)* (Special Court of Sierra Leone, Appeal Chamber, Case No. SCSL-04-14-A) [184]-[186]. For a discussion of lessons learned from this tribunal, including exclusion of sexual violence charges and inadequate protection of women victims and witnesses, see Michelle Staggs Kelsall and Shanee Stepakoff, '"When We Wanted to Talk about Rape": Silencing Sexual Violence at the Special Court for Sierra Leone' (2007) 1(3) *The International Journal of Transitional*

Cambodia (ECCC) are also characterised by initial failures and subsequent improvements. For example, the ECCC's recent recognition of forced marriage as an international crime and rape as torture is juxtaposed against earlier failures. Only a limited number of sexual violence crimes were charged compared to the available evidence; the ECCC found that between 1975 and 1979 rape did not exist as a crime against humanity; and it reduced gender-based violence to sexual violence and elected not to investigate charges of forced pregnancy.[92]

The 2017 conviction of Hissène Habré in Senegal for rape and sexual slavery as crimes against humanity is similarly juxtaposed against the one and only charge for which he was acquitted on appeal: direct perpetration of rape.[93] The appeal judgment set an important precedent in confirming Habré's criminal responsibility for sexual violence crimes committed by his security forces. However, its reversal of the rape conviction because it was based on evidence adduced only during trial (and not before) highlights the continuing challenges specific to sexual violence crimes which are reported late due to fear, as described in Chapter 3.2.3 above.

One key distinction to emerge through the practice of these institutions is between 'extra-ordinary' rape committed as an international crime and rape committed as a 'domestic' or 'ordinary' crime.[94] Critics argue that deflecting attention from the 'ordinary rape' to the more dramatic 'wartime rape' obscures the importance and

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Justice 355; Valerie Oosterveld, 'Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes' (2009) 17(2) *Journal of Gender, Social Policy and the Law* 407.

[92] Forced pregnancy was found not to be a distinct crime at the time, nor the subject of specific policy according to the evidence before the ECCC: *Case 001 (Decision)* (ECCC, Trial Chamber, Doc No. D 301/5, 13 June 2016); see also Valerie Oosterveld and Patricia Viseur Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC' in John D Ciorciari and Anne Heindel (eds) *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (TMC Asser Press, 2016) 321; Sarah Williams and Emma Palmer, 'The Extraordinary Chambers in the Courts of Cambodia: Developing the Law on Sexual Violence?' (2015) 15(3) *International Criminal Law Review* 452.

[93] For an English summary of the appeal judgment see <http://forumchambresafricaines.org/press-release-final-appeal-decision-in-the-hissein-habre-case-before-the-eac/?lang=en>; see also Kim Thuy Seelinger, 'Rape and the President: The Remarkable Trial and (Partial) Acquittal of Hissène Habré' (2017) 34(2) *World Policy Journal*, 16. For a summery of the recent national prosecutions for international cries of sexual violence in Guatemala, Peru and Colombia, see: Daniela Kravetz, 'Promoting Domestic Accountability for Conflict-Related Sexual Violence: The Cases of Guatemala, Peru, and Colombia' (2016-2017) 32 *American University International Law Review*, 32.

[94] Alison Cole, '*Prosecutor v Gacumbitsi:* The new Definition for Prosecuting Rape under International Law' (2008) 8 *International Criminal Law Review* 55, 62; Fionnuala Ní Aoláin, 'Gendered Harms and Their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622, 626.

gravity of the experience and prosecution of 'ordinary' rape.[95] This is problematic for women victims, who will experience the same health risks, shame, and stigma associated with rape, whether it takes place in conflict or not.[96] In fact, although both are the 'product of systemic relations of male power and domination'[97], there is frequently a perception that international crimes of sexual violence receive comparatively low sentences, given the harm they cause.[98] Understandably, victims of sexual violence may feel anger at these outcomes, given the risks taken and exposure to negative experiences associated with testifying.[99]

Thus, institutional contributions to ICL's increased gender sensitivity and recognition of sexual violence crimes have often been characterised by initial oversights and subsequent improvements. The extent to which the ICC consolidates, builds or undermines this progress affects both its own jurisprudence and the standards it communicates to national jurisdictions.[100] A number of UN Security Council resolutions reinforce States' legal obligations relating to women, peace and security issues, including the obligation to investigate and prosecute international crimes of sexual violence.[101] These resolutions broadly focus on the disproportionate and unique impact of armed conflict on women, sexual violence as a war crime, the need for women to participate equally in prevention, resolution, peacebuilding and peacekeeping, the development of progress indicators, gender mainstreaming in women, peace and security issues and, finally, and the creation of the Office of the Special Representative of the Secretary-General (SRSG) on Sexual

[95] Catherine O'Rourke, *Gender Politics and Transitional Justice* (Routledge, 2013) 4.
[96] Naomi Cahn, 'Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence' (2005) 1 *Stanford Journal of Civil Rights and Civil Liberties* 240; Manuela Melandri, 'Gender and Reconciliation in Post-Conflict Societies: The Dilemmas of Responding to Large-scale Sexual Violence', (2009) 5(1) *International Public Policy Review* 4.
[97] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester United Press, 2000), 334.
[98] Inger Skjelsbæk, 'The Military Perpetrator: A Narrative Analysis of Sentencing Judgments on Sexual Violence Offenders at the International Criminal Tribunal for the Former Yugoslavia (ICTY)' (2015) 3(1) *Journal of Social and Political Psychology* 46.
[99] See e.g. Islam Online, *Bosnian Rape Victim Protests Lightness of War Crimes Sentences* (4 November 2001), http://www.islam-online.net/English/News/2001-11/04/article7.shtml.
[100] Chapter 4.4.
[101] Summaries of the resolutions (1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 2106 (2013), 2122 (2013)) and links to the texts are available at: <http://www.un.org/en/peacekeeping/issues/women/wps.shtml>.

Violence in Conflict.[102] The SRSG has become a key norm entrepreneur, particularly with respect to the obligation to prosecute and punish crimes of sexual violence articulated in Security Council Resolution 1888, which also urged States to undertake the reform necessary to bring perpetrators to justice.[103] Former British Foreign Secretary William Hague's 'promotion of the international norm prohibiting use of sexual violence in conflict through the UK's Preventing Sexual Violence Initiative', including initiating the 'Global Summit to End Sexual Violence in Conflict'[104], reflects his role as a norm entrepreneur.[105] The Security Council resolutions and other UN documents create an international legislative context that reinforces the obligations of States to investigate and prosecute the international crimes defined in the Rome Statute.[106]

As described in Chapter 1.5, criminal convictions for sexual violence crimes can serve multiple worthwhile goals in both international and national contexts. They can express social condemnation, establish an official record of violations, re-establish the rule of law and promote security for women through incapacitating perpetrators.[107] However, the flaws embedded in the criminal justice process vis-à-vis crimes of sexual violence, often augmented by other challenges when international crimes are being prosecuted, remain. These limitations inform our expectations of the OTP's potential to promote solutions to these problems during preliminary examinations. Understanding the context within which this potential can be realised, shaped by ICC standards in its architecture and practice, is addressed in the next section.

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[102] SC Res 1888 UNSCOR, 6195th mtg, S/RES/1888 (20 September 2009).
[103] SCR 1888, active clauses [6], [7]; this resolution also noted States' responsibilities to prosecute genocide, war crimes and crimes against humanity.
[104] Preventing Sexual Violence Initiative, *Global Summit to End Sexual Violence in Conflict* <https://www.gov.uk/government/topical-events/sexual-violence-in-conflict>.
[105] Sara E Davies and Jacqui True, 'Norm Entrepreneurship in Foreign Policy: William Hague and the Prevention of Sexual Violence in Conflict' (2017) 13(3) *Foreign Policy Analysis* 701.
[106] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99(1) *The American Journal of International Law* 175.
[107] Fionnuala Ní Aoláin and Michael Hamilton, 'Gender and the Rule of Law in Transitional Societies' (2008) 18 *Minnesota Journal of International law* 380.

4. The ICC's approach to sexual violence and gender

How well the Rome Statute builds on ICL successes, and addresses the above challenges, anchors the ICC's potential to challenge through its own actions and jurisprudence the persistent impunity for international sexual crimes. The ICC's substantive laws and procedures resemble those developed through some national criminal systems and by its international criminal tribunal predecessors. Notwithstanding the creation of several OTP policies in recent years, it is too early to know the extent to which the ICC's practice vis-à-vis sexual violence crimes can affect the OTP's influence as a norm entrepreneur or how progressive the OTP's norm interpretations are or could be. However, since Article 17's admissibility test anchors the OTP's approach to positive complementarity,[108] its interpretation and application by ICC actors influences the OTP's conduct during preliminary examinations. The one exception to this may be when the OTP's characterisation of crimes, or its charging strategy, is rejected by the ICC judiciary, thus revealing a dissonance between ICC jurisprudence and OTP practice. This section first outlines the key elements of the ICC framework, from the Rome Statute definitions of crimes and procedures to the architecture of the ICC. It then outlines the broader gender-sensitive provisions regarding the ICC's personnel and structure, before examining the evolving gender-sensitive approaches adopted by the OTP.

4.1 The ICC framework

Adopted by 120 States on 17 July 1998, the Rome Statute creating the ICC represented a culmination of international political and legal developments over the preceding decades. With the goal of ending the impunity enjoyed by perpetrators of international crimes,[109] in part through its permanence and global scope, the ICC created a new benchmark for ICL. In affirming the primary duty of States to prosecute those responsible for international crimes,[110] the Rome Statute also created the ICC as a complementary structure intended to guarantee this outcome.[111]

[108] Chapter 4.4.
[109] *Rome Statute*, Preamble [5].
[110] *Rome Statute* Preamble [6].
[111] *Rome Statute*, Preamble [5], art 17; Chapter 4.2.

The Rome Statute articulates the ICC's jurisdiction and applicable law and details its composition and administration as well as how investigation, prosecution, trials, appeals and revision, international cooperation and judicial assistance and enforcement are to be conducted. Two additional legal texts, *Elements of Crimes*[112] and *Rules of Procedure and Evidence*,[113] govern the substantive and procedural operations of the ICC in much greater detail than is contained in the Rome Statute.[114] The Rome Statute created four organs of the ICC: the Presidency, the Chambers (comprising Appeals, Trial and Pre-Trial divisions), the OTP and the Registry.[115] Operationally, regulations exist for Chambers, the OTP and the Registry,[116] while ethical codes govern the conduct of staff, counsel and the judiciary.[117] In addition, the OTP has released a number of policy papers and reports, including on its preliminary examination activities, victim participation, case selection and sexual and gender-based crimes.[118]

The ICC's temporal jurisdiction is limited to crimes committed after the Rome Statute came in to force, or after a specific State accedes to the Rome Statute or otherwise accedes to the ICC's jurisdiction.[119] In the absence of a UN Security Council referral, the two main preconditions to the exercise of jurisdiction are (1) that the conduct occurred on the territory of a State Party (or the State accepts the ICC's jurisdiction with respect to the crime) or (2) the person accused of the crime is a national of a State Party (or the State accepts the ICC's jurisdiction with respect to the crime).[120] There are three avenues by which the ICC may exercise its jurisdiction: (1) if a State Party (including the State in which the alleged crimes

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[112] International Criminal Court, *Elements of Crimes,* Doc No. ICC-ASP/1/3 (Part II-B) (adopted and entered into force 9 September 2002) (hereinafter '*Elements of Crimes*').
[113] International Criminal Court, *Rules of Procedure and Evidence,* Doc No. ICC-ASP/1/3 (Part II-A) (adopted and entered into force 9 September 2002) (hereinafter '*ICC RPE*').
[114] For a comprehensive analysis of these documents, see Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001).
[115] *Rome Statute*, art 34.
[116] ICC, *Regulations of the Registry,* Doc No. ICC-BD/03-01-06-Rev.1 (adopted 6 March 2006).
[117] E.g. International Criminal Court, *Code of Professional Conduct for counsel,* ICC-ASP/4/Res.1 (adopted 2 December 2005); International Criminal Court, *Code of Judicial Ethics,* ICC-BD/02-01-05 (9 March 2005).
[118] OTP, *Policies and Strategies* < https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx>.
[119] *Rome Statute*, art 11(1) and (2) respectively.
[120] *Rome Statute*, art 12(2)

occurred) refers the situation to the ICC, (2) if a Security Council resolution refers a situation to the ICC pursuant to Chapter VII of the UN Charter and (3) if the Prosecutor initiates an investigation independently.[121] These processes and the preconditions for exercising jurisdiction are described further in Chapter 4.2.

Describing the ICC's institutional design informs subsequent analysis of the various evolving roles when implementing complementarity. While it is unnecessary here to detail the composition of each ICC organ, it is important to note that the OTP, headed by the Prosecutor, is 'responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court'.[122] Beyond this, the Rome Statute establishes an Assembly of States Parties (ASP) ,[123] which is responsible for, among other duties, providing 'management oversight regarding the administration of the Court'.[124]

The ICC's subject matter jurisdiction includes the crime of genocide, crimes against humanity and war crimes, and provides for future jurisdiction over the crime of aggression.[125] The Rome Statute recognises indirect perpetration[126] and command responsibility;[127] as noted above, the latter is particularly important for enabling sexual violence as a tool or strategy of warfare in circumstances of mass rape to be recognised.[128] However, the restrictive definitions of both modes of liability in the Rome Statute, coupled with the general absence of such principles in national jurisdictions (see Chapter 3.2.1 above), make indirect liability possibly the most

[121] *Rome Statute*, art 13–15.
[122] *Rome Statute*, art 42(1).
[123] *Rome Statute*, art 112(1).
[124] *Rome Statute*, art 112(2)(b). Article 112(2) contains a comprehensive list of ASP responsibilities.
[125] Rome Statute, art 5. From 17 July 2018 the ICC's jurisdiction over aggression will be active: ICC, *Assembly activates Court's jurisdiction over crime of aggression*, ICC-ASP-20171214-PR1350, 15 December 2017.
[126] *Rome Statute*, art 25(3). For the differences in forms of commission liability under this provision see *Prosecutor v Lubanga (Judgment*) (International Criminal Court, Appeals Chamber, Doc No. ICC-01/04-01/06-3121-Red, 1 December 2014) [465].
[127] *Rome Statute*, art 28.
[128] Patricia Viseur Sellers, 'Individual(s) Liability for Collective Sexual Violence' in *Gender and Human Rights* (2012) 153–194. See Chapter 3.2.1.1 and for ICC jurisprudence on this see: WIGJ, *A review of the International Criminal Court's current jurisprudence and practice: Modes of Liability* (2013) < http://iccwomen.org/documents/Modes-of-Liability.pdf>.

significant barrier to challenging impunity of senior commanders for sexual crimes through national investigations and prosecutions. This is relevant in both the Colombian and Guinean contexts, as discussed in Chapter 6.

Despite compromises in its drafting process, the Rome Statute is the most progressive international legal instrument to date with respect to sexual and gender-based crimes.[129] The gender-sensitive aspects of the ICC's architecture and the substantive law produced through the Rome Statute drafting process were hard-won.[130] The Women's Caucus for Gender Justice ('Women's Caucus'), a network comprising over 300 women's organisations and 500 individuals,[131] played a central lobbying, activist and negotiating role to ensure that the ICC was responsive to principles of gender justice and capable of representing women and men officials and victims.[132]

The Rome Statute consolidated previous international legal developments in its recognition of rape, sexual slavery, enforced prostitution, enforced sterilisation and other forms of sexual violence as war crimes[133] and crimes against humanity.[134] It also expanded existing categories of crimes, such as forced pregnancy as a war crime and crime against humanity,[135] and persecution on the basis of gender.[136]

Genocide is defined in the same terms as in the Genocide Convention,[137] which includes imposing measures intended to prevent births within a group; this encompasses sexual mutilation, sterilisation, forced birth control, separation of the sexes and prohibition of marriage.[138] The Women's Caucus was unable to secure agreement that rape be recognised explicitly as an act of genocide in the Rome

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[129] Steains, above n 52, 364; Chappell, above n 62, 32.
[130] Chappell, above n 62, 42-44.
[131] Ibid 35-36.
[132] Ibid 2.
[133] *Rome Statute*, arts 8(2)(b)(xxii) and 8(2)(e)(vi)
[134] *Rome Statute*, art 7(1)(g). Note that the Rome Statute does not include rape as an act of genocide: this is done in the *Elements of Crimes*.
[135] *Rome Statute*, art 8(2)(b)(xxii).
[136] *Rome Statute*, art 7(1)(h).
[137] Genocide Convention, art II.
[138] *Rome Statute*, art 6(d). See *Prosecutor v Akayesu, (Judgment)* (ICTR, Case No. ICTR-96-4-T, 2 September 1998) 507 ('*Akayesu Judgment').*

Statute, or that the types of groups against which genocide can be committed be expanded.[139] However, the ICC's *Elements of Crimes* includes 'acts of torture, rape, sexual violence or inhuman or degrading treatment', causing serious bodily injury or mental harm as acts of genocide.[140]

The Rome Statute went beyond customary international law in its recognition of sexually violent acts that can constitute crimes against humanity.[141]It was the first international legal instrument to recognise sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity alongside rape as crimes against humanity.[142]

Under the Rome Statute, war crimes committed in international armed conflicts include rape, sexual slavery, enforced prostitution, forced pregnancy (as defined in Article 7, paragraph 2 (f)), enforced sterilisation, or any other form of sexual violence also constitute a grave breach of the Geneva Conventions.[143] War crimes in non-international armed conflicts include rape, sexual slavery, enforced prostitution, forced pregnancy (as defined in Article 7, paragraph 2 (f)) enforced sterilisation, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions.[144]

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[139] Women's Caucus for Gender Justice, *Gender Justice and the ICC* (1998), 11.
[140] *Elements of Crimes*, art 6(a)(3), fn 3.
[141] For example, including forced pregnancy as a crime against humanity: see Solange Mouthaan, 'The Prosecution of Gender-Based Crimes at the ICC: Challenges and Opportunities' (2011) 11 *International Criminal Law Review* 775.
[142] *Rome Statute* art 7(1)(g); Theodor Meron, 'Rape as a Crime under International Humanitarian Law' (1992) 87 *American Journal of International Law* 424. Note that draft article 3 of the International Law Commission's ('*ILC*') draft articles for a treaty on crimes against humanity includes exactly the same list of acts as contained in the Rome Statute: ILC, *Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015,* 2 June 2015, <http://legal.un.org/docs/?symbol=A/CN.4/L.853>.
[143] *Rome Statute* art 8(2)(b)(xxii). Grave breaches of the Geneva Conventions are identified in Articles 49-51 of the First Geneva Convention, Articles 50-52 in the Second Geneva Convention, Articles 129-131 of the Third Geneva Convention, Articles 146-148 of the Fourth Geneva Convention, and Articles 11 and 85 of Additional Protocol 1 to the Geneva Conventions.
[144] Article 8(2)(a) lists the grave breaches as defined by the Geneva Conventions; article 8(2)(b) lists '[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'; article 8(2) lists acts committed 'in the case of an armed conflict not of an international character' that are 'serious violations of article 3 common to the four Geneva Conventions of 12 August'; article 8(2)(e) lists '[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character'.

Understanding the extent to which these definitions vary from previous international instruments and customary international law is important. A crime defined in the Rome Statute that has been previously recognised in international law is more likely to be prosecuted in national courts. This is because it is more likely to have been incorporated into national law and more likely to have been previously prosecuted at either a national or international level. For example, acts listed as grave breaches of the Geneva Conventions have been criminalised by many States in their domestic law (which is not an obligation under these treaties) to enable their prosecution or extradition (which *is* an obligation under these treaties).[145] The ICTY has recognised rape and other forms of sexual violence as a grave breach of the Geneva Conventions including as torture and 'wilfully causing great suffering or serious injury to body or health'.[146] These international precedents facilitate domestic prosecution of this conduct in national jurisdictions with legislation implementing the Geneva Conventions.

Conversely, excluding particular crimes drawn from enumerated lists in the Rome Statute can inhibit the evolution of national criminal legal definitions. For example, forced nudity and sexual humiliation are not explicitly included as crimes in the Rome Statute, despite having been prosecuted at ad hoc tribunals.[147] Thus, even if they arise in an OTP investigation, their prosecution and conviction depends on OTP and judicial willingness to recognise them as crimes within the residual 'catch-all' categories.[148] Their exclusion is a missed opportunity to consolidate international jurisprudence and perpetuates the dependence on progressive judicial actors to proactively recognise, prosecute and punish such crimes. As discussed in the next section, this carries real, and realised, risks that such conduct will not be recognised or convicted as an international crime at the ICC.

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[145] This is limited to international armed conflicts and violations of Common Article 3 of the Geneva Conventions. For a survey of national legislation enacting criminal repression of the grave breaches see ICRC, *National Implementation of IHL* <https://ihl-databases.icrc.org/applic/ihl/>.
[146] As noted below, ICTY jurisprudence also establishes rape can constitute 'other grave breaches' including for example, torture. Patricia Viseur Sellers, above n 46, 9 (citing the International Committee for the Red Cross, *Aide-memoire*, December 1992 [2]: '[T]he grave breaches enumerated in art. 147… 'obviously covers not only rape, but also any other attack on a woman's dignity'). For additional critiques see Mouthaan, above n 141, 779-782.
[147] These crimes were also not explicitly included in the ICTY and ICTR Statutes.
[148] For example, as 'other inhumane acts of a similar character' in *Rome Statute*, art 7(1)(k).

The Rome Statute's expanded list of recognised crimes of sexual violence contrasts with its conservative definition of gender as the 'two sexes', rather than 'socially constructed differences between men and women'.[149] Nevertheless, this definition represents a victory over the suggested term 'sex',[150] and was achieved because of similar definitions of the term in UN documents.[151] The Rome Statute also does not define gender violence and includes only one non-sexual gender crime against humanity, namely, persecution on the grounds of gender.[152] While there are mixed views on whether the use of the term 'gender' will facilitate prosecutions on the basis of sexual orientation and non-traditional gender identities,[153] the inclusion was considered to 'pave […] the way for several other gender-related provisions in the statute'.[154]

Under the Rome Statute, the Victims and Witnesses Unit (VWU) in the Registry provides and advises other ICC organs on protective measures, security arrangements, counselling and other support.[155] VWU staff members are required to have expertise in assisting victims of sexual violence-related trauma and in protecting victims and witnesses during proceedings.[156] Article 68(2) of the Rome

[149] The Women's Caucus' proposed definition of 'gender' at the Rome conference was: 'the socially constructed differences between men and women and the unequal power relationships that result. Gender indicates that the differences between men and women are not essential or inevitable products of biological sex difference': Women's Caucus for Gender Justice, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court, United Nations* Headquarters, 10-12 December 1997 (1998); A Dickens, 'Women Withhold Final Verdict,' *Terra Viva: The Conference Daily Newspaper* 18 July 1998.

[150] Chapter 1.3 outlines the important differences between the two in understanding sexual violence crimes.

[151] Steins, above n 52, 372-73. Examples of UN Documents include the Beijing Declaration and Platform for Action in Report of the 4th World Conference on Women, Beijing, 4 -15 September 1995, UN Doc. A/CONF.177/20/REV.1, UN. Sales n. 96.IV.13 (1996); UN High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* UN Doc. HCR/GIP/02/01. See Chappell, above n 62, 44-47.

[152] Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalisation of Sex-related Violence in Positive International Criminal Law' (2008) 1 *Michigan Journal of International Law* 1–123, 105-107.

[153] Joshua H Joseph, 'Gender and International Law: How the International Criminal Court Can Bring Justice to Victims of Sexual Violence' (2008) 18 *Texas Journal of Women and the Law* 61, 69.

[154] Steains, above n 52, 375.

[155] *Rome Statute*, art. 68(4).

[156] *Rome Statute*, art. 43(6).

Statute permits *in camera* proceedings or remote testimony for victims of sexual violence and child victims and witnesses.

Gender mainstreaming of the entire institution is pursued through gender equality, legal expertise and awareness at all levels.[157] The Rome Statute also imposes an explicit duty on the Prosecutor to investigate crimes of sexual and gender violence,[158] and to appoint a legal adviser with legal expertise on gender.[159] The OTP has in turn created a Gender and Children Unit to advise on sexual violence crimes and crimes against children, and both the former and current prosecutors (at the time of writing) appointed Special Gender Advisors to provide specialist advice on policies, submissions and investigations relating to gender violence.[160]

The ICC's Rules of Procedure and Evidence (RPE) also contain provisions relating to the protection and participation of victims and witnesses in proceedings,[161] including procedural restrictions in cases of sexual violence. Rule 70 prohibits the inference of consent across a range of circumstances,[162] while Rule 71 presumptively prohibits evidence related to other sexual conduct. Rule 72 provides for *in-camera* procedures to consider the relevance or admissibility of evidence related to sexual violence crimes.

The Rome Statute is also innovative in permitting victim participation in court proceedings,[163] and providing the ICC with the power to award reparations to victims.[164] For victims who experience many social, economic and health-related

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[157] *Rome Statute*, arts 36(8)(iii), 36(8)(b) and 44(2); Chappell, above n 62, 51-86.
[158] *Rome Statute*, art 54(1)(b). This was a direct result of advocacy by the Women's Caucus, which highlighted gender legacies as manifested by the initial failure in *Akayesu* to present testimony of sexual violence: Women's Caucus for Justice, above n 139, 39.
[159] As well as an expert on violence against children: *Rome Statute*, art 42(9); International Criminal Court, *Regulations of the Office of the Prosecutor,* Doc No. ICC-BD/05-01-09, (entered into force on 23 April 2009) ('*OTP Regulations*').
[160] OTP Regulations, 6(b).
[161] ICC RPE, Section III.
[162] But note that the ICC straddles the definitional divide between *Akayesu's* conception of coercive circumstances and subsequent ICTY decisions that frame the issue as one of body parts and non-consent: Kiran Grewal, 'Rape in Conflict: Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 *Australian Feminist Law Journal* 57.
[163] *Rome Statute*, art 68(2) and (3).
[164] Rome Statute, art 75.

consequences of sexual violence, reparations can offer redress beyond the scope of criminal convictions. Thus, the Rome Statute has created a range of positive standards and benchmarks to facilitate the prosecution of crimes of sexual violence. As a result, the ICC is the most progressive international criminal institution in relation to crimes of sexual violence to date,[165] including in its gender-sensitive provisions and protection and support for victims of sexual violence crimes.

The Rome Statute does not require the incorporation of its crimes and procedural rules into national jurisdictions, but this would constitute legal internalisation of the sexual accountability norm according to the TLP. Moreover, as discussed in Chapter 3.2.1 above, the typically inadequate responses of national criminal justice systems to crimes of sexual violence suggests these types of provisions are necessary to achieve their prosecution. As a norm entrepreneur, the OTP can promote these standards in its norm-interpretive interactions with States to ensure compliance, if not total internalisation, of the sexual violence accountability norm. Unfortunately, however, the ICC's practice has not so far lived up to the potential of its legal architecture. As the next sub-section discusses, this negatively affects both the standards the OTP can promote and potentially the OTP's influence when engaging with States to catalyse national proceedings regarding sexual violence crimes.

4.2 Prosecutions of sexual violence at the ICC

The ICC's *Elements of Crimes* defines sexual violence to be when

> the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.[166]

[165] Barbara Bedont and Katherine Hall-Martinez, 'Ending Impunity for Gender Crimes Under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65, 70; Copelon, above n 59, 237.

[166] *Elements of Crimes,* Art. 7(1)(g); (8)(2)(b)(xxii); 8(2)(e)(vi).

As Rosemary Grey notes, 'this explains what makes a sexual act violent (that it involved force, threat, coercion, etc.) but not what makes a violent act sexual'.[167] This lacuna is significant; Grey notes that none of the ICC constituent documents clarify whether it is the involved body part or the cultural significance of the act that renders it sexual, and queries whether any acts are objectively 'sexual'.[168] The historic culturally and socially mandated silence around sexual violence has made it a struggle to accurately identify at both international and national levels the full range of sexually violent acts.[169] As outlined below, this has problematically allowed restrictive and regressive subjective determinations by the ICC judiciary about what constitutes a 'sexual' crime.

Typical attrition-related challenges explain the ICC's mixed track record of indictments and successful prosecutions for sexual crimes. The OTP has included charges for sexual violence in an increasing proportion of cases and charges, from 33% of cases in 2006 to 80% in 2012 and beyond, and from 18% of all charges in 2006 to 41% in 2012 and beyond.[170] However, Grey notes that there are significant disparities between sexual and other crimes, that increase at each stage of proceedings as the evidentiary threshold increases. Up until 31 December 2014 the comparison between sexual and other crimes was: 87% compared to 99% at the arrest warrant/summons stage; [171] 59% compared to 79% at the confirmation of charges stage;[172] and 0% compared to 60% at the trial stage. [173]

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[167] Rosemary Grey, 'Conflicting Interpretations of "sexual violence" in the International Criminal Court' (2014) 29(81) *Australian Feminist Studies* 273, 276.
[168] Ibid.
[169] For example, as discussed in Chapter 3.4.1, crimes of forced nudity and sexual humiliation are not explicitly listed in the Rome Statute despite being prosecuted at the ad-hoc tribunals.
[170] Rose Grey, *Prosecuting Sexual and Gender Violence Crimes in the International Criminal Court - Historical Legacies and New Opportunities* (PhD Thesis, University of New South Wales, 2015), 218-220.
[171] Article 58(1)(a) stipulates the evidentiary threshold for the Pre-Trial Chamber to issue an arrest warrant as: 'there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'.
[172] Article 61(7) requires that for a charge to be confirmed by the Pre-Trial Chamber to proceed to charge, there must be 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'.
[173] Grey, above n 170, 229. Article 66(3) states that in order to convict the accused, 'the Court must be convinced of the guilt of the accused beyond reasonable doubt'.

Grey attributes this attrition to the OTP's inability to (1) prove the elements of sexual crimes due to evidentiary weaknesses, (2) establish criminal responsibility of the accused and (3) persuade the Pre-Trial Chamber to accept its interpretation of sexual crimes.[174] As outlined in Chapter 3.2 above, the same issues also inhibit national prosecutions and convictions of sexual crimes. As such, they also indicate the types of reforms or procedures required to achieve legal, political and social internalisation of the sexual violence accountability norm. These are lessons learned by the OTP that it could apply to its norm-interpretive interactions with national criminal justice actors.

The brief chronological sketch of key ICC decisions below reveals a few trends. First, although the OTP is including an increasing range of sexual violence crimes in its investigations and charges, insufficient evidence to prove the charges to the judges' satisfaction, particularly in relation to indirect responsibility, have proven fatal their prosecution. Second, beyond rape, other (particularly non-penetrative) sexual violence crimes are still less likely to be accurately characterised or considered grave enough to be admissible before the ICC. And third, the ICC does not always build upon the lessons learned from other international criminal tribunals when the opportunity arises.

The first ICC case to reach trial, *Lubanga*,[175] is considered a litmus test for crimes of sexual violence that the OTP failed.[176] Despite available evidence that sexual violence crimes (rape and sexual slavery) were committed as international crimes, the OTP conspicuously failed to investigate them adequately and lay charges.[177]

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[174] For a full description see Grey, above n 170, 229-236. For a graphical summary of the attrition across each of the sexual violence crimes in the Rome Statute see Chappell, above n 62, 105-107.
[175] *Prosecutor v Lubanga (Judgment)* (ICC, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Doc No. ICC-01/04-01/06-2842, 14 March 2012) ('*Lubanga Judgment*').
[176] Women's Initiatives for Gender Justice ('WIGJ'), *Special Issue of the Legal Eye on the ICC* (May 2012) <http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2012-first-special-issue-on-lubanga-judgement/>; Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor Without Borders' (Spring 2009*) World Affairs* 30; K'shaani O Smith, 'Prosecutor v Lubanga: how the International Criminal Court failed the women and girls of the Congo' (2011) 54(2) *Howard Law Journal* 467, 474.
[177] ICC-OTP, *Document Containing the Charges, Article 61(3)(a)*, Doc No. ICC-01/04-01/06-356-Conf-Anx2 (28 August 2006). Niamh Hayes, 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' (2013) in Niamh Hayes, Yvonne McDermott and William Schabas (eds) *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2012), 7-

Subsequently, both the Trial Chamber judgment and the sentencing decision included statements criticising the OTP's approach to sexual violence charges.[178] For national criminal justice actors, this precedent evidences the risk that that even with experts and specialised structures in place sexual crimes may not be charged. Certainly, a deeper analysis of case selection, prosecutorial strategy and investigative priorities is required to overcome this possibility.

Following this, a 2012 Pre-Trial Chamber decision in the case against *Kenyatta* concerning the 2007 post-election violence in Kenya gained notoriety as 'one of the most retrograde developments at the ICC'.[179] The decision problematically characterised forcible circumcision, which necessarily targets male genitalia, as an act of physical, rather than sexual, violence.[180] The finding that 'not every act of violence which targets part of the body commonly associated with sexuality should be considered an act of sexual violence'[181] is inconsistent with widely accepted international standards,[182] and with the logic that considers the nature of the crime's impact on the victim when characterising it. It is difficult to conceive of an attack on a sexual organ that would not have a significant sexual impact and thereby not be of an inherently sexual nature. In conservative national jurisdictions with limited definitions of sexual crimes, following this precedent is likely to significantly

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44, 7; Louise Chappell 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court' (2014) 67(1) *Political Research Quarterly* 183; Grey, above n 167; WIGJ, 'Public redacted version of confidential letter to ICC Prosecutor' (2006) <http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf>; WIGJ, above n 176. Initially, Prosecutor Moreno-Ocampo claimed a lack of time and evidence to link Lubanga to crimes of sexual violence; subsequently he suggested they were not 'systematic' so could not be charged as crimes against humanity. Regardless, attempts to remedy the oversight were rejected on appeal: Chappell, above n 62, 111; *Prosecutor v Lubanga (Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court)* (ICC, Trial Chamber II, Doc No. ICC-01/04-01/06-1891, 22 May 2009).

[178] Lubanga Judgment [141]; Prosecutor v Lubanga, (Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901) (Trial Chamber I, Case No. ICC-01/04-01/06-2901, 10 July 2012) [60].

[179] Niamh Hayes, above n 177, 43.

[180] Beth Maina Ahlberg and Kezia Muthoni Njoroge, '"Not men enough to rule!": politicisation of ethnicities and forcible circumcision of Luo men during the postelection violence in Kenya' (2013) 18(5) *Ethnicity & Health* 454.

[181] *Prosecutor v Kenyatta (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (ICC, Pre-Trial Chamber, Case No. ICC-01/09-02/11, 23 January 2012) [265].

[182] See e.g. Etienne G. Krug et al, *World Report on Violence and Health* (2002) 149 <http://www.who.int/violence_injury_prevention/violence/world_report/chapters/en/>.

inhibit accurate characterisation of sexual violence crimes, particularly against males.[183]

On 7 March 2014, *Katanga* became the first defendant charged with, and acquitted of, sexual violence crimes. The Trial Chamber was satisfied that rape and sexual slavery had been proven[184] and found that lack of consent in coercive circumstances did not need to be proven.[185] However, for the majority of the Trial Chamber, unlike the other non-sexual crimes committed during the same attack for which Katanga was convicted, there was insufficient evidence to conclude that the sexual crimes formed part of the common purpose 'to wipe out from that area [Bogoro] the Hema civilians there'.[186]

That judgment has been criticised for establishing an unjustifiably higher double standard of evidence required for sexual violence crimes compared to other crimes,[187] because it 'perpetuates the view that rape is a by-product of war, instead of an instrument of warfare'.[188] Despite the well-documented characteristic use of sexual violence as a 'weapon of war' in the DRC conflict,[189] the OTP relied on only three primary witnesses to establish the sexual violence and did not present strong

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[183] See Grey, above n 167, 79-83; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006); Kapur and Muddell, above n 9; Rosemary Grey and Laura J Shepherd, ''Stop rape now?': Masculinity, responsibility, and conflict-related sexual violence' (2013) 16(1) *Men and Masculinities* 115.

[184] *Prosecutor v Katanga (Judgment rendu en application de l'article 74 du Statut*) (ICC-01/04-01/07), Trial Chamber II, 7 March 2014) ('*Katanga Trial Judgment*' [965]. Katanga's co-defendant, Mathieu Ngudjolo Chui, was eventually tried separately for war crimes and crimes against humanity, and acquitted on 18 December 2012 due to the failure to prove criminal responsibility under article 25(3) of the Rome Statute.

[185] Katanga Trial Judgment [965].

[186] Katanga Judgment, [1663-1664].

[187] WIGJ, *Prosecutor Sentenced to 12 Years by ICC* (23 May 2014) <www.iccwomen.org/documents/Statement-Katanga-Sentencing.pdf>; Carsten Stahn, 'Justice Delivered or Justice Denied?: The Legacy of the Katanga Judgment' (2014) 12(4) *Journal of International Criminal Justice* 809, 821. Katanga was acquitted of the charges related to child soldiers for different reasons: *Katanga Judgment,* [1086]-[1088].

[188] Kelly Dawn Askin, Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence (11 March 2014) <http://www.opensocietyfoundations.org/voices/katanga-judgment-underlines-need-stronger-icc-focus-sexual-violence>.

[189] See e.g. SC Res 1820, UN SCOR, 5916th mtg, UN. Doc S/RES/1820 (19 June 2008) ('*Resolution 1820*'); <http://www.ohchr.org/EN/NewsEvents/Pages/RapeWeaponWar.aspx>;

evidence of the link between these and the accused.[190] Thus there was no direct evidence proving sexual violence was committed on a scale comparable to the non-sexual crimes. Additionally, the Trial Chamber was not prepared to consider sexual crimes as part of the common purpose, despite the well-established trend of their commission in the conflict, including as accepted in the *Lubanga* case. Thus, the OTP demonstrated a failure from the outset to adopt a gender-sensitive prosecutorial strategy that would have ensured a specific focus on presenting sufficient evidence regarding the sexual violence charges. The Trial Chamber then compounded these barriers through its gender-neutral perceptions about the circumstances under which sexual violence is committed as an international crime.

Katanga raises immediate concerns of inconsistent standards of proof between sexual violence and other crimes and the longer-term risk that entrenching impunity for sexual violence crimes in this way damages both the victims of sexual violence crimes in conflict zones and the ICC's credibility. The ICC judiciary's interpretation could inhibit the OTP's norm interpretations and its potential capacity as a norm entrepreneur to catalyse internalisation of the sexual violence accountability norm.

These evidentiary challenging 'hotspots' highlight how currently, more testimonies of crimes of sexual violence to prove their commission as international crimes and more evidence linking perpetration to accused who are not direct perpetrator/s may be required to achieve convictions. This perceived requirement should continue to be challenged, but recognising and anticipating it in prosecutorial strategy may nevertheless be required to secure convictions. They are also lessons the OTP can incorporate in its norm interpretations with national criminal justice actors. Querying whether the evidence adequately establishes indirect responsibility and includes enough testimonies for the court before which a case is heard could enhance national prospects of convictions for sexual violence crimes. The OTP could incorporate the lessons learned from ICC jurisprudence into its norm

[190] WIGJ, Statement of the Women's Initiatives for Gender Justice, Appeals Withdrawn by Prosecution and Defence, The Prosecutor v Germain Katanga (26 June 2014) <http://www.iccwomen.org/documents/Katanga-Appeals-Statement.pdf>.

interpretations during preliminary examination interactions. However, based on publicly available information, it has yet to do so.

The CAR case of Jean Pierre Bemba Gombo (*Bemba)* provides an important contrast. The arrest warrant for Bemba included a broad range of sexual violence crimes,[191] but only charges of rape as a war crime and rape as a crime against humanity were confirmed for trial. Contrary to ICTR jurisprudence,[192] the Pre-Trial Chamber did not consider enforced nudity as grave as other forms of sexual violence.[193] This regression highlights the comparative advantage of explicitly listing more recently recognised sexual violence crimes in the Rome Statute, rather than relying on judicial interpretation and conceptualisation of sexual crimes. While the OTP retains the discretion to adopt more progressive norm interpretations than appear in ICC jurisprudence in preliminary examinations, it will need to consider that such ICC standards may inhibit national recognition and prosecution of forced nudity as a crime of sexual violence.

In the same *Bemba* case, the Pre-Trial Chamber made an unnecessarily restrictive finding that the crime of rape was not legally distinct from the crime of rape as torture or rape as an outrage upon personal dignity.[194] This finding deviated from established practice in the other international tribunals, and from the practice envisaged by the *Elements of Crimes*.[195] This is another precedent that may limit the

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[191] *Prosecutor v Bemba (Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo)* (ICC, Pre-Trial Chamber III, Case No. ICC-01/05-01/08, 10 June 2008) [33]('Bemba Arrest Warrant').

[192] While the ICTR Statute did not include a comparable 'gravity' threshold, its finding that forced nudity could constitute an international crime comparable to other sexual violence necessarily implies comparable gravity between forced nudity and other sexual violence crimes: *Akayesu Judgment* [68].

[193] *Bemba Arrest Warrant,* [207]-[209], [266]. See Grey, above n 167, 277-279.

[194] Prosecutor v Bemba (*Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*) (Pre-Trial Chamber II, ICC-01/04-01/06, 15 June 2009) [202], [204], [210]. For a critique see WIGJ, Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence (31 July 2009) <http://iccwomen.org/publications/briefs/docs/Amicus-Curiae-Submission-in-Jean-Pierre-Bemba.pdf>.

[195] The *Elements of Crimes* Annex notes that a 'particular conduct may constitute one or more crimes'. 1 [9]. For critiques of this, see Valerie Oosterveld, 'Prosecuting Gender-Based Persecution as an International Crime' in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 57, 73-76; Laurie Green, 'First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court' (2011) 11(3) *International Criminal Law Review* 529, 533.

OTP's capacity to encourage (and may deter national prosecutors from pursuing) charges that more accurately capture the harm experienced by victims of sexual violence.[196]

On 21 March 2016, Bemba was the first ICC defendant convicted of sexual violence crimes, that is, rape as both a crime against humanity and as a war crime, and received the longest sentence yet - 18 years- from the ICC for his role as commander-in-chief of the troops who perpetrated the crimes.[197] The judgment was significant in a number of respects. It was the first conviction on the basis of command responsibility; it included rapes committed against males; it identified a range of motivations behind sexual violence; it confirmed that underlying conduct can form the basis of different charges and did not constitute legally impermissible cumulative charging,[198] and it confirmed that inconsistent recollections of age at the time of the offences and not disclosing the violations within the community did not undermine the probative value of the testimony.[199] These are all important benchmarks for national prosecutions of sexual violence; the path to Bemba's conviction may guide national prosecutors to prove command responsibility for sexual crimes.

In the case against *Al Mahdi* in Mali, although the OTP concluded there was a reasonable basis to conclude rape had been committed as a war crime in its preliminary examination,[200] it did not ultimately lay these charges.[201] Rather, in this situation, the OTP prioritised crimes relating to cultural heritage rather than sexual violence,[202] despite evidence that suggested sexual violence was committed on a

[196] The practices referred to above evolved from recognition that rape perpetrated in these different contexts could and should be charged as independent crimes: Sácouto and Cleary, above n 85.
[197] *Prosecutor v Bemba (Judgment)* (ICC, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, Doc No. ICC-01/05-01/08-3343, 21 March 2016) (*'Bemba Judgment'*).
[198] This 'remedied' the PTC's finding above that rape, constituting the conduct, could not form the basis of multiple distinct charges (namely rape as torture and rape as a crime against humanity).
[199] *Bemba Judgment,* [567], [743]-[775], [492].
[200] ICC-OTP, *Report on Preliminary Examination* Activities (2012) ('PEX 2012') [177].
[201] *Prosecutor v Al Mahdi* (Public Redacted Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi) (ICC, Pre-Trial Chamber I, Case No. ICC-01/12-01/15, 24 March 2016).
[202] Investigations in Mali are ongoing, so charging sexual violence at a later date is still possible. The decision thus far is an outcome of the OTP balancing competing prosecutorial priorities and preferencing a category of crime that is underrepresented in international prosecutions in a case against an accused who had indicated he would plead guilty and cooperate with the ICC.

scale that may have warranted further investigation. For instance, more than one year earlier, in late 2014, the FIDH filed a complaint in the national courts on behalf of 80 victims of rape and sexual violence during the occupation of northern Mali by several armed groups.[203] Just five days before the ICC confirmed the charges against Al Mahdi, FIDH filed another complaint on behalf of 33 victims, also including sexual violence crimes.[204] Al Mahdi was convicted as a co-perpetrator for the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque.[205] Although the conviction for destruction of cultural property was heralded as a success,[206] it risked creating the *impression* that 'destroying shrines is worse than rape'[207], even though this was not reflected in the sentencing rationale.[208]

The most recent benchmark is the June 2017 Appeals Chamber judgment in the *Ntaganda* case that rape and sexual slavery of child members of an armed group by other members of the same group can be charged as war crimes under the Rome Statute.[209] To reach this conclusion, the Appeals Chamber found that IHL 'concerns itself with protecting vulnerable persons during armed conflict and assuring fundamental guarantees to persons not taking active part in the hostilities'.[210] In demonstrating a willingness to interpret ICL in a manner that provided more protection to those who are more vulnerable to violations, this judgment created

[203] FIDH, Complaint filed on behalf of 80 victims of rape and sexual violence during the occupation of northern Mali: response by Malian judiciary to victims' need for justice is essential without delay (12 November 2014) <https://www.fidh.org/>.
[204] FIDH, *Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded* (30 September 2015) **<**https://www.fidh.org/>.
[205] *Prosecutor v Al Mahdi (Judgment and Sentence)* (ICC, Trial Chamber VIII, Case No. ICC-01/12-01/15, 27 September 2015) (*'Al Mahdi Judgment').*
[206] Mark Kersten, 'The al-Mahdi Case is a Breakthrough for the International Criminal Court' on *Justice In Conflict* (25 August 2016) <https://justiceinconflict.org>.
[207] Marie Forestier, 'ICC to War Criminals: Destroying Shrines is Worse Than Rape', *Foreign Policy* (22 August 2016) **<**http://foreignpolicy.com>.
[208] The sentence ranks crimes regarding cultural heritage as a crime against property, which is ranked lower than a crime against person(s): *Al Mahdi Judgment*, 35 [72].
[209] *Prosecutor v Ntaganda (Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9")* (ICC, Appeals Chamber, Case No. ICC-01/04-02/06 OA5, 15 June 2017) 11 [24]. Prior to this judgment, perpetrators and victims in criminal cases had always belonged to different armed groups.
[210] Ibid.

more interpretive space for the OTP do the same in its engagements during preliminary examinations.[211]

In the context of the ICC's ambivalent jurisprudence track record regarding sexual violence, there are two relevant implications if the ICC is indeed a benchmark of 'international best practice'.[212] First, resource-poor post-atrocity criminal justice systems cannot be expected, nor are they likely able, to meet procedural and practice standards created for a permanent international institution. As outlined in Chapter 5.2, this margin of discretion is built into the complementarity regime; national jurisdictions have primacy and there is no requirement they must conduct proceedings as if they were the ICC. Lower-than-optimum international standards and jurisprudence necessarily lower expectations of national proceedings that are already expected to be imperfect. They may also legitimate indirectly existing disparities in prosecutorial treatment between sexual violence and other categories of crimes.

The second implication is that OTP norm interpretations in preliminary examinations would be more conservative if the OTP was to adopt the standards from ICC jurisprudence, rather than its own practices and policies. In response to this, I propose that OTP norm interpretations in preliminary examinations should not be limited by ICC jurisprudence. Instead, they should promote an inclusive and progressive approach to gender and sexual violence consistent with the OTP Policy Paper on Sexual and Gender-Based Crimes (SGBC Policy), as discussed below. I suggest this is within the OTP's discretion, even if this means an OTP norm interpretation conflicts with a prior ICC decision. There is no rule preventing the OTP from characterising charges or submitting arguments contrary to prior ICC jurisprudence. For example, adopting this approach would mean the OTP's

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[211] For a critique on this judgment see Rosemary Grey, *ICC Appeals Chamber issues "unprecedented" decision on war crimes of rape and sexual slavery* (14 June 2017) https://ilg2.org/2017/06/14/icc-appeals-chamber-issues-unprecedented-decision-on-war-crimes-of-rape-and-sexual-slavery/>; Patricia Viseur Sellers, *Ntaganda: Re-Alignment of a Paradigm* (2018) <http://www.iihl.org/wp-content/uploads/2018/03/Ntaganda-V.pdf>.

[212] Chappell, above n 62, 182; see also ICC, *Pre-Trial Manual* (September 2015), 4; ICC, *Understanding the International Criminal Court* 37, 40 <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>. 37, 40.

interpretation of norm compliance with the sexual violence accountability norm requires forcible circumcision to be prosecuted as a crime of sexual violence, rather than physical violence.[213]

Perhaps partly in response to its track record and the need for a coherent and systemic approach to sexual and gender-based crimes, the OTP launched its SGBC Policy in June 2014.[214] This policy affirms the OTP's commitment to pay particular attention to sexual and gender-based crimes; to use the provisions of the Rome Statute and other instruments to ensure these crimes are effectively investigated and prosecuted; to provide clarity and direction relating to these crimes in all aspects of operations; to contribute to the culture of best practice with respect to these crimes, and to contribute to the ongoing development of international jurisprudence with respect to these crimes.[215] The SGBC Policy is comprehensive, adopts a victim-responsive intersectional approach, and commits to applying a gender analysis and 'best practice with regard to sexual and gender-based crimes'.[216] It provides useful definitions of key terms, including gender-based crimes, gender analysis and sexual crimes, which are adopted in this thesis. Unfortunately, the SGBC Policy refers to preliminary examinations only briefly; this issue is discussed further in the next chapter in the context of complementarity. While the OTP's track record has improved, the SGBC Policy has been in effect only since 2014, so its full impact is yet to be seen.

5. Conclusion

This chapter has explored the challenges to prosecuting sexual violence crimes in national jurisdictions and what types of internalisation are required to overcome them. Practices, attitudes, and priorities of national criminal justice actors that trivialise sexual violence crimes continue to impede internalisation of the sexual violence accountability norm. To catalyse national proceedings in compliance with

[213] *Prosecutor v Kenyatta (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (ICC, Pre-Trial Chamber, Case No. ICC-01/09-02/11, 23 January 2012) [265].
[214] ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) 3 https://www.icc-cpi.int/iccdocs/otp ('*SGBC Policy*').
[215] Ibid 10-11.
[216] Ibid 8.

this norm, the OTP's norm interpretations need to articulate how to overcome these challenges in a highly imperfect environment.

Tracing the evolution of international criminal jurisprudence regarding sexual violence crimes highlights the progress represented by a gender-sensitive Rome Statute and other ICC constitutive documents. However, key progressive, substantive, procedural and operational features of the ICC's framework have not been fully utilised to challenge impunity for international crimes of sexual violence. The ICC's track record is improving, but both prosecutorial and judicial choices have impeded access to justice for sexual violence victims. Regressive ICC jurisprudence representing international standards could affect OTP norm interpretations in preliminary examinations and national criminal practices in post-atrocity contexts.

There is scope for OTP norm-interpretive interactions with national actors during the preliminary examination phase to flag likely gaps and challenges in prosecuting sexual violence crimes, as well as methods for overcoming them. Unfortunately, while this chapter has shown it may not always be constructive to draw upon ICC jurisprudence and OTP practices, the OTP can and does use Rome Statute provisions and its own practices to inform its interactions with national actors. These limitations may have consequences for national accountability efforts, as explored in Chapters 5, 6 and 7.

The next chapter answers this question within the complementarity paradigm, examining both the ICC's jurisprudence and the OTP's implementation of positive complementarity during preliminary examinations. It also explores the statutory basis for the OTP's engagement with States to achieve this, and how this plays out in preliminary examinations.

CHAPTER 4. COMPLEMENTARITY IN THE STATUTE, JURISPRUDENCE AND PRACTICE: HOW CAN IT CHALLENGE IMPUNITY?

1. Introduction

The Rome Statute established the complementarity framework to promote national prosecutions as the primary criminal response to international crimes. A key premise underpinning the complementarity regime is that genuine national prosecutions are desirable and preferable to international prosecutions,[1] both as a matter of State obligation under international law and for reasons of practicality. Victims of crimes are assumed to benefit in contexts where the territorial State is persuaded to prosecute, presumably because impunity can be more comprehensively challenged, evidence and proceedings are more accessible and the value of such trials, both practically and symbolically, is enhanced.[2]

This means that successfully challenging impunity for international crimes of sexual violence depends largely on how well national justice systems respond to this category of crime. Chapter 2 outlined how the ICC may facilitate national prosecutions for sexual violence through a Transnational Legal Process involving norm-interpretive interactions, particularly between the OTP and national stakeholders. Chapter 3 explored the challenges posed by criminal law's historical and continuing failures to investigate and prosecute sexual violence crimes, in both

[1] As a matter of pragmatism, this could be because proximate proceedings are expected to improve access to evidence, victims' access to the proceedings and the symbolic value of trials to victims: *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court,* GAOR, 50th sess, Supplement No. 22 (A/50/22) (6 September 1995) *('Ad Hoc Committee Report')*; [31] and *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, GAOR, 51st sess, Supplement No. 22 A/51/22(I) (1996) *(Prep Committee Report)*:[155].

[2] See UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52-54 <http://www.unwomen.org>, 92. The symbolic value of trials fulfils the expressivist purpose of criminal law by 'sending a message' through punishment: Mark A Drumbl, 'A Hard Look at the Soft Theory of International Criminal Law' in L Sadat and MP Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers, 2008) 1, 17; Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford Journal of International Law* 39; Margaret deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265.

national and international courts, including the ICC. Understanding the historic legal, social and political contexts of impunity for crimes of sexual violence anchors our expectations of the potential OTP influence on national prosecutions for these crimes.

This chapter describes how complementarity is conceptualised in the Rome Statute and how the ICC implements the complementarity provisions. Complementarity is a legal admissibility criterion designed to allay sovereignty concerns around ICC intervention in national judicial systems.[3] However, the ICC's practice has manifested two notions of complementarity, institutional and systemic;[4] in other words, the 'technical admissibility rule' and the 'big idea'.[5] As Carsten Stahn notes, while the Rome Statute does not expressly require States to incorporate the substantive crimes it covers into domestic law, complementarity 'serves as a catalyst for compliance by virtue of the construction of Articles 17 and 19 of the Rome Statute'.[6] Thus, the 'big idea' of complementarity has a textual basis in the Rome Statute.[7] Further, it is anchored in and shaped by the jurisprudence interpreting the Statute's relevant provisions because once an ICC investigation is opened, admissibility is determined by the ICC Pre-Trial Chamber. The line between the two notions is important to construe the OTP's appropriate role, powers and potential to catalyse genuine national proceedings when pursuing a policy of

[3]John T Holmes, 'Complementarity: National Courts versus the ICC' in Antonio Cassese, Paolo Gaetta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 668, 671; International Law Commission, 'Report of the Working Group on a Draft Statute for an International Criminal Court' 46th sess, 2357th mtg, Agenda Item 4 (27 June 1994) [22] (Mr Yamada); UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Record of the 8th Meeting,* UN Doc. A/CONF.183/C.1/SR.8, Agenda Item 11 (15 January 1999) [59]; UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Record of the 12th Meeting,* UN Doc. A/CONF.183/C.1/SR.12, Agenda Item 11 (20 November 1998): [7] (Mr Mahmood) and [35] (Mr Triquell).

[4] Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87, 89-92; Luis Moreno-Ocampo, 'A Positive Approach to Complementarity' in Carsten Stahn and Mohammed M El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) *('The Complementarity Volume')* 21, 23.

[5] Nouwen, 11, 15-21.

[6] Stahn, above n 4, 92.

[7] Ibid 91-93; William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19(June 2003) *Criminal Law Forum* 59, 63-70; Mohammed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers, 2008) 336–345. But see Nouwen, above n 5, 20, 36-41 on how complementarity as an admissibility rule does not create any obligation on States.

positive complementarity. Accordingly, this chapter discusses the narrow judicial admissibility test in Article 17 before describing the OTP's implementation of its 'positive complementarity' agenda.

The next section reviews how the architecture of complementarity is described in legal instruments, and particularly in Article 17 of the Rome Statute that governs admissibility before the ICC.[8] Chapter 4.3 describes how the ICC judiciary has interpreted complementarity as an admissibility criterion, as contained in Article 17. The OTP also applies this narrow technical test in admissibility determinations during preliminary examinations, a practice described in Chapter 5.

Chapter 4.4 examines how the OTP, as a norm entrepreneur, has proactively interpreted its powers and role under the Rome Statute to pursue a policy of positive complementarity to encourage genuine national proceedings. The fifth and final section of this chapter examines the OTP's implementation of positive complementarity with respect to sexual crimes specifically, and introduces how this applies in the preliminary examination context. This lays the groundwork for the analysis in Chapter 5, which focuses on the OTP's practice of positive complementarity during preliminary examinations vis-à-vis sexual crimes.

2. Complementarity as a legal admissibility test

The drafting process of the Rome Statute, including its admissibility provisions, has been comprehensively covered in other publications and does not form part of this thesis.[9] This section describes how the complementarity architecture defines relationships between the ICC and States under various conditions to identify the relevant thresholds used by the OTP in implementing its policy of positive complementarity.

[8] Nouwen, above n 5, 11.
[9] E.g. William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011), 99-107; B S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar, 2011); Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer, 1999).

As a cornerstone of the Rome Statute,[10] complementarity defines the relationship between the ICC and States parties,[11] confirms the primacy of national jurisdiction and limits the admissibility of cases before the ICC. The Statute states that it is 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'[12] and that the ICC 'shall be complementary to national jurisdictions'.[13] Explicitly recognising this duty reinforces the international legal norm requiring investigation and prosecution of international crimes. It also re-calibrates the relationship between domestic governments, domestic criminal justice systems and potential ICC defendants.[14]

Prior to the ICC, if a national system failed in its duty to investigate and prosecute international crimes there was only a remote risk of external intervention to achieve individual accountability. While internationally-driven prosecutions of international crimes have occurred more frequently since the two UN *ad hoc* tribunals, [15] they cannot be considered a typical response, given such crimes are committed in many more contexts than have been the subject of international interventions.[16] State sovereignty, including over international crimes, therefore remains the prevailing norm. Nevertheless, complementarity is supposed to 'fundamentally change […] the incentives for national courts and […] make […] them more likely to address international crimes directly'.[17] Indeed, from the outset of his term, the ICC's first Prosecutor, Luis Moreno-Ocampo, claimed that success for the ICC would be reflected in the absence of trials before it, the assumption being

[10] *Prosecutor v Kony (Decision on the admissibility of the case under article 19(1) of the Statute)* (ICC, Pre-Trial Chamber II, Case No. ICC-02/04-01/05-377, 10 March 2009) 18 [34]; *Prosecutor v Lubanga (Decision on the Practices of Witness Familiarisation and Witness Proofing)* (ICC, Pre-Trial Chamber I, Case No. ICC-01/04-01/06, 8 November 2006) 16 [fn 38]; Holmes, above n 3, 73.
[11] Rome Statute, art 1.
[12] *Rome Statute,* Preamble [6].
[13] *Rome Statute,* Preamble [10], art 1.
[14] See Chapter 2.2.4 for a discussion on how this dynamic creates a 'two-level' game that changes the interests of the players and can promote internalization.
[15] See Chapter 3.3. Although the ICTY and ICTR were established through a Security Council resolution, international intervention also took the form of negotiated hybrid tribunals, as in Cambodia and Sierra Leone.
[16] Chapter 1.3.
[17] William W Burke-White, 'The International Criminal Court and the Future of Legal Accountability' (2003) 10 *ILSA Journal of International and Comparative Law* 195, 201.

that national institutions would effectively investigate and prosecute the most serious crimes themselves.[18]

Complementarity as a technical admissibility test in Article 17 involves assessments by the OTP[19] and the ICC Pre-Trial Chamber[20] of the existence, scope and genuineness of national proceedings.[21] There is a significant body of international criminal legal scholarship on complementarity as a legal principle.[22] In addition, the meaning of different admissibility factors has evolved primarily through judicial decisions. Two key features of the concept provide important context for understanding the jurisprudence.

The first key feature is that complementarity does not establish a legal obligation to investigate or prosecute the international crimes contained in the Rome Statute; this obligation arises from other sources (which vary depending on whether the subject crime is a war crime, crime against humanity or genocide).[23] The Rome Statute recognises that responsibility exists, but it does not create a mechanism to compel domestic proceedings. Rather it articulates admissibility rules that determine which cases may come before the ICC, which in turn has consequences for States parties, particularly States with jurisdiction over conduct that could be investigated by the ICC.[24] This is important because a common misconception is that complementarity itself establishes this responsibility.[25]

The second key feature is that the Rome Statute does not require States to adopt 'implementing legislation that makes the crimes within the ICC's jurisdiction crimes

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[18] Luis Moreno-Ocampo, *Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court* (16 June 2003) <https://www.icc-cpi.int>.
[19] Under article 53(1)(b) the Prosecutor is to consider admissibility under article 17 in making the decision whether or not to initiate an investigation.
[20] *Rome Statute*, arts 53(3), 17, 19(1).
[21] Chapter 4.3.
[22] For a comprehensive volume, see *The Complementarity Volume*; see also Jan K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008); Nidal N Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate, 2011).
[23] Chapter 2.1.1.
[24] Nouwen, above n 5, 37-40.
[25] Ibid 36-37.

under domestic law, although this is an observable trend'.[26] This is relevant to understanding how and why prosecuting *conduct* that comprises the elements of an international crime as a national crime may be sufficient to render a case inadmissible before the ICC. It also explains how variations in national criminal responses to international crimes do not necessarily undermine their genuineness for the purposes of admissibility. As discussed in the following chapters, this has implications for how the OTP can and does assess national proceedings for international crimes of sexual violence.

Stahn identifies three normative assumptions underpinning this classical concept of complementarity: (1) complementarity preserves and protects domestic jurisdictions from ICC intervention, (2) ICC intervention is predicated on State failure and (3) complementarity brings about State compliance with Rome Statute obligations through the threat of ICC intervention.[27] Pragmatically, complementarity was also considered important to overcome the ICC's operational deficiencies, such as the ICC's lack of enforcement power and its limited capacity to conduct trials.[28]

As the following section illustrates, the mechanisms through which complementarity operates regulate the relationship between the ICC and States. However, they also retain a degree of ambiguity, which means ICC judicial interpretation has played a formative role in how complementarity has evolved. References to specific articles are to those in the Rome Statute unless otherwise indicated.

2.1 The architecture of complementarity

The ICC's jurisdiction is triggered in one of three ways.[29] The first is when a State Party refers a situation to the ICC;[30] the second is when the Security Council, acting

[26] Ibid 40-41; see the ICC Legal Tools Implementing Legislation Database, at https://www.legal-tools.org/browse/national-implementing-legislation-database/.
[27] See Chapter 2.1.2 for how complementarity has a normative agenda: see also Stahn, above n 4, 96-97; Carsten Stahn, 'Taking Complementarity Seriously' in *The Complementarity Volume,* 233-282, 252-3.
[28] Stahn, above n 27, 235.
[29] *Rome Statute*, art 13.
[30] *Rome Statute*, art 14.

under Chapter VII of the UN Charter, refers a situation to the ICC[31] and the third is when the ICC Prosecutor initiates an investigation into a situation in accordance with Article 15 of the Rome Statute. Diagram 4.1 illustrates that in all three cases a preliminary examination is conducted prior to the Prosecutor opening an investigation, but that the procedure under Article 15 differs from the other two. Article 12(2) outlines the preconditions relevant to the ICC's exercise of jurisdiction: those relevant to exercising jurisdiction under Article 15 are that the international crimes have occurred in the territory of a State Party or the accused is a national of a State Party[32] or a State that is not a Party accepts the ICC's jurisdiction 'with respect to the crime in question'.[33]

Article 15 empowers the Prosecutor to initiate an investigation *proprio motu* (on his or her own motion) after a preliminary examination that involves receiving and analysing information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources and oral or written testimony.[34] 'If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected'.[35] The Pre-Trial Chamber authorises the commencement of an investigation if, upon examining the request and supporting material, it considers there is a reasonable basis to proceed with an investigation.[36]

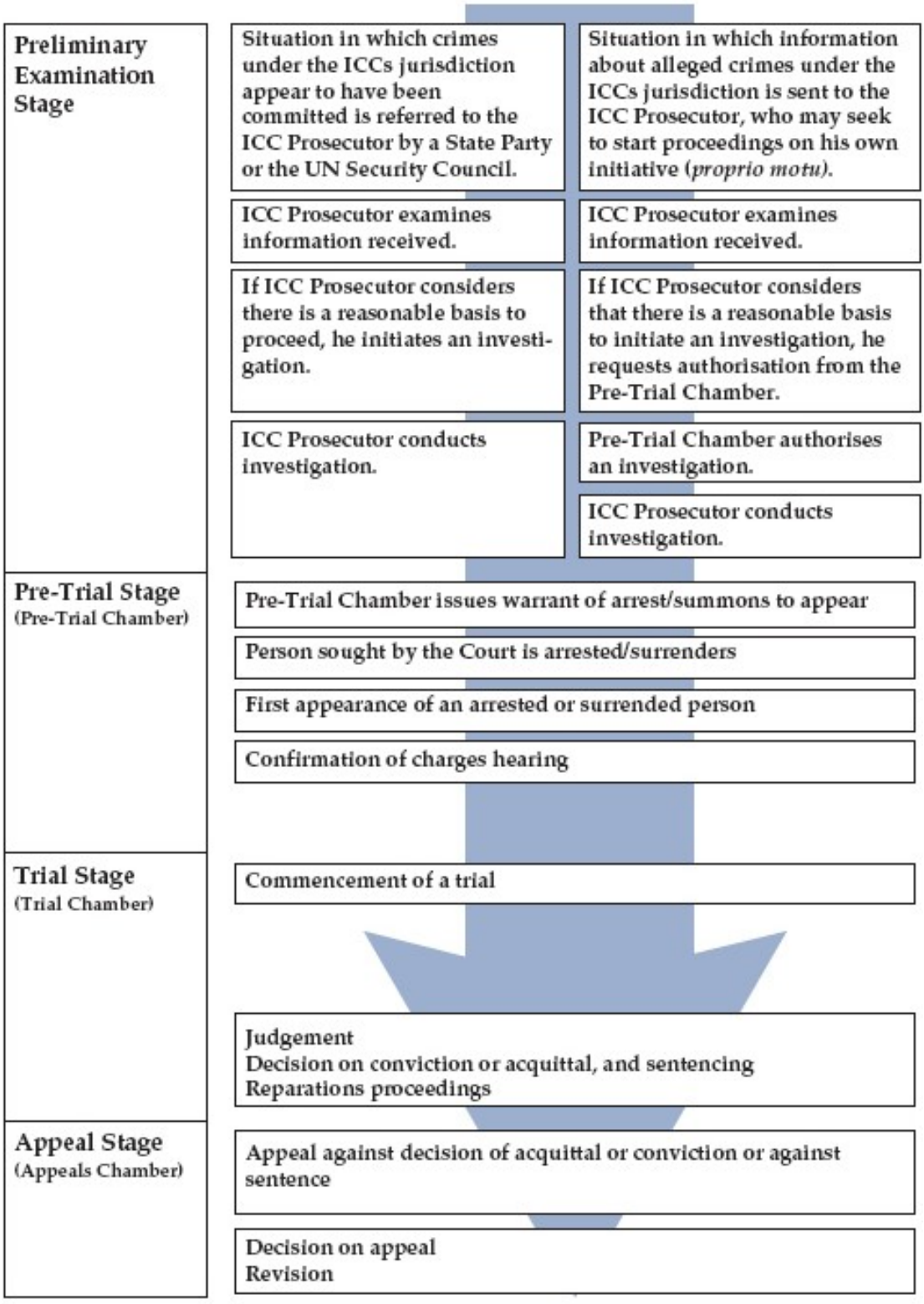
It is useful to compare the different pathways to an investigation. The following diagram of proceedings, excerpted from the ICC publication, *A Guide for the*

[31] *Rome Statute*, art 13(b).
[32] *Rome Statute*, art 12(2). The Rome Statute establishes three types of relationships (with State Parties, non-State Parties, and State Parties with which the ICC is actively engaged), with varying levels of obligations, but this is the only relevant context for this thesis. Thus, I do not discuss a Security Council referral or acceptance by a non-State Party for a specific crime as a precondition to the ICC's jurisdiction.
[33] *Rome Statute*, art 12(3).
[34] *Rome Statute,* art 15(6), which refers to a preliminary examination as described in article 15(1) and (2).
[35] *Rome Statute*, art 15(3).
[36] *Rome Statute*, art 15(4).

Participation of Victims in the Proceedings of the Court,[37] illustrates the differences between the process when a situation is referred to the OTP by a State Party or the UN Security Council, compared to when the OTP decides to initiate a *proprio motu* investigation under Article 15. It illustrates how the OTP examines information received before opening an investigation, regardless of the referral method. However, when a preliminary examination is opened based on communications received under Article 15, the Prosecutor must request Pre-Trial Chamber authorisation for it and may not proceed without that authorisation.

[37] <www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>

Diagram 4.1: Stages of proceedings



Regardless of the referral method, the Prosecutor must consider when initiating an investigation under Article 53 whether the available information provides a

reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed,[38] whether a case would be admissible considering gravity and complementarity under Article 17[39] and whether 'there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.[40]

The main features of complementarity considered as part of the admissibility test when opening an investigation under Article 53 appear in Article 17 as follows:

> Article 17
>
> 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 or unable genuinely[41] to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has 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.[42]
>
> 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 undertaken 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;

[38] *Rome Statute*, art 53(1)(b).
[39] *Rome Statute*, arts 53(1)(b), 17.
[40] *Rome Statute*, art 53(1)(c).
[41] Importantly, the phrase 'genuinely' was included in Article 17 to prevent the Court from exercising jurisdiction only because it 'could do the job of investigation and prosecution better than the domestic courts': Holmes, above n 3, 674.
[42] Gravity is an independent admissibility criterion, not an element of complementarity. Unless otherwise stated, references to admissibility criteria in this thesis relate only to complementarity criteria.

(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.

When there are national proceedings, Article 20 ('*Ne bis in idem*') prevents the ICC from trying a person for the same conduct proscribed under Articles 6, 7, or 8, if he or she has already been tried in another court, *unless* the proceedings in the other court were for the purposes outlined in Article 17(2)(a) and (b).

From the discussion and Diagram 4.1 above, it becomes clear that the way the admissibility test is interpreted necessarily varies at different stages of ICC proceedings. At the preliminary examination stage, the OTP applies admissibility criteria, not to a specific case but in relation to a situation; admissibility cannot be challenged at this stage because there is no formal ICC investigation. The first opportunity to challenge admissibility is when the OTP requests pre-trial authorisation for an investigation under Article 15, or has opened an investigation in a situation referred to it under Articles 13 or 14. Once an investigation has been opened, an admissibility challenge may be made by a State with respect to a situation, and by an individual with respect to a case. The jurisprudence discussed in Chapter 4.3 below describes how the terms of Article 17 have been interpreted in these two contexts.

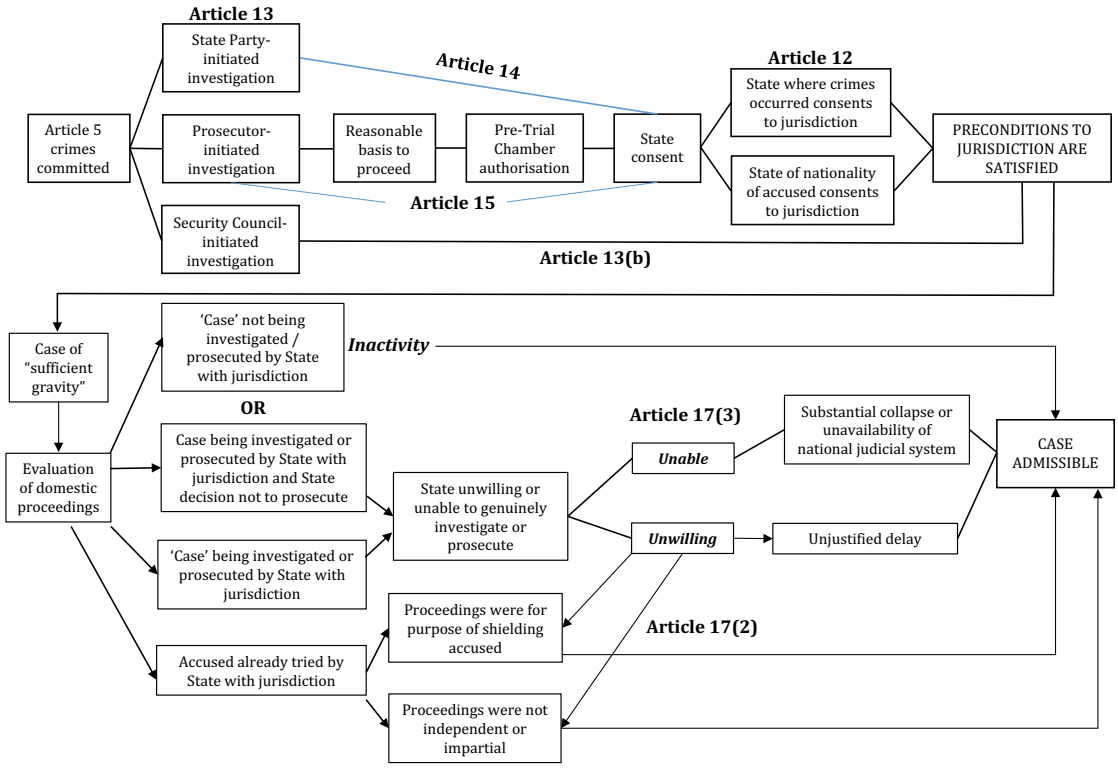
If the Prosecutor initiates an investigation, he or she may apply to the Pre-Trial Chamber for an arrest warrant or a summons for an individual to appear, to be issued if there are reasonable grounds to believe the person committed a crime

within the jurisdiction of the ICC.[43] The Pre-Trial Chamber may determine on its own motion the admissibility of a case in accordance with Article 17.[44] Challenges to admissibility may be made by an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58; or by a State that satisfies the criteria in Article 19(2). If there is an admissibility challenge at this point, the Pre-Trial Chamber will determine admissibility with respect to a specific case against an individual on the criteria in Article 17: complementarity (Article 17(1)(a) and (b)); *ne bis in idem* (Article 17(1)(c)); and gravity (Article 17(1)(d)). As questions of gravity and the interests of justice are separate aspects of the admissibility test, it is not necessary to address them in the current analysis, which focuses exclusively on the complementarity aspect of admissibility.

The diagram below outlines the flow of decisions and proceedings, which are discussed in detail in the following sections.

[43] *Rome Statute*, art 58; art 58(2) and (7) identify the supporting information required for such an application.
[44] *Rome Statute*, art 19(1).

Diagram 4.2: OTP Process for determining Jurisdiction and Admissibility



3. ICC jurisprudence interpreting Article 17 as an admissibility test

The jurisprudence of the Appeals Chamber establishes that inactivity, inability or unwillingness will give rise to admissibility, and that assessing activity is the first stage of the enquiry. Thus, the first stage is to assess whether either there are ongoing investigations, or there have been investigations in the past and the State with jurisdiction has decided not to prosecute the person concerned.

> It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability . . . It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has

not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.[45]

Most of the ICC decisions addressing the various aspects of complementarity focus on whether there are national proceedings or not (inactivity or inaction) rather than State unwillingness and inability, which is the focus of preliminary examinations and this thesis. Accordingly, only the key aspects of the jurisprudence relevant to this thesis are discussed below to contextualise the later discussion on the OTP's implementation of positive complementarity.[46]

3.1 Stage 1: What constitutes activity?

The first stage of determining admissibility is a factual assessment whereby the absence of national investigations or prosecutions renders a case admissible; in this circumstance, the Pre-Trial Chamber is not required to consider inability or unwillingness. The concept of 'case' will necessarily be interpreted differently at the situation stage, when no cases against specific individuals have been prepared, compared to the investigation stage, when there are cases against individual suspects.[47] Thus, although the elements that are relevant to a case do encompass suspects, conduct and incidents, these will vary across stages and contexts.

During the preliminary examination stage, the focus is on criteria that define 'potential cases', based on the information available and information that would

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[45] *Prosecutor v Katanga (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (ICC Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009) ('*Katanga Admissibility Appeal*') [78]. See also Ben Batros, 'The Evolution of the ICC Jurisprudence on Admissibility' in Carsten Stahn and Mohammed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) 558, 570.

[46] For a discussion on unwillingness to prosecute before national courts, but not to avoid justice, see Katanga Admissibility Decision [77]; see also Schabas, above n 9, 161. Gravity as part of the admissibility test is also not discussed here.

[47] *Prosecutor v Muthaura et al (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, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) ('Muthaura Admissibility Appeal')[37]; *Prosecutor v Ruto (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, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [38] ('Ruto Admissibility Appeal').

likely arise from an investigation into the situation.[48] In Kenya, these criteria were identified in a decision arising from an investigation initiated from a preliminary examination pursuant to Article 15 as '(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s), and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)'.[49] The State challenging admissibility bears the burden of proof to show that the case is inadmissible.[50]

ICC jurisprudence confirms that the use of the term 'conduct' rather than 'crime' in Article 20(3) indicates that investigating the conduct as a national or 'ordinary' crime,[51] rather than as an international crime, is sufficient to render a case inadmissible at the ICC.[52] This would include, for example, prosecuting rape under domestic criminal legislation instead of as a war crime, a crime against humanity or an act of genocide. 'Article 17's use of the present tense indicates this determination can be made while an investigation or prosecution is ongoing';[53] admissibility

[48] *Situation in the Republic of Kenya, Request for authorization of an investigation pursuant to Article 15,* (ICC, OTP, Case No. II-01/09-3, 26 November 2009) [51], [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, Pre-Trial Chamber II, Case No. ICC-01/09-19-Corr, 31 March 2010) [40]-[54], [182],[188] ('Kenya Article 15 Decision').

[49] Kenya Article 15 Decision [41].

[50] Muthaura Admissibility Appeal [62]; *Prosecutor v Gaddafi (Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi)* (ICC, Pre-Trial Chamber I, Case No. ICC-01/11-01/11-239**,** 7 December 2012) ('*Gaddafi Pre-Trial Admissibility Decision')*[9] and Transcript of Hearing, 10 October 2012, ICC-01/11-01/11-T-3-Red-ENG, 64 (line 18) to 65 (line 1).

[51] An 'ordinary crime' is one tried under domestic law under the normal criminal system rather than as an international crime; International Law Commission, *Draft Statute for an International Criminal Court, Report of the International Law Commission on the Work of its Forty- Sixth Session* (May 2–July 22 1994) Chapter II.B.I, UNGAOR, 49th Sess., Supp. 10, UN Doc. A/49/10, 38-39; Nouwen, above n 5, 50-51.

[52] *Prosecutor v Al-Senussi (Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi')* (ICC, Appeals Chamber, ICC-01/11-01/11-547-Red OA4, 21 May 2014) (*'Al-Senussi Admissibility Appeal')* [118]-[123]; *Prosecutor v Lubanga (Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo)* (ICC, Pre-Trial Chamber I, ICC-01/04-01/06-8-US-Corr, 24 February 2006) [37]. See also R Rastan, 'What Is a "Case" for the Purpose of the Rome Statute?' (2008) 19 *Criminal Law Forum* 435.

[53] Katanga Admissibility Appeal [75]

decisions are determined on the 'facts as they exist at the time of the proceedings concerning the admissibility challenge'.[54]

'[T]he test is more specific when it comes to an admissibility determination at the "case" stage'[55] because it requires the national investigation to 'cover the same individual and substantially the same conduct as alleged in the proceedings before the Court' (now known as the 'same person/same conduct' test).[56] The assertion that investigations are ongoing must be supported by evidence of a sufficient degree of specificity and probative value (tangible proof)[57] demonstrating concrete, progressive investigative steps have been taken.[58] Such evidence includes police reports attesting to the time and location of visits to crime scenes and documentation demonstrating that witnesses and ICC suspects have been interviewed by authorities'.[59] This part of the test is less relevant to this thesis because there are no ICC 'cases' against individuals during preliminary examinations. However, it is important to note that the ICC has adopted a flexible approach to interpreting the term 'case', by which it retains broad discretion in determining admissibility.[60]

The admissibility challenge in one of the Kenyan cases relied on judicial reforms that enabled national courts to try crimes from the post-election violence, including the

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[54] Katanga Admissibility Appeal [56].
[55] Ruto Admissibility Appeal [54].
[56] *Prosecutor v Lubanga (Decision on the Prosecutor's Application for a warrant of arrest. Article 58)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) [31]. A similar approach was taken in Prosecutor v Katanga (Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga) ('Katanga Arrest Warrant Decision')(ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/07-55, 5 November 2007) [20] and *Prosecutor v Chui (Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-02/07-262, 7 July 2007) ('Chui Arrest Warrant Decision')[21]; Muthaura Admissibility Appeal [39].
[57] *Muthaura Admissibility Appeal* [62], [80]; *Ruto Admissibility Appeal* [63], [82]. For a discussion on the decision not to prosecute, see Nouwen, above n 5, 61-62.
[58] *Prosecutor v Muthaura (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, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [60]-[61]; *Prosecutor v Ruto (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, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) ('Ruto Pre-Trial Admissibility Decision') [64].
[59] Muthaura Admissibility Appeal [40], [68]; Ruto Admissibility Appeal [41], [69].
[60] Al-Senussi Admissibility Appeal [119].

ICC cases.[61] The Trial Chamber rejected the argument that these reforms constituted activity because it was not supported by evidence demonstrating concrete investigative steps were being taken; this rendered the two potential cases admissible.[62]

This broad discretion has two implications; first, it increases the likelihood of concurrent investigations at both national and international levels[63] and second, it suggests the OTP similarly has discretion to determine the scope of substantially similar conduct for the purposes of assessing inactivity. For example, the OTP opened a preliminary examination in Guinea into the September 2009 stadium massacre just a few weeks after it occurred, *prima facie* arguably too early to truly determine whether Guinea could be regarded as 'inactive'.[64]

The OTP's willingness to exercise its discretion to open and close preliminary examinations in contrasting ways and its initial policy of keeping preliminary examinations confidential demonstrated a lack of clear criteria and transparency. Without OTP communication of the scope of its scrutiny during preliminary examinations, States are less able to ensure national proceedings cover substantially the same conduct of interest to the OTP. This reinforces the importance of norm-interpretive interactions by the OTP in its engagement with a State under preliminary examination, if its goal is to stimulate genuine national proceedings. If

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[61] *Ruto Pre-Trial Admissibility Decision* [13], [30]; *Prosecutor v Ruto (Application on Behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute)* (ICC, Pre-Trial Chamber II, Case No. ICC-01/09-01/11 and ICC-01/09-02/11, 31 March 2011) [4]-[6].

[62] *Kenya Admissibility Appeal* [59]-[63]. Charles Jolloh argues this constitutes an judicial rejection of of margin of appreciation or latitude regarding any legitimate national attempts to prosecute crimes differently to the ICC: Charles C Jalloh, 'Kenya vs. The ICC Prosecutor' (2012) 53 *Harvard International Law Journal* 269, 278. I suggest however, that judicial reforms do not constitute 'activity' pursuant to Article 17; they merely create a legal framework that permits such activity to occur. Further in preliminary examinations, the OTP grants a margin of appreciation in its assessments of national proceedings, as discussed in Chapters 5.2 and 6. Burke-White, above n 17, 75; Jenia I Turner, 'Nationalizing International Criminal Law' (2004) 41 *Stanford Journal of International Law* 1, 32; Jan K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 98.

[63] Nicola Palmer, 'The Place of Consultation in the International Criminal Court's Approach to Complementarity and Cooperation' (King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2016-05), 1-2, 4.

[64] State destruction of evidence, burial of bodies and intimidation of witnesses prompted this swift decision: see Chapters 5.4 and 6.3.1.

national proceedings are under way, the ICC will consider the second stage of assessing admissibility.

3.2 Stage 2: What constitutes inability or unwillingness?

If the ICC is satisfied that a State with jurisdiction is, in fact, investigating or prosecuting the same conduct and the same case or potential case, it must then determine whether the State 'is unwilling or unable genuinely to carry out the investigation or prosecution' or whether the national decision not to prosecute 'resulted from the unwillingness or inability of the State genuinely to prosecute'.[65] Only a few ICC decisions have considered inability or unwillingness in any depth. The ICC's first decision considering unwillingness arose from the self-referred situation of the DRC in the case against Germain Katanga. However, this 'second form' of unwillingness[66] is less relevant to this thesis as it was based on the DRC's explicit admission that the 'relevant authorities are unable to carry out investigations',[67] and that the State did not intend to prosecute Katanga for any of the conduct included in the ICC proceedings.[68] Nouwen notes that characterising this as unwillingness seems at odds with the text of Article 17, which regards unwillingness as the 'lack of an intent to bring the person concerned to justice that undermines genuineness'.[69]

The second stage of the admissibility test under Article 17 was next considered in the two Libyan cases. In the *Gaddafi* case, the Pre-Trial Chamber found Libya unable to secure Gaddafi in State custody, obtain his legal representation[70] or secure the necessary relevant evidence due to an inability to provide adequate witness protection, particularly in detention centres.[71] The second stage was not addressed

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[65] *Rome Statute,* art 17(1) and (2). In this stage, the emphasis is on unwillingness or inability to genuinely investigate or prosecute, such that 'genuineness' is not an independent criterion: Robinson 2006, 141; Nouwen, above n 5, 62.

[66] The first form of unwillingness was recognized as 'unwillingness motivated by the desire to obstruct the course of justice: *Katanga Admissibility Decision,* [70], [76]-[88]; see also Batros, above n 45, 567.

[67] *Letter from DRC President Joseph Kabila to ICC prosecutor Luis Moreno-Ocampo* (3 March 2004) <https://www.legal-tools.org/doc/40d1a1/pdf/>.

[68] Katanga Admissibility Decision, [93]-[95].

[69] Nouwen, above n 5, 63.

[70] Gaddafi Pre-Trial Admissibility Decision [206]-[215].

[71] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Judgment 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*

on appeal because the Appeals Chamber found the 'inactivity' test had not been satisfied.[72] In the Al-*Senussi* case, the Pre-Trial Chamber found Libya satisfied the 'same person/same conduct' test (first stage). For the second stage, it considered witness statements, documentary evidence and intercepts sufficient to conclude that progressive steps in the proceedings were being taken, that it was possible to identify the subject-matter of such proceedings, and that lack of counsel did not itself evidence unwillingness or inability; the case was found inadmissible.[73]

The Appeals Chamber found that distinctions between the two cases accounted for their contrasting pre-trial outcomes, and upheld both judgments on appeal. Critical to the Appeal Chamber's rationale was the inclusion of evidence submitted to substantiate the claim that Libya was investigating Al-Senussi for the same conduct as the ICC was (for the first stage of the admissibility test) and that Al-Senussi was in State custody but Gaddafi was not (for the second stage of the admissibility test).[74] Interestingly, several ICC accused have been subject to some national criminal proceedings, but in other cases, the ICC judiciary has interpreted the meaning of the term 'case' very restrictively to find them admissible before the ICC.[75] It chose not to apply a restrictive definition of 'case' regarding Al-Senussi, and indeed, looked at incidents in concluding an overlap between national and ICC investigations.[76]

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against Saif Al-Islam Gaddafi'), ICC-01/11-01/11-547-Red (21 May 2014) *('Gaddafi Admissibility Appeal)* [200]-[211]. See on inability to secure the necessary relevance: *Prosecutor v. Bemba (Decision on the Admissibility and Abuse of Process Challenges)* (ICC, Trial Chamber III, Case no. ICC-01/05-01/08-802, 24 June 2010) [245]-[246]. However, note that this aspect of the decision in *Bemba* was not addressed on appeal because the first stage of the admissibility test had not been met: *Prosecutor v Bemba (Judgment 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, Appeals Chamber, ICC-01/05-01/08-962 19-10-2010, 19 October 2009) [105]-[109].

[72] Gaddafi Admissibility Appeal [77], [213].

[73] *Prosecutor v Al-Senussi (Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi)* (ICC, Pre-Trial Chamber, ICC-01/11-01, 31 May 2013) [83]-[157], [160].

[74] Al-Senussi Admissibility Appeal [94]-[99]. Note the significance of custody in the *Gaddafi* case was considered by the Pre-Trial Chamber, but not by the Appeals Chamber.

[75] Katanga Arrest Warrant decision [20]; Chui Arrest Warrant Decision [21]. See also *Prosecutor v Harun (Decision on the Prosecution Application under Article 58(7)) of the Statute)* (ICC, Pre-Trial Chamber I, ICC-02/05-01/07, 27 April 2007) ('Harun Arrest Warrant Decision') [21]-[25], where the Pre-Trial Chamber did not engage with the Prosecutor's more narrow formulation of conduct to imply the same incidents, but implicitly endorsed such an approach in finding the case admissible. For a discussion, see Nouwen, above n 5, 45-51.

[76] Harun Arrest Warrant Decision [20].

Additionally, the Appeals Chamber went on to dismiss Libya's argument that State failure to appoint legal representation for Al-Senussi while he was in State custody was not sufficiently egregious that the proceedings should be deemed inconsistent with an intent to bring Al-Senussi to justice.[77] Further, attributing this failure to the security situation did not constitute inability (because inability was assessed differently in the context of investigating compared to appointment of defence counsel)[78] or unwillingness, because it was due primarily to the security situation in the country, rather than the State's intent.[79] The conclusion on inability, in particular, seems too complacent, given that the continued and escalating insecurity in Libya in the following two months led to a suggestion that inability could clearly be found in the 'absence of a functioning government'.[80]

The contrasting outcomes in the two Libyan cases reinforce Kevin Heller's warning that there is a shadow side to complementarity. Since Article 17 was designed to render a case admissible if the national legal proceedings make it *more difficult* to convict, in the event that national proceedings make it *easier* to convict a defendant, the ICC may be required to defer to the State, no matter how unfair those proceedings may be.[81] However, it may be that *extreme* violations of the accused's rights constitute unwillingness, because proceedings that completely disregard the principles of the criminal process cannot be said to bring the accused to justice.[82]

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[77] Rome Statute art 55 (2)(c) and (d); Al-Senussi Admissibility Appeal [190]-[191].
[78] Al-Senussi Admissibility Appeal [194]-[195].
[79] Al-Senussi Admissibility Appeal [192].
[80] Keven Jon Heller, *It's Time to Reconsider the Al-Senussi Case (But How?)* (2 September 2014) <http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/>.
[81] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17(3–4) *Criminal Law Forum* 255, 257. Emphasis in original. For a discussion on how respect for rights of the accused was explicitly rejected as an admissibility ground during the drafting process see John Holmes, 'The Principle of Complementarity' in Roy S Lee, *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 41-78, 50.
[82] The Appeals Chamber termed this a 'high threshold': Al-Senussi Admissibility Appeal [191]. See Frédéric Mégret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11(3) *Journal of International Criminal Justice* 571, 585-586; Michele Tedeschini, 'Complementarity in Practice: The ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions' (2015) 7 *Amsterdam Law Forum* 76, 80.

Following these decisions, Al-Senussi was convicted and sentenced to death; his case is on appeal before the Libyan Supreme Court.[83] Gaddafi was convicted in absentia and sentenced to death in a trial that failed to meet due process standards,[84] while he was being tortured[85] in arbitrary detention[86] and had no access to adequate legal representation.[87] Gaddafi was apparently released by the militia detaining him on 9 June 2017 but he has never been arrested by the State.[88] Notwithstanding the Libyan law requirement that he be re-tried if arrested, the ICC Prosecutor is contemplating submitting 'a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under Article 17'.[89] The combination of credibly documented factors in Gaddafi's case may well meet the high threshold required to establish unwillingness on the basis that the State proceedings are inconsistent with an intent to justice. It remains to be determined whether the prospect of a re-trial materially changes this, given the State has already demonstrated its preparedness to violate Gaddafi's trial rights – perhaps to the extent of completely disregarding fundamental principles of criminal justice.

There were also contrasting outcomes in the investigation phase of two cases from Côte d'Ivoire. In 2011, the Pre-Trial Chamber issued arrest warrants for the deposed President of Côte d'Ivoire, Laurent Gbagbo, and his First Lady, Simone Gbagbo. Côte d'Ivoire surrendered Laurent to the ICC but refused to surrender Simone, and sentenced her to 20 years' imprisonment after she was convicted at trial at the end of 2014. However, while the OTP was investigating Simone for the crimes against

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[83] Statement of ICC Prosecutor to the UNSC on the Situation in Libya, (9 May 2017) <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>.

[84] Human Rights Watch, Libya: Flawed Trial of Gaddafi Officials (28 July 2015) <https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials>.

[85] This conclusion by Human Rights Watch is based on Gadaffi's extended periods of time spent in solitary confinement: Human Rights Watch, Libya: Surrender Saif al-Islam Gaddafi to ICC (15 June 2017) <https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc>.

[86] UN Working Group, *Saif Al-Islam Gaddafi v Libya, Working Group on Arbitrary Detention, Opinion No. 41/2013*, U.N. Doc. A/HRC/WGAD/2013/41 (7 April 2014) <http://hrlibrary.umn.edu/wgad/41-2013.html>.

[87] Human Rights Watch, *Libya: Ensure Gaddafi Son's Access to Lawyer* (21 December 2011) <https://www.hrw.org/news/2011/12/21/libya-ensure-gaddafi-sons-access-lawyer>.

[88] Al Jazeera, *Saif al-Islam Gaddafi freed from prison in Zintan* (11 June 2017) <http://www.aljazeera.com/news >.

[89] *Rome Statute*, art 19(10).

humanity of murder, rape, other inhumane acts, and persecution,[90] the national case charged domestic crimes of disturbing the peace, organising armed gangs and undermining State security.[91]

Even *prima facie,* the cases did not cover 'substantially the same conduct'; this was the finding of both the Pre-Trial Chamber and the Appeals Chamber in rejecting Côte d'Ivoire's admissibility challenge.[92] Thus, Côte d'Ivoire has an outstanding obligation to surrender Simone to the ICC, notwithstanding the trial completed and sentence passed in its own courts.[93] The willingness of Libya and Côte d'Ivoire to violate their Rome Statute obligations to cooperate with the ICC by retaining and prosecuting individuals who had already been charged by the OTP is significant. By highlighting the ICC's impotence to secure and prosecute charged individuals without State cooperation, they prompt questions about the best strategy for the OTP in such situations and how the ICC's limited resources can best be allocated. One such question is whether more concerted OTP norm-interpretive engagements with State criminal justice actors to encourage qualitatively improved national proceedings would produce a more satisfactory (national) outcome than the current prospect of potential future ICC investigations following internationally criticised national outcomes.

The jurisprudence discussed above highlights how broad judicial discretion is in these determinations and suggests that the OTP may have similarly broad discretion in its interpretations of inability and unwillingness and inability, particularly in the preliminary examination phase.[94] However, several key questions remain

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[90] *Prosecutor v Simone Gbagbo (Warrant of Arrest for Simone Gbagbo)* (ICC, Pre-Trial Chamber III, ICC-02/11-01/12, 29 February 2012) [7].

[91] Mark Caldwell, 'Ivorians Divided Over Simone Gbagbo Conviction' (10 March 2015) <http://www.dw.com/en/ivorians-divided-over-simone-gbagbo-conviction/a-18305986>.

[92] *Prosecutor v Simone Gbagbo (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, Appeals Chamber, Case No. ICC-02/11-01/12 OA, 27 May 2015) [14].

[93] For a criticism of this outcome and a proposal of 'radical complementarity' that would find Simone's case inadmissible, see Kevin Jon Heller, 'Radical Complementarity' (2015) 57 *Journal of International Criminal Justice* 1.

[94] For example, if the OTP chooses not to open an investigation, perhaps based on progressive improvements in national proceedings, then its admissibility assessments are not reviewed by the

unanswered by the jurisprudence so far. These are: What constitutes, or what are the criteria to determine what constitutes, 'substantial overlap in conduct' investigated nationally and by the ICC? At what point are omissions at the national level sufficient to render a case admissible at the ICC? Are there situations where prosecuting the conduct as a national (rather than an international) crime would be insufficient to render a case inadmissible, notwithstanding the same conduct is prosecuted? It is possible that a significant gap in sentencing trends between domestic and international crimes could result in too-lenient sentences for international crimes if they are prosecuted as domestic crimes. Could this affect admissibility? If there is insufficient evidence for some crimes but not others, can that still constitute inability? Do the reasons the evidence is unavailable affect this determination?

The lack of detailed judicial guidance on the answers to these questions means the OTP currently retains broad discretion in interpreting these terms during preliminary examinations. Indeed, if ICC jurisprudence expands on the factors addressed below, this will constrain the OTP's discretion in its norm-interpretive interactions, just as the ICC's interpretation of 'case' and 'conduct' currently shape the OTP's approach to the first stage of determining inactivity. In the meantime, answers to these questions arise from the OTP's practice during preliminary examinations; this is discussed with respect to Colombia and Guinea in Chapters 5 and 6.

4. Positive complementarity

Positive complementarity has a textual basis in the Rome Statute[95] and is shaped by ICC jurisprudence interpreting the Statute's admissibility provisions. This is because failure to catalyse national prosecutions may result in ICC investigations where admissibility is determined by the ICC judiciary. The ICC's anticipated catalytic effect at the national level is predicated on a general preference by individual States to investigate international crimes nationally, rather than

Pre-Trial Chamber. However, Chapter 5.3 discusses the implications of the fact that no article 15 preliminary examination has yet been closed on complementarity grounds in the admissibility phase.

[95] Chapter 4.1; see Stahn, above n 4, 91-93; Burke-White, above n 7, 63-70; El Zeidy, above n 7.

relinquish control to an independent international prosecutor and render the State subject to scrutiny.[96] Although it is considered 'integral to the functioning of the Rome Statute system and its long-term efficacy',[97] complementarity is also 'based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses'.[98]

This section explores how jurisprudence standards regarding inactivity, inability and unwillingness have been communicated by the OTP in its implementation of positive complementarity. It then narrows the discussion to States that can be considered reluctant to comply with their obligations to investigate and prosecute international crimes. Finally, it describes the OTP's powers and practice in preliminary examinations within the context of complementarity.

4.1 The OTP and positive complementarity

The classical 'narrow' version of complementarity as part of an admissibility test discussed above underpins positive complementarity, its evolution in practice and its potential for catalysing national prosecutions of sexual violence crimes. However, it also necessarily anchors the OTP's broader approach to positive complementarity.[99] This encompasses managing the relationship between the ICC and States,[100] as well as monitoring, encouraging and catalysing national prosecutions to end impunity for international crimes. Since the OTP is not obliged by the Rome Statute to perform any of these roles, the concept of positive complementarity has evolved through practice, described in this section.

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[96] This is inherent in the conception of the ICC as a court of last resort, rather than merely an alternative venue. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), 143, 165; Stahn, above n 4, 97-98; Nouwen, above n 5, 9; Payam Akhavan, 'The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability', (2003) 97 *American Journal of International Law* 712, 716-7, 720. This presumption is invalid in self-referred situations.

[97] International Criminal Court, Assembly of States Party, Report of the Bureau on Stocktaking, *Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap* (ICC-ASP/8/51) 18 March 2010, 2 <www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf>.

[98] ICC-OTP, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003), 2. See also Ad Hoc Committee Report, above n 1 [31]; Prep Committee Report, above n 1 [155].

[99] See e.g. Moreno-Ocampo, above n 4, 23; Nouwen, above n 5, 11-12; Burke-White, above n 7, 2; El Zeidy, above n 7.

[100] Mireille Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems', in (Antonio Cassese (ed) *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press, 2002), 1915-1925.

Accordingly, the OTP conducts preliminary examinations from its JCCD Situation Analysis Section (SAS), comprised of only a few team members (fewer than 5).[101] The SAS reviews all article 15 communications received by the Office and gathers information from multiple reliable sources, including states, international organisations, NGOs, media and open sources; provides advice on complex matters of fact and law regarding jurisdiction, admissibility (including complementarity and gravity), and the interests of justice; and submit recommendations to the Prosecutor on the opening of new investigations. At the time field research was conducted, none of the SAS team members were lawyers.

The implications are twofold: on one hand, the increasingly systematic and consistent approach to preliminary examination activities is commendable given the SAS' limited resources. On the other hand, the size and composition of the team will necessarily affect the extent to which the OTP's norm interpretations are specific enough to prompt the improvements in national proceedings necessary to overcome the concerns listed in article 17 of the Rome Statute. These aspects are revisited in Chapter 7 and 8 when assessing the OTP's potential for greater catalytic impact during preliminary examinations.

The Rome Statute does not require implementing legislation or contain any mechanism that expressly promotes national proceedings. Equally, ICC judgments are explicitly *not* an evaluation or review of national systems.[102] This thesis claims that nonetheless, the OTP does assess State compliance with the international norm that obliges investigations and prosecutions of international crimes according to the standards or benchmarks in ICC jurisprudence. This is evident from references to both the Rome Statute and ICC jurisprudence in OTP interpretations of inactivity, inability and unwillingness during preliminary examinations.[103] However, as the

[101] This was in June 2013: notes on file with author.
[102] Al Senussi Admissibility Appeal [225].
[103] Chapter 5.5 and 5.6. For examples on references to jurisprudence see ICC-OTP, Report on Preliminary Examination Activities (2012) ('PEX 2012') 25 [106]; ICC-OTP, Report on Preliminary Examination Activities (2014) ('PEX 2014') 30 [169]; ICC-OTP, Report on Preliminary Examination Activities (2015) ('PEX 2015') 4 [11].

discussion above illustrates, exactly what is sufficient to satisfy these standards is unclear[104] and one of the key issues of this thesis.

Triffterer foreshadowed one challenge in this respect – that a national judiciary may be unable to follow the ICC's interpretation 'if there are no corresponding points of reference established in the domestic legal systems'.[105] Chapter 1.5 noted that national practices in post-atrocity contexts struggling with resource, infrastructure and expertise constraints cannot and should not be expected to match standards developed in international institutions. Without a contextually relevant national benchmark, determining how ICC interpretations of admissibility apply to national practices is both difficult and prone to inconsistencies. On the other hand, in making context-specific assessments of national proceedings, the OTP has more interpretive space to overcome barriers to norm compliance.

Notwithstanding this discretion, the OTP is highly unlikely to open investigations against individuals when it is likely such cases would subsequently be judged inadmissible before the ICC. Not only are OTP determinations guided by thresholds set by the ICC judiciary; but conversely, when cases appear to be potentially admissible during preliminary examinations, it is in the ICC's practical interests to catalyse improvements that would render them inadmissible, thus eliminating the impetus for an ICC investigation.[106]

As early as 2004, Prosecutor Moreno-Ocampo committed to 'a positive approach to cooperation and the principle of complementarity, . . . encouraging genuine national proceedings where possible, relying on national and international networks, and

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[104] Chapter 4.3. Note that this contrasts with proceedings under Rule 11*bis* of the ICTY RPE and ICTR RPE.

[105] Otto Triffterer, 'Legal and Political Implications of Domestic Ratification and Implementation Processes', in Claus Kress and Flavia Lattanzi (eds) *The Rome Statute and Domestic Legal Orders.: Volume I: General Aspects and Constitutional Issues* (Editrice il Sirente, 2000) 14. Triffterer uses the example of the definition of sexual assault: see also *Prosecutor v Akeyesu (Judgment)* (ICTR, Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998) [507], [508], [577], [593]; *Prosecutor v Furundzija (Judgment*) (ICTY, Trial Chamber, Case No. IT-95-17/1-T, 10 December 1998) 163, 165-186.

[106] See Chapter 4.4.4.1 below for a discussion on why this is the case, including pragmatic concerns around the allocation of limited resources. But on the complementarity paradox see Nouwen, above n 5.

participating in a system of international cooperation'.[107] By 2006, this approach was incorporated into the OTP's prosecutorial strategy[108] and has since evolved further.[109]

In 2012, the ASP explicitly excluded capacity building from the OTP's operational scope, considering it a matter for 'States, the United Nations and relevant specialised agencies'.[110] Arguably, there is an ethical dimension as well, that the OTP's role in *assessing* willingness and ability is compromised if it in fact attempts to *make* States willing and able.[111] Nevertheless, the ASP acknowledged that when the OTP:

> is either analyzing, actively investigating or prosecuting a given situation, [it] may have interaction with national authorities or be involved on the ground. . . In this way, the Court can in the course of carrying out its core functions and without assuming any new responsibilities promote, support and catalyse domestic prosecutions.[112]

Indeed, the following year the OTP conceptualised the complementarity regime as 'an interdependent, mutually reinforcing international system of justice' that ensured the international rule of law.[113]

This is a politically and economically 'consensual division of labour [that may be] the most logical and effective approach',[114] given the ICC's self-acknowledged institutional and resource limitations, evidenced by the low number of ICC trials since its establishment.[115] However, it is important to note that the OTP does not represent the complementarity framework to State actors neutrally. Stahn suggests complementarity is 'increasingly developing into a structural principle of a new

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[107] Luise Moreno-Ocampo, Address by the Prosecutor to the Third Session of the Assembly of States Parties (6 September 2004) <https://www.icc-cpi.int>.
[108]ICC-OTP, *Report on Prosecutorial Strategy* (14 September 2006) <http://www.icc-cpi.int>.
[109]ICC-OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) <http://www.icc-cpi.int>.
[110] Assembly of States Parties (ASP), *Report by the Bureau of Complementarity* (2012) [16]; (ASP), *Report by the Bureau of Complementarity*, (2015) [21], [29], [37].
[111] Paul Seils, 'Making Complementarity Work: Maximizing the Limited Role of the Prosecutor' in Carsten Stahn and Mohammed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) 989, 1012.
[112] ASP (2012), above n 110, [17].
[113] ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) ('*PEX Policy*') 23; See also Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity after Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Goettingen Journal of International Law* 791, 796.
[114] ICC-OTP, above n 99, 5.
[115] Ibid 3.

system of justice',[116] that is, that complementarity increasingly frames how, where, when and under what conditions justice is delivered, and influences the quality of that justice.[117] It has been suggested the OTP's approach to positive complementarity is actually a hybrid mixture of incentives (positive complementarity) and threats (classical complementarity), which is unique in its normative assumption that 'compliance is brought about through the support of civil society, NGOs, and donor States and organisations'.[118] This is consistent with the TLP's description of the range of actors involved in norm interpretations required to achieve internalisation. The desired outcome is thus: States are motivated to prosecute those most responsible for international crimes[119] and they receive the material and technical assistance from other actors (rather than the ICC) to do this properly.

This outcome is predicated on two assumptions. The first, that, as discussed above, States will either fulfil their obligations as a matter of course, or if they are not doing so, they will investigate and prosecute to the extent required to avoid any incursion on sovereignty. With self-referred situations, this assumption may apply only to cases related to individuals over whom the State wishes to retain control. For instance, Kenya and Uganda's creation of special chambers with jurisdiction over international crimes reflects a clear desire to retain national control over international criminal investigations. In fact, these reactions to ICC scrutiny reflect the concern that national and international processes function 'in opposition and to some extent with hostility with respect to each other'.[120] The subsequent question

[116] Carsten Stahn, 'Introduction: Bridge over Troubled Waters?' in *The Complementarity Volume* 1, 1.
[117] The consequence is that other approaches to justice are assessed against and subordinate to this form of criminal law: Mark A Drumbl, 'Policy Through Complementarity' in *The Complementarity Volume,* 197-232, 203. This has the effect of privileging criminal prosecutions over alternative approaches, as 'justice': see for examples, William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2nd ed, 2004) 87; John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary,* (Oxford University Press, 2002), 693-704; Gregory S Gordon, 'Complementarity and Alternative Forms of Justice: A New Test for ICC Admissibility' in *The Complementarity Volume,* 745-806, 804.
[118] Will Colish, 'The International Criminal Court in Guinea: A Case Study of Complementarity' (2013) 26(2) *Revue québécoise de droit international* 23, 34-35.
[119] Ideally, this is because States have internalised the international norm that requires international crimes be investigated; but if not, that they are incentivised to avoid the 'threat' of an ICC investigation to do so.
[120] Schabas, above n 117, 85; Nouwen, above n 5, 13.

of whether these national efforts constitute compliance with the principal norm in the Rome Statute is an empirical one. This thesis essentially explores this question vis-à-vis international sexual violence crimes specifically in the context of preliminary examinations.

The second implicit assumption is that the ICC provides guidance about what actions are sufficient to render a case inadmissible. As acknowledged above, States are not required to mirror ICC substantive or procedural standards, nor to prosecute international crimes as international crimes. Nevertheless, when their investigations are subject to OTP scrutiny, ICC jurisprudence and OTP expectations necessarily provide guidance. For instance, the OTP's preliminary examination reports include an admissibility assessment comprising an evaluation of the ongoing proceedings under the criteria outlined in Article 17. In TLP terms, this can be understood as a norm interpretation by a norm entrepreneur (OTP) belonging to an interpretive community (the ICC). In this respect, it is important that the OTP is focused not merely on a select few perpetrators, but 'that it will intervene in any case that it considers of sufficient gravity that has not been addressed by the national authorities'.[121]

There is added complexity when States claim inability due to lack of resources or capacity to protect witnesses, but may also be unwilling to genuinely investigate and/or prosecute. This is discussed in Chapter 6.3.5.2, because the empirical research assists in determining which stage of admissibility test is more applicable. For the moment, it is clear that while jurisprudence has sharpened some of the hazy edges of complementarity as a judicial test of admissibility, the concept of positive complementarity remains normatively ambiguous and in need of further elaboration.[122] Since there is little ICC jurisprudence detailing the indicia for unwillingness,[123] the OTP's implementation of positive complementarity with

[121] Paul Seils, 'Putting Complementarity in Its Place' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 305, 317.
[122] Stahn, above n 27, 235.
[123] See Discussion Paper submitted by Denmark and South Africa, *Bridging the Impunity Gap Through Positive Complementarity* (6 November 2009) [24], cited in Bergsmo, Bekou and Jones, above n 113, 797.

respect to unwillingness involves a high degree of subjectivity[124] and has been the focus of both theoretical and empirical scholarship.[125]

For instance, a 2016 comparative qualitative study examining the 'positive complementarity' link between ICC investigations and domestic prosecutions in Uganda, the DRC and the Republic of Congo[126] found 'the first systematic evidence that ICC involvement in a country might have at least one potentially beneficial intermediate side-effect: it increases domestic prosecutions and convictions of human rights violators'.[127] The effect was not caused by a spill-over of international cases transferred from international to national systems, or due to ICC support of local institutions. Instead, it was attributed to 'reformer coalitions inside and outside the judiciary [that] use the opportunities created by international involvement to demand legal reforms, to build local capacity, and to litigate human rights cases'.[128]

Further, 'these actions are taken in part because governments make commitments to legal justice that they may not be willing to keep, and activists call them out by taking action. Engaged in a two-level game with domestic and international audiences, State leaders allow limited reforms to go through, even if they would prefer to stop them'.[129] These findings parallel the claims made by the TLP and this thesis.[130] Sarah Nouwen's in-depth qualitative analysis of the situations in Uganda and Sudan is the other key empirical contribution to understanding complementarity's impact on national proceedings; this is discussed in detail in the next section.

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[124] Holmes, above n 106, 50-51.
[125] See e.g. Burke-White, n 7; Nouwen, above n 5; Burke-White, above n 17; Geoff Dancy and Florencia Montal, Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions (2016) <http://www2.tulane.edu/liberal-arts/political-science/upload/Dancy-and-Montal-Unintended-Positive-Complementarity-AJIL.pdf>.
[126] Dancy and Montal, above n 123.
[127] Ibid 69.
[128] Ibid 70.
[129] Ibid.
[130] However, certain aspects and claims, such as suggesting these effects only occur during an ICC investigation rather than preliminary examinations, are challenged by this thesis' empirical research, as discussed in Chapter 5.2.

4.2 Unwillingness and catalysing prosecutions

Scholarship around unwillingness assists our predictions about State receptivity to norm-interpretive interactions with the OTP and other norm entrepreneurs. It may also help evaluate the extent to which States will, or why they may not, overcome unwillingness. For example, I suggest interest-based unwillingness is a likely explanation for State non-compliance with the obligation to investigate and prosecute international crimes.[131] Interest-based unwillingness encompasses national foreign and domestic policy interests, personal security and personal power interests.[132] Personal power interests of political, military and economic leaders implicated in crimes who are not willing to forego their security and power[133] have arguably emerged as the most challenging and salient forms of interest-based unwillingness. The effective exercise of personal power to protect these interests is epitomised in Kenyatta's and Ruto's responses to the ICC cases against them, and the subsequent termination of these cases.[134]

More subtly, personal power interests could also encompass political relationships between key decision makers of a regime with the responsibility to prosecute, and members of a former regime who are implicated but still wield political influence and power. In this case, while government actors may not themselves be perpetrators, preserving their personal political careers and ambitions may depend on maintaining relationships with those who are implicated in international crimes. Colombian President Santos' relationship with former President Uribe, who is implicated in State policies resulting in international crimes, embodies these types of political tensions.[135]

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[131] Christoph Burchard, 'Complementarity as Global Governance' in *The Complementarity Volume,* 167-196, 176-178.
[132] Ibid 176.
[133] Ibid.
[134] *Prosecutor v Ruto (Decision on Prosecution Request for Admission of Prior Recorded Testimony)* (ICC, Trial Chamber V(a), ICC-01/09-01/011, 19 August 2015); *Prosecutor v Kenyatta (Decision on the Prosecutor's application for a further adjournment)* (ICC, Appeals Chamber, Case No. ICC-01/09-02/11, 3 December 2014) [45]-54].
[135] FIDH and Coordinacion Colombia Europa Estados Unidos, 'Colombia. The War Is Measured In Litres of Blood' (2012) <https://www.fidh.org/IMG/pdf/rapp_colombie__juin_2012_anglais_def.pdf>; Chapter 6.3.1.

Clearly, the OTP is not a political actor and should not engage in political processes. However, its success in implementing positive complementarity depends on acknowledging and anticipating or responding to the political realities of highly sensitive and politicised criminal processes. Failure to do this can prove fatal to ICC investigations and the prospect of national proceedings. The OTP's approach to investigating the Kenyan situation and the subsequent withdrawal of both Kenyan cases suggests how important it is for the OTP to take interest-based unwillingness into consideration when implementing its prosecutorial strategy and in its investigations.[136]

Sarah Nouwen's empirical research in Uganda and Sudan offers important insights into the ICC's catalysing effect in pursuit of positive complementarity. Some of her conclusions, related to ICC investigations, are particularly relevant to preliminary examinations and are mentioned here.[137] First, as already described above, Nouwen notes complementarity's 'double life' as both a technical admissibility rule in the Rome Statute and the 'big idea' that includes 'responsibilities and even obligations for States'.[138] While the technical admissibility rule is understood and applied only by courtroom specialists, the rhetoric of the 'big idea' is what dominates media, politics, policies and human rights advocacy circles. Nouwen notes the catalytic effects of complementarity are 'often based more on the meaning of complementarity as mediated by influential actors' than on the terms of Article 17.[139] This understanding underpins the importance of norm-interpretative interactions by actors such as the OTP that go beyond the requirements of Article 17, but are used to promote normative agendas. It also suggests that more developed or strategic articulations of what constitutes norm compliance could improve the catalytic effects of complementarity.

[136] I note that the lack of activity meant unwillingness was not considered in assessing admissibility, however, it was well established the inactivity was a product of the State's unwillingness: above n 123 and accompanying test. For a suggestion that a communicated willingness to act in any case of sufficient gravity unaddressed by authorities would have produced different effects in Kenya see Seils, above n 125, 317.
[137] Nouwen, above n 5, 11-14.
[138] Ibid 11.
[139] Ibid 11, 338.

Reinforcing TLP's relevance to the ICC treaty regime, Nouwen observed the catalysing effects of an ICC investigation were strongest when the outcome of a government's comparison of the costs and benefits of ICC proceedings with those of taking domestic action (a cost-benefit analysis) coalesced with pressure from the Security Council and norm entrepreneurs: ' … activists promoting the adoption of international norms at the domestic level'.[140] This finding also suggests that using norm-interpretive interactions to increase the influence or leverage of norm entrepreneurs could improve the OTP's catalytic capacity.

However, Nouwen concluded that steps such as passing domestic legislation do not address the real obstacles to prosecution and are therefore, in effect, cosmetic.[141] Nouwen characterised these efforts as evidence of the ICC's modest catalysing effects, revealing 'some of complementarity's normative power'.[142] While this constitutes legal internalisation according to the TLP, the lack of enforcement and implementation reflects the importance of social and political internalisation for norm compliance to eventuate. Political and social internalisation are hypothesised outcomes of ongoing norm-interpretive interactions, which have been conspicuously absent in the case of Sudan.[143]

Nouwen's finding that the sovereignty and reputation costs of ICC intervention are considered of less weight than the costs incurred by domestic proceedings[144] suggests that interest-based unwillingness overwhelms the potential catalytic effect of the ICC. However, this may not apply equally to preliminary examinations, when the costs of an ICC intervention are not yet incurred and the benefit, of avoiding intervention altogether, is greater. The focus of this thesis tests the impact of positive complementarity on this cost-benefit calculation of catalysis during preliminary examinations.

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[140] Ibid 12.
[141] This was the case in Sudan: ibid 12, 284, 289-90.
[142] Ibid 211.
[143] Sudan terminated communications with the ICC after Ahmad Muhammad Harun and Ali Muhammed Abdal-Rahman were charged: Nouwen, above n 5, 250.
[144] Nouwen, above n 5, 12.

Finally, Nouwen found a *catalysing effect paradox*[145] created by the fact that the ICC relies on State cooperation for its own investigations. Thus, the ICC has encouraged domestic proceedings in States where cooperation is unlikely and discouraged them in States where cooperation is likely, that is, where complementarity has the greatest chance of catalysing genuine domestic proceedings. This seems unlikely to apply to preliminary examinations in which the State intends for its national proceedings to persuade the OTP to avoid opening an ICC investigation. Nouwen's insights are referred to in subsequent chapters where they provide a relevant comparison with the empirical research of this thesis. Following the outline of the relevant aspects of complementarity generally, it is appropriate to narrow the focus to the framework guiding the OTP's conduct of preliminary examinations.

4.3 Preliminary examinations in the context of complementarity

Article 53(1)(b) requires the Prosecutor to consider admissibility when deciding whether to initiate an investigation. This means that to secure authorisation for investigation, the Prosecutor must consider inactivity, unwillingness and inability as defined in Article 17 in the same terms as the Pre-Trial Chamber. Here is the source of complementarity's 'double life';[146] this is why the OTP's conduct during a preliminary examination can have such an impact on the interpretation of inactivity, unwillingness and inability, and where the catalysing potential of the OTP on national prosecutions for international crimes is greatest.

The ICC jurisprudence detailed in Chapter 4.3 above guides the ICC Prosecutor's exercise of prosecutorial discretion when assessing admissibility, particularly when determining whether to request authorisation for an investigation initiated *proprio motu*. This section describes how preliminary examinations fit within the statutory framework outlining complementarity, to frame the OTP's practice during preliminary examinations described in the next chapter.

[145] Ibid 14.
[146] Ibid 14-21.

Mirroring the Rome Statute provisions, the Regulations of the Office of the Prosecutor[147] ('OTP Regulations') permit the Prosecutor to initiate a preliminary examination or an evaluation of a situation on the basis of (a) any information on crimes, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations, (b) a referral from a State Party or the Security Council or (c) a declaration pursuant to Article 12, paragraph 3 by a State that is not a Party to the Statute.[148]

The OTP Regulations also address aspects of complementarity, including preliminary examinations and 'determining whether there is a reasonable basis to proceed with an investigation' under article 15,[149] which are the responsibility of the Jurisdiction, Complementarity and Cooperation Division (JCCD) in the OTP. Regulation 27 requires the OTP to distinguish between types of information, relevantly including information that warrants further examination in accordance with Rule 48 of the ICC RPE. This rule requires the Prosecutor to consider the factors outlined in Article 53(1)(a) to (c) in considering whether there is a reasonable basis to proceed to an investigation from a preliminary examination. As already noted, Article 53(1)(b) requires the Prosecutor to consider whether the case 'is or would be admissible under Article 17'.

Any decision to initiate an investigation, under either Articles 15(3) or 53(1), requires the Office to produce an internal report 'analysing the seriousness of the information and considering the factors set out in Article 53, paragraph 1 (a) to (c), namely issues of jurisdiction, admissibility (including gravity), as well as the interests of justice, pursuant to Rules 48 and 104. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation'.[150]

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[147] International Criminal Court, *Regulations of the Office of the Prosecutor,* Doc No. ICC-BD/05-01-09, (entered into force on 23 April 2009) ('*OTP Regulations*').
[148] OTP Regulations, regulation 25.
[149] OTP Regulations, regulation 7. The Executive Committee (ExCom) is Executive Committee is composed of the Prosecutor and the Heads of the three Divisions of the Office: regulation 4.
[150] OTP Regulations, regulation 29(1).

The Prosecutor retains the discretion to make public the OTP's activities in relation to the preliminary examination of information on crimes under Article 15(1) and (2), or a decision under Article 15 (6) that there is no reasonable basis to proceed with an investigation.[151] The decision to make the OTP's activities public is to consider the 'safety, wellbeing, and privacy of those who provided the information or others who are at risk on account of such information in accordance with Rule 49, sub-rule 1'.[152] While these activities were not initially made public systematically,[153] since its first report on preliminary examinations in 2011, the OTP has been increasingly transparent in communicating decisions to open preliminary examinations, its activities, State activities and its assessment of national proceedings under Article 17 of the Rome Statute.[154] As the discussion in Chapters 6, 7 and 8 reveals, this transparency is particularly significant in relation to sexual crimes. The last section of this chapter addresses the two broad intersecting aspects of the thesis, namely complementarity and sexual violence.

5. Complementarity and sexual violence

The ICC has an institutional mandate to address the long-standing impunity typically associated with crimes of gender-based violence. However, in adopting a gender analysis,[155] I acknowledge that criminal justice responses problematically and typically reduce gender-based violence to a focus on sexual violence.[156] Further, the suggestion to adopt a gender approach to complementarity to challenge impunity for crimes of sexual and gender violence[157] was unsuccessful at the 1998 Rome Conference. Nevertheless, there is still scope for progressive gender-sensitive implementation of complementarity:[158] Chapter 5 considers how the OTP could

[151] OTP Regulations, regulation 28(2).
[152] OTP Regulations, regulation 28(2).
[153] For example, the Colombian preliminary examination was opened in June 2004 but not made public until November 2011.
[154] Chapter 5.2.
[155] Chapter 1.3; ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) 3 https://www.icc-cpi.int/iccdocs/otp ('*SGBC Policy*'), 4.
[156] Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425, 427; Chapter 1.3.
[157] Women's Caucus for Gender Justice (WCGJ), 'Gender Justice and the ICC' (paper presented at the Rome Conference, Rome, Italy, 15 June–17 July 1998), 24. For more detail see Chapter 7.4.1.
[158] However, there are consequences to stakeholders, including ICC staff, who interpret and implement complementarity as a gender-neutral concept: see Pam Spees, 'Women's Advocacy in the

adopt this approach in its preliminary examinations, while this section reviews research on complementarity more broadly.

First, the ICC's practice substantially determines the evolution of international criminal law with respect to sexual violence, and this influence will only grow as other international criminal institutions conclude their work and close. Second, while the ICC's gender-focused provisions are more progressive than most domestic laws, they must be used strategically to maximise their impact. States cannot be assumed to incorporate gender-focused provisions in law reforms, prosecutorial procedures or in practice. Third, prosecutors, lawyers and activists in transitional contexts pay attention to ICC proceedings, often using ICC jurisprudence, standards and practices to bolster domestic advocacy and innovative gender-sensitive approaches to prosecuting sexual violence crimes.[159]

Only a minority of States have enacted legislation containing either cooperation provisions or provisions enabling their compliance with the norm obliging investigation and prosecution of international crimes. A minority of the States parties have passed legislation to ensure their cooperation with the Court and their legal capacity to comply with it; much of the legislation enacted does this incompletely or in a flawed manner.[160] Nevertheless, Ní Aoláin suggests that ratification creates incentives to prosecute these crimes nationally, which may have two systemic consequences. The first is the 'creation of, or general modification to, broadly-based domestic war crimes statutes and/or criminal law norms facilitating the prosecution of war crimes, genocide and crimes against humanity by States Parties'.[161] At a minimum, this should encompass incorporating crimes of sexual

Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28(4) *Signs* 1233, 1246.

[159] Chapter 6.

[160] Note that there is no data available on the ICC's Legal Tools website under 'National Implementing Legislation': as of February 2014 Parliamentarians for Global Action recorded only 65 countries had passed such legislation (http://www.pgaction.org/campaigns/icc/implementing-legislation.html), while in 2010 Amnesty International that of the 111 states parties at the time, 33 had enacted both types of legislation, 33 had enacted one or the other, and 55 states parties had not enacted either: Amnesty International, 'International criminal court: updated checklist for effective implementation' (6 May 2010) < https://www.amnesty.org/en/documents/ior53/009/2010/en/>.

[161] Ní Aoláin, above n 95, 627.

violence and gender-sensitive procedures contained in the ICC legal instruments into national legislation. This would constitute legal internalisation in TLP terms.

The second claimed consequence is 'some evidence of significant modifications to an array of domestic norms related to sexual violence, trafficking, stalking and domestic violence in States that have ratified the ICC Statute'.[162] Both correlations are claimed to be a result of the impetus generated by the obligation to investigate and prosecute international crimes contained in the Rome Statute – an effect of complementarity.[163] However, without controlling for and excluding other external and internal influences that have been shown to facilitate or encourage such law reform, it is difficult to confirm the veracity of this claim.

By way of example, Kenya's Sexual Offences Act of 2006, enacted soon after the Rome Statute was ratified in March 2005, was significantly more progressive than its predecessor; however, there is no publicly available evidence suggesting ratification was the impetus for this law reform. The new law redefined rape to include both males and females as possible victims and perpetrators and included new offences, such as gang rape, sodomy, trafficking for sexual exploitation and pornography.[164] Two years later, Kenya enacted the International Crimes Act, which conferred jurisdiction for genocide, war crimes and crimes against humanity on domestic courts, but referred to the Rome Statute for definitions of these crimes.[165] Consequently, all the sexual violence crimes contained in the Rome Statute may now be prosecuted before Kenyan courts.

As noted in Chapter 1.5, *attributing* such reform to the ICC is impossible in such complex circumstances. Although Ní Aoláin notes that only 27 of 122 States parties (at the time) had not introduced any legislation addressing violence against women, she acknowledges that country-level research would be required to show that this 'domestic norm development is necessarily an outworking of the ICC'[166] and not

[162] Ibid.
[163] Ibid 628.
[164] Kenya Sexual Offences Act 2006, arts 10, 5(1), 18, and 16 respectively. On the other hand, marital rape remains outside the scope of the Act; see Kenya Sexual Offences Act 2006, art 43(5).
[165] Kenya International Crimes Act 2008, art 6.
[166] Ni Aoláin, above n 95, 630.

coincidence. This is explored by the empirical research in this thesis, on the basis that 'paying close attention to domestic developments provides insight into the nuances of domestic and international interactions as well as giving us a granular understanding of the complementarity terrain'.[167]

Beyond legislative reform, meaningful improvement in norm compliance is tied to law enforcement, including investigating, prosecuting and punishing crimes of sexual violence and providing adequate protection for their victims. Particularly in resource-poor post-conflict societies, the failure to prioritise crimes of sexual violence crimes perpetuates their invisibility, as well as the culture of impunity surrounding perpetrators of such crimes.

For example, while the DRC amended its domestic law to incorporate international legal definitions of international crimes, subsequent large-scale attacks involving sexual violence committed with impunity belie any international legal influence on DRC armed actors. The same danger exists in other ICC situation countries. In Sudan, violence against civilians at the hands of individuals affiliated with the government continues, while in the CAR, refugees report that the high incidence of rape of young and adolescent children continues without any repercussions for perpetrators.[168]

Crimes of sexual violence continue to be blatantly and consistently used to perpetrate genocide, war crimes and crimes against humanity, despite the spectre of an ICC investigation. In fact, there are ongoing ICC investigations in six of the worst 10 countries in the first (and only) Sexual Violence in Conflict Index (measuring the risk of sexual violence) issued in 2013.[169] Clearly, any influence the ICC has had on these national legal systems has not translated into more effective

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[167] Ibid 633.

[168] UN OCHA, *Shaken but not broken* (1 September 2015) <http://www.unocha.org/top-stories/all-stories/shaken-not-broken-women-recover-abuse>. This excludes the multitude of sexual violence crimes alleged to have been committed by UN personnel: see e.g. <https://www.hrw.org/news/2016/02/04/central-african-republic-rape-peacekeepers>.

[169] There is no more recent version of this report publicly available. The 2013 index was reported in the Huffington Post: Sara Gates, *Sexual Violence In Conflict Index 2013 Shows Countries With An 'Extreme Risk' Of Sexual Attack During War* (26 March 2013) <http://www.huffingtonpost.com/2013/03/26/sexual-violence-in-conflict-index-2013_n_2956085.html>.

criminal justice responses and practices. Closing the gap between law and practice in preliminary examinations requires assessing the stage of engagement and methods by which the OTP has or could have maximum impact on State behaviour. This leads us to examine OTP policy and practice during preliminary examinations in Colombia and Guinea in Chapter 5.

6. Conclusion

This chapter has described the relevant contours of complementarity, as a legal principle and in practice, to establish and contextualise expectations of the OTP's norm interpretations in preliminary examinations. Complementarity as a judicial test of admissibility anchors the OTP's implementation of positive complementarity. This 'double life' has developed beyond the Rome Statute text, from jurisprudence restrictively defining the meaning of the term 'case' to find cases admissible before the ICC, to the OTP's adoption of positive complementarity as part of its prosecutorial strategy.

There is a particular impetus to enhance the OTP's catalytic effect with respect to crimes of sexual violence. This is because of their historical neglect notwithstanding their gravity and the ICC's institutional prioritisation of sexual violence. However, it is also because the OTP's capacity to influence State behaviour is still developing and may be under-exploited. The next chapter focuses on how OTP norm-interpretive interactions during preliminary examinations may better promote compliance with the sexual violence accountability norm.

CHAPTER 5. OTP PRACTICE DURING PRELIMINARY EXAMINATIONS: WHY IS SEXUAL VIOLENCE OVERLOOKED?

1. Introduction

Building on the OTP's approach to positive complementarity and the legal framework governing preliminary examinations described in Chapter 4, this chapter focuses on the OTP's understanding and implementation of its role in preliminary examinations. Elements of the TLP framework are referred to where they arise, but discussion of the TLP's application to the two case-studies is reserved for the next chapter as part of the empirical research analysis.

This chapter first describes the OTP's approach to preliminary examinations, particularly as expressed through its policies, before considering crimes of sexual violence within the context of preliminary examinations. Analysing this approach, Chapter 5.4.2 exposes and endorses the impetus to ensure the conduct of preliminary examinations is gender sensitive and proposals for how the OTP could practically achieve this. In its introduction to the two case study contexts the latter part of the chapter first argues that both Colombia and Guinea are characterised by a pre-existing culture of impunity for sexual violence. It then sketches the OTP's conduct for the duration of these two preliminary examinations with respect to crimes of sexual violence.

The evolving dialogue between the OTP and States during preliminary examinations described here provides the necessary context within which to understand the empirical research and analysis in the next chapter on the impact of norm-interpretive interactions on internalisation of the sexual violence accountability norm. Relying on the information in this chapter, Chapters 6 and 7 analyse the extent to which the OTP's conduct has or may be able to promote compliance with the sexual violence accountability norm based on the empirical research from Colombia and Guinea.

2. Exploring the OTP's potential in preliminary examinations

This thesis focuses on the potential of the OTP to catalyse national prosecutions of sexual violence *during preliminary examinations*, for several reasons.[1] First, a State's obligation to prosecute is enlivened by evidence of international crimes; second, the extent to which the State fulfils this obligation is under OTP scrutiny, and third, the State may be able to avoid an ICC investigation altogether if the OTP is convinced the State's national proceedings are genuine and thus comply with the obligation to investigate and prosecute international crimes. This research applies only to inactive or potentially[2] unwilling or unable States that can be incentivised to comply, including with the sexual violence accountability norm, so as to persuade the OTP to refrain from opening an ICC investigation.

When the OTP opens a preliminary examination, it is difficult to distinguish between a potentially unwilling State that may be persuaded to genuinely investigate and prosecute international crimes and a potentially unwilling State that initiates domestic criminal justice responses without a genuine intent to hold perpetrators responsible for international crimes. Put in TLP terms, the former is when obedience is achieved; complete internalisation has occurred and genuine investigations and prosecutions can occur without incentives or the 'punishment' of an ICC investigation. The latter is an instrumental response of apparent compliance intended merely to avoid the negative consequence of an ICC investigation.

While internalisation is the goal of both TLP and complementarity, this thesis acknowledges that interest-based unwillingness will continue to influence national prosecutions of international crimes even after the OTP opens a preliminary examination. As foreshadowed in Chapter 2.3.2, internalisation of the sexual violence accountability norm is made more difficult by compounding national social and cultural norms. This raises the very important question: are States more likely

[1] This is regarded as the phase where the OTP can exercise the greatest influence on national prosecutions: Paul Seils, 'Putting Complementarity in Its Place' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 305, 309.
[2] I use the qualifier 'potentially' because no finding has been made by the OTP or any other entity that the State is 'unwilling' in the terms of Article 17 of the Rome Statute.

to comply with the sexual violence accountability norm because of OTP scrutiny and norm interpretations than they otherwise would be?

It is impossible to *prove* enhanced compliance when States are under preliminary examination because there is no valid way to prove what States would have done were they not under preliminary examination. However, in answering this question, this thesis triangulated historical, documentary and subjective data to (1) establish a timeline for OTP norm-interpretive interactions and State activity around the sexual violence accountability norm in Colombia and Guinea, (2) support inferences about the State's likely response to international crimes, including those of sexual violence, if they were not under preliminary examination and (3) draw on insights from relevant stakeholders to better understand the extent and limitations of the OTP's influence on national proceedings.

It is only during a preliminary examination phase that a State can avoid an ICC investigation entirely, and then only if the OTP determines that State is willing and able to genuinely investigate and prosecute the international crimes under its scrutiny.[3] In fact, the ideal outcome of a preliminary examination is closure without an ICC investigation because the ICC is not required to apply its limited resources to investigate the case itself if a State has fulfilled its obligations under international law.[4] This has occurred *prima facie* only in Al-Senussi's case, which the ICC judiciary found inadmissible on the basis of ongoing national proceedings.[5] Al-Senussi's conviction and death sentence are currently on appeal before the Libyan Supreme Court; however, serious due process violations throughout the case have prompted calls for the OTP to request a review of the ICC admissibility decision.[6]

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[3] Nouwen notes that the normative paradox of complementarity: once the ICC is investigating there is a presumption that international justice is preferable: Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013) 13.

[4] Although preliminary examinations were closed in Honduras, the Republic of Korea, Venezuela and Iraq (subsequently re-opened), the reasons did not include a determination that the State was willing and able genuinely to investigate and prosecute international crimes within national courts.

[5] Chapter 4.3.2.

[6] Chapter 4.3.2; FIDH, FIDH condemns Libyan Court's decision to sentence nine Gaddafi-era officials to death (28 July 2015) <fidh.org>. On the due process rights violations see UNOCHR, Report on the trial of 37 former members of the Qadhafi regime (case 630/2012) (21 February 2017) <http://www.ohchr.org/> . *Cf* Frédéric Mégret and Marika Giles Samson, 'Holding the Line on

Preliminary examinations 'involve a high degree of uncertainty and complex strategic choices in relation to transparency, the selection of situations, the timing of judicial intervention, the framing of accountability narratives, the form of engagements with governments, and the use of resources'.[7] In contrast, once the OTP opens an investigation, ICC actors and processes determine what charges are laid against specific individuals and the course of criminal proceedings and national criminal justice actors lose their discretion to directly determine criminal outcomes.[8] If a case is admissible before the ICC, State Parties are obliged to cooperate with the ICC.[9] Only by actively violating this obligation (for instance by destroying or refusing access to evidence) can States affect the outcome of an ICC investigation. This contrasts with the latitude or 'margin of appreciation'[10] extended to States in OTP assessments of national proceedings during preliminary examinations[11] and with the OTP's broad discretion to set the threshold for genuine proceedings based on highly specific contextual factors. Importantly, there is more prosecutorial discretion in *proprio motu* preliminary examinations compared to

Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11(3) *Journal of International Criminal Justice* 571.

[7] Carsten Stahn, 'Damned If You Do, Damned If You Don't' (2017) *Journal of International Criminal Justice* 1, 4.

[8] The course of the intervention, however, is necessarily affected by access to evidence and witnesses, which is dependent upon State cooperation.

[9] Rome Statute, Part 9.

[10] A challenge to this doctrine was advanced by the defence in Lubanga, but this was not addressed in the appeal judgment: *Prosecutor v Lubanga (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006)* (ICC, Appeals Chamber, Case No. ICC-01/04-01/06, 14 December 2006). Kenya also argued that there must be leeway in the exercise of discretion regarding the 'same person/same conduct' test before the Appeals Chamber, which found this argument had no merit because 'the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict'. *Prosecutor v Muthaura (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, Appeals Chamber, 01/09-02/011 OA, 30 August 2011) [43]. The doctrine is considered more applicable to the OTP's implementation of positive complementarity: See William Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53, 75; Jenia I Turner, 'Nationalizing International Criminal Law' (2004) 41 *Stanford Journal of International Law* 1, 32; Jan K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 98.

[11] See for a discussion on this as it relates to Colombia: Avocats sans Frontières, 'The Principle of Complementarity in the Rome Statute and the Colombian Situation' (2012), 10-11.

those opened on referral.[12] A State under preliminary examination that wishes to retain control over criminal proceedings for international crimes is incentivised by the 'shadow' of the threat of an investigation. Satisfying the OTP that there are genuine national proceedings avoids the stigma of an ICC investigation and the political and other costs of challenging admissibility before the ICC. Thus, preliminary examinations create real incentives for the OTP to articulate achievable criteria and standards required for norm compliance that allows States, should they be found to conduct genuine national proceedings, to avoid an ICC investigation.

This logic is consistent with the claim by Koh and others that persuading States is effective partly because of the negative consequences flowing from non-compliance.[13] It also reflects the approach adopted by ICC actors, who recognise that in preliminary examinations, a State's 'priority is to prevent the ICC from stepping in, so [the ICC] need[s] to say what the benchmark and what the bare minimum is. We can use that type of leverage to focus [their proceedings]'.[14]

The OTP conducts preliminary examinations in a four-phase process, as follows:

> Phase 1: Communications: the OTP assesses all the information on alleged crimes received with respect to jurisdiction
>
> Phase 2: Subject-matter jurisdiction: the OTP determines whether the preconditions under article 12 are satisfied in commencing a formal preliminary examination
>
> Phase 3: the OTP determines admissibility of potential cases on the grounds of complementarity and gravity
>
> Phase 4: assesses whether, pursuant to article 53(1), it is nevertheless in the interests of justice not to apply to initiate an investigation.[15]

This thesis focuses on Phase 3 (admissibility) of the preliminary examination.

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[12] On why a greater degree of prosecutorial discretion 'makes sense' see Stahn, above n 7, 13-14. See also *Rome Statute*, art 15(6); Chapter 5.3.

[13] The 'shadow' is the undesirable consequence, if not a 'punishment', of an ICC investigation: Harold Hongju Koh, 'Internalization through Socialization' (2005) 1(54) *Duke Law Journal* 975, 981; Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 40.

[14] Interview I1; see also interview I4.

[15] For the content of each of these stages, see ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) ('*PEX Policy*') 18-19. On problems with the phased approach, see Stahn, 16-17.

Table 5.1 below summarises the status and/or outcomes of each preliminary examination initiated *proprio motu* pursuant to Article 15. The outcomes for preliminary examinations initiated by other mechanisms are not included for two reasons. The first reason is because every preliminary examination conducted following a Security Council or State referral has led to an ICC investigation after the situation was found admissible.[16] The second reason is that it is the *indeterminacy* of situation admissibility in Article 15 preliminary examinations that is of interest in this thesis, focusing as it does on how norm-interpretative interactions promote norm compliance that would lead to inadmissibility.[17]

Table 5.1 Preliminary examinations initiated proprio motu (in chronological order)

Country	**PEX opened or made public**	**Current status**	**Phase**
Colombia	**Opened June 2004**	**Ongoing**	**Phase 3: Admissibility (since 2011 PEX report)**
Afghanistan	**Made public in 2007**	**Ongoing**	**Phase 3: Admissibility (since 2014 PEX report)**
Iraq	Made public when closed in Feb 2006; re-opened in May 2014	Ongoing	1st: closed at Phase 1 - gravity 2nd: Phase 2: Subject-matter jurisdiction
Venezuela	Made public when closed in Feb 2006	Closed	Closed at Phase 2: Subject-matter jurisdiction
Burundi	Opened April 2006	Ongoing	Phase 2: Subject-matter jurisdiction
Kenya	Opened Feb 2008	Closed	26 November 2009: OTP requested authorisation for ICC investigation 31 March 2010: ICC PTC granted authorisation

[16] The preliminary examination in Palestine is ongoing.
[17] This is what provides the OTP with leverage to catalyse national proceedings: Stahn, above n 7, 8.

Guinea	**Opened Oct 2009**	**Ongoing**	**Phase 3: Admissibility (since 2011 PEX report)**
Georgia	Opened August 2008	Closed (Admissibility assessed since 2011 PEX report)	13 October 2015: OTP requested authorisation for an ICC investigation 27 January 2016: ICC PTC granted authorisation
Nigeria	**Made public Nov 2010**	**Ongoing**	**Phase 3: Admissibility (since 2013 PEX report)**
Honduras	Opened Nov 2010	Closed	Closed at Phase 2: Subject-matter jurisdiction
Republic of Korea	Opened Dec 2010	Closed	Closed at Phase 2: Subject-matter jurisdiction
Côte d'Ivoire	Opened May 2011	Closed	23 June 2011: OTP requested authorisation for an ICC investigation 3 October 2011: ICC PTC granted authorisation

All the OTP's *proprio motu* preliminary examinations that have been closed without an ICC investigation were closed *before* admissibility was considered.[18] Only the Article 15 preliminary examinations of Georgia and Côte d'Ivoire have progressed beyond the admissibility stage, and ICC investigations have been opened in both situations. This creates an interesting comparison between the preliminary examinations following a Security Council resolution or State referral. It could be argued that it is premature to conclude that, based on OTP practice, States under *proprio motu* preliminary examinations have the best chance of avoiding an ICC investigation. However, a closer look at the two Article 15 examinations that resulted in ICC investigations suggests a different conclusion.

[18] These three situations are Venezuela, the Republic of Korea and Honduras: <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.

The OTP's examination of 'the existence and genuineness of relevant national proceedings' in Georgia dates from 2011.[19] Georgia's 17 March 2015 notification to the OTP that national proceedings had been indefinitely suspended resulted in the OTP's notification to the ICC on 5 October 2015 of an intention to request authorisation of an investigation pursuant to Article 15(3).[20] 'With no foreseeable resumption apparent, and no other investigations in relation to such conduct underway in other States, the Office assessed that the potential case identified in its Request would be admissible, due to State inaction'.[21] This change in circumstances appears to eliminate all indeterminacy and OTP discretion; it could be argued that an ICC investigation became unavoidable in this highly visible shift to inactivity.

In Côte d'Ivoire, the opening of the preliminary examination is noted as occurring in May 2011 because 'the OTP received a letter from President Ouattara dated 3 May 2011, in which he noted his assessment that "the Ivorian judiciary is not at this stage in the best position to address the most serious of the crimes" committed since 28 November 2010, and "any attempt at trying the most responsible individuals may face multiple obstacles"'.[22] The Côte d'Ivoire President's implicit admission of 'inability' and lack of national proceedings (which according to *Katanga* could nevertheless be construed as a 'second form of unwillingness')[23] again suggest an ICC investigation was inevitable. Both Georgia and Côte d'Ivoire made it clear there would be no national proceedings with respect to these cases, so admissibility under Article 17 on the grounds of inactivity seemed unavoidable. In contrast, no other *proprio motu* preliminary examination has proceeded past the admissibility stage. I suggest this is because of the OTP's incentive to encourage genuine national proceedings for international crimes so that an ICC investigation is unnecessary.

Preliminary examinations may be open for years without resulting in an investigation; 'there are no timelines provided in the Statute for bringing a

[19] ICC-OTP, Report on Preliminary Examination Activities (2015) ('PEX 2015'), 52.
[20] Ibid.
[21] Ibid 58.
[22] ICC-OTP, *Report on Preliminary Examination* Activities (2011) ('PEX 2011') 24.
[23] *Prosecutor v Katanga (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute))* (ICC, Trial Chamber II, ICC-01/04-01/07, 16 June 2009) ('Katanga Admissibility Decision') [70], [76]-[88]; Chapter 4.3.1.2.

preliminary examination to a close'[24] and the decision to keep one open is not subject to review.[25] Nevertheless, there is an implicit requirement for closure to occur within 'a reasonable period of time'[26] and this has been reinforced by Pre-Trial Chamber III.[27] While on the one hand, 'the longer a preliminary examination lasts, more pressing becomes the need to explain positive elements, gaps and causes of inaction,'[28] on the other hand, it is possible the OTP loses some of its leverage if a preliminary examination has been open for too long, without corresponding action.[29]

The OTP has been evaluating admissibility in Colombia since 2004 and examinations have been ongoing for years in Afghanistan (made public in 2007), Guinea (opened in 2009), and Nigeria (made public in 2010). This further strengthens the inference that if the OTP determines national proceedings are becoming increasingly genuine, it will keep the examination open rather than initiate an ICC investigation or close the preliminary examination. The OTP retains the discretion to do this because its assessment of national proceedings, while tethered to Article 17 as a judicial admissibility test, is necessarily context-specific.[30] Further, without ICC jurisprudence specifying the limits of inability and unwillingness, the OTP has a 'margin of appreciation'[31] in exercising its discretion.

A preliminary examination is intended to prompt a State to 'aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the

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[24] PEX Policy, above n 15, 3 [14], 21 [89]. In fact, the PEX Policy also states the OTP may assess specific national proceedings 'over a long period of time' to assess their genuineness: 20 [90].
[25] See Human Rights Watch, *ICC: Course Correction - Recommendations to the Prosecutor for a More Effective Approach to 'Situations under Analysis'* (16 June 2011).
[26] A number of Rome Statute provisions use this phrase: Hector Olásolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor' (2005) 5 *International Criminal Law Review* 121, 144; Stahn, above n 7, 17.
[27] *Situation in the Central African Republic (Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic)* ICC, Pre-Trial Chamber III, l Case No. ICC-01/05-6, 1 December 2006) 4.
[28] Stahn, above n 7, 22. Note, however, that it is unclear from this statement whether it is the State or the OTP, or both, that experience the increased pressure.
[29] Human Rights Watch, above n 25. But note that what constitutes 'too long' and 'corresponding action' remains ambiguous.
[30] see Stahn, above n 7, 11.
[31] This draws from jurisprudence from the European Court of Human Rights, but has been applied to positive complementarity: Burke-White, above n 10; Turner, above n 10, 32; Kleffner, above n 10, 98.

jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it'.[32] This creates a context ripe for the OTP to strategically maximise its influence over national prosecution efforts and therefore to test whether and how OTP norm-interpretive interactions promote compliance with the sexual violence accountability norm. The next section details how the OTP conceives of and performs its role during preliminary examinations.

3. OTP Practice during Preliminary Examinations

Chapter 4 described the legal framework for complementarity, including preliminary examinations, as tethered in Article 17 and expanded upon in ICC jurisprudence. This section examines OTP documents relating to preliminary examinations that shape its practice during this stage. The principal document is the Policy Paper on Preliminary Examinations released in 2013 ('PEX Policy'), which built on a draft version circulated in 2010 for comment. The other relevant OTP documents include the annual OTP preliminary examination reports, the 2012 Interim Report on Colombia, and other OTP policy papers, including on sexual and gender-based crimes (2014), case selection and prioritisation (2016) and children (2016). The general principles guiding the OTP's performance of its various roles, including preliminary examinations, are contained in the Code of Conduct.[33]

The 2010 OTP's draft policy on preliminary examinations distinguished the positive complementarity policy, based on the goals of the preamble and Article 93(10) of the Statute, from the legal admissibility threshold of complementarity.[34] Article 93(10) of the Statute provides for 'reverse cooperation',[35] whereby the ICC may, at its discretion, assist a State conducting an investigation or trial with respect to conduct constituting a crime that falls within the jurisdiction of the ICC. The

[32] Mark S Ellis, 'The International Criminal Court and Its Implications for Domestic Law and National Capacity Building', (2003)15 *Florida Journal of International Law* 215, 223.
[33] ICC-OTP, *Code of Conduct for the Office of the Prosecutor* (2013). Principles from this document, such as impartiality, independence and objectivity are also in the OTP Policy Paper for Preliminary Examinations: PEX Policy, above n 25, 7-8.
[34] ICC-OTP, *Report on Preliminary Examination Activities (2010)* (*'PEX 2010')* 19 [93]. Note that this statement does not appear in the 2013 PEX Policy, but is included here to illustrate the OTP's evolving approach to preliminary examinations.
[35] Reverse cooperation is in contradistinction to article 93(1), which requires States to comply with ICC requests related to investigations and prosecutions: Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87, 107.

provision is drafted broadly and includes a non-exhaustive list of forms of cooperation that may help overcome shortcomings in national jurisdictions.[36] This provision raises at least two questions dealt with in greater detail here and in the next chapter. First, at what point does assistance render a potentially 'unable' State able to investigate and prosecute, so that its failure to do so may be attributed to unwillingness? Second, given its limited resources, mandate and expertise in international prosecutions rather than in capacity building, what can the OTP appropriately do in preliminary examinations?

While the OTP has no investigative powers at the preliminary examination stage, it may receive and request information, conduct field missions and consult with stakeholders.[37] Its discretion over the length of the preliminary examination allows the OTP to continually re-assess genuineness over a period of time and under changing circumstances.[38] The OTP will investigate the persons considered most responsible for the most serious crimes, but its strategy extends beyond high-level perpetrators to include mid-level and notorious low-level perpetrators.[39]

Throughout preliminary examinations, the OTP can 'report on its monitoring activities, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organisations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures'.[40] It is this last aspect that is key to norm interpretation and internalisation, and to challenging the persistent impunity for sexual crimes.

The PEX Policy contains the OTP's most recent approach to assessing complementarity (Article 17(1)(a)-(c)) and gravity (Article 17(1)(d)) pursuant to

[36] Ibid.
[37] PEX Policy, above n 15, 22 [85]-[88].
[38] Ibid 21.
[39] ICC-OTP, Strategic Plan June 2016-2018 (2015) 16 [34].
[40] PEX Policy above n 15, 24 [124].

Article 53(1)(b).[41] Like its draft, the policy also re-affirms the two dimensions of complementarity: (1) the admissibility test pursuant to Article 17, i.e., how to assess the existence of national proceedings and their genuineness, which is ultimately a judicial issue but also something the OTP must take into account in its decisions[42] and (2) the positive complementarity concept, i.e., a proactive policy of cooperation aimed at promoting national proceedings.[43] The PEX Policy confirms that the annual OTP PEX reports, along with publicly announcing the opening of a preliminary examination and regular updates about PEX activities are intended to promote transparency around the PEX process.[44]

The PEX Policy echoes the ICC jurisprudence outlined in Chapter 4.3 in its assertion that the absence of national proceedings, based on the concrete facts that exist at the time,[45] is sufficient to make the case admissible without needing to consider inability or unwillingness.[46] Factors giving rise to inactivity include the absence of an adequate legislative framework, the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation, the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence concerning those more responsible, or other, more general issues related to a lack of political will or judicial capacity.[47]

Similarly reflecting ICC jurisprudence, the OTP has noted that the term 'case' generally comprises an identified set of incidents, suspects and conduct,[48] but

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[41] Ibid 10 [42]. Note that this paper appeared in a draft form in 2010, but for the purposes of this thesis, analysing differences between the two is not necessary.
[42] Chapter 4.4.1.
[43] PEX Policy, above n 15, 23–24 [100]-[103].
[44] PEX 2011, above n 252 4 [13], PEX Policy, above n 15, 22-23 [94]-[99]. Lack of transparency was a main criticism of the OTP's conduct prior to this, and of inconsistencies around announcements of, and engagement during, preliminary examinations: Justine Tillier, 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?' (2013) 13 *International Criminal Law Review* 507, 537-538, 545, 549-551.
[45] *Prosecutor v Kony (Decision on the admissibility of the case under article 19(1) of the Statute)* (ICC, ICC, Pre-Trial Chamber II, ICC-02/04-01/05-377, 10 March 2009) [49]-[52].
[46] PEX Policy, above n 18, 12 [47]; *Prosecutor v Katanga (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) [78].
[47] PEX Policy, above n 15, 12-13 [48]-[49].
[48] Ibid 10 [43], citing *Prosecutor v Lubanga (Decision on the Prosecutor's Application for Warrant of Arrest, Article 58)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) [21], [31], [38].

during preliminary examinations, when there are no cases initiated against individuals, the criteria for 'potential cases' include (1) the groups of persons involved who are likely to be the focus of an investigation for the purpose of shaping the future case(s) and (2) the crimes within the jurisdiction of the ICC allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[49]

When there are national proceedings, the OTP will consider unwillingness or inability to investigate or prosecute a case. Material inability may be overcome with practical assistance,[50] whereas unwillingness requires persuading a non-compliant State to initiate genuine national proceedings. Since my analysis of the OTP's conduct in preliminary examinations is grounded in the criteria it applies, I have extracted the relevant text from the PEX Policy Paper into Table 5.2 below.

Table 5.2 PEX Policy Indicators

Test for inactivity	**Indicators**
No ongoing investigations or prosecutions	• the absence of an adequate legislative framework • the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation • the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible • other, more general issues related to the lack of political will or judicial capacity.[51]
Test for unwillingness	**Indicators**

[49] PEX Policy, above n 15, 10-11 [43]-[44], citing *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 ('Kenya Admissibility Decision') [50], [182], [188]. *Situation in the Republic of Côte d'Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire)* (ICC, Pre-Trial Chamber III, Case No. ICC-02/11-14 (3 October 2011) [190]-[191] and [202]-[204].
[50] On other forms of inability, including a gender-sensitive interpretation of this term, see Chapter 7.5 and Table 7.2.
[51] PEX Policy, above n 15, 12-13 [48].

(a) intent to shield the person concerned from criminal responsibility for crimes within the ICC jurisdiction (Article 17(2)(a))	• 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 • irreconcilability of findings with evidence tendered • manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused • mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence • manipulated or coerced statements and/or undue admission or non- admission of evidence • lack of resources allocated to the proceedings at hand as compared with overall capacities, and • refusal to provide information or to cooperate with the ICC.[52]
(b) unjustified delay in the proceedings (Article 17(2)(b))	• the pace of investigative steps and proceedings • whether the delay in the proceedings can be objectively justified in the circumstances, and • whether there is evidence of a lack of intent to bring the person(s) concerned to justice.[53]
(c) independence of proceedings (Article 17(2)(c))	• the alleged involvement of the State apparatus, including those departments responsible for law and order, in the commission of the alleged crimes • the constitutional role and powers vested in the different institutions of the criminal justice system • the extent to which the appointment and dismissal of investigators, prosecutors and judges affect due process in the case • a regime's application of immunity and jurisdictional privileges for alleged perpetrators belonging to government institutions

[52] Ibid 13 [51].
[53] Ibid 13 [52].

	• political interference in the investigation, prosecution or trial • recourse to extra-judicial bodies, and • corruption of investigators, prosecutors and judges.[54]
(c) impartiality of proceedings (Article 17(2)(c))	• connections between the suspected perpetrators and competent authorities responsible for investigation, prosecution or adjudication of the crimes as well as public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.[55]
Test for inability	**Indicators**
total or substantial collapse or unavailability of the judicial system means the State is unable to collect the necessary evidence and testimony, unable to obtain the accused or is otherwise unable to carry out its proceedings (article17(3))	• the inability of the competent authorities to exercise their judicial powers in the territory concerned • the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems • the absence of the required legislative framework to prosecute the same conduct or forms of responsibility • the lack of adequate resources for effective investigations and prosecutions, and • violations of fundamental rights of the accused.[56]

The OTP assesses whether any combination of the above factors impacts on the proceedings to such an extent as to vitiate their genuineness.[57] This is explicitly *not* a judgment of the entire national justice system, but rather of the facts relating to 'potential cases' as they exist at the time and subject to revision based on changes in circumstances.[58]

[54] Ibid 14 [53].
[55] Ibid 14 [54].
[56] Ibid 14 [57].
[57] Ibid 14 [58].
[58] Ibid 15 [58].

Each of these factors, and each of these grounds for admissibility, provide a point of entry for the OTP to (1) engage in norm interpretations with the target State, (2) highlight its priorities and (3) potentially influence State choices in distributing scarce political and material resources within the criminal justice system. Given the threat of an ICC investigation is diminished by the OTP's limited capacity, positive complementarity is an important tool for the OTP to promote accountability for international crimes. Preliminary examinations provide the best avenue for the OTP to achieve this.[59] Up until now, only 'limited strategic and long-term thinking has been devoted to broader policy questions, such as the context, rationale and role of preliminary examinations, the suitability of the existing legal framework, ICC methodologies, public communication during such examinations, their impact in and across situations, and lessons learned from specific case studies'.[60] The next section examines some of these issues with respect to crimes of sexual violence.

4. Preliminary examinations and sexual violence

As outlined in Chapter 3, there is a clear imperative to improve the ICC's impact on the national punishment of international crimes of sexual violence; particularly in States with which it is engaged. Preliminary examinations offer a unique context within which the OTP can and should strategically encourage States to pursue accountability for international crimes of sexual violence, particularly when they are otherwise neglected by national criminal justice actors.

4.1 The OTP SGBC policy and preliminary examinations

The intersection of the OTP's conduct in preliminary examinations and its gender effects appears in the OTP's Policy on Sexual and Gender-Based Crimes (SGBC Policy). Relevant to this thesis is the section on preliminary examinations, which identifies such barriers to genuine proceedings as:

[59] Chapter 2.4.2, 4.4.3 and 5.1. See also Stahn, above n 7.
[60] In response to this, Professors Carsten Stahn and Morten Bergsmo convened a conference and will publish an open access anthology on quality control in preliminary examinations: <http://www.internationallawbureau.com/index.php/call-for-papers-quality-control-in-preliminary-examination/>.

> … 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 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.[61]

When investigations or prosecutions that relate to potential cases are being examined by the OTP, 'an assessment will be made into whether such national proceedings are vitiated by an unwillingness or inability to carry out genuine proceedings'.[62] Apart from specifying that such an assessment is conducted 'on the basis of the underlying facts as they exist at the time of the determination, and is subject to ongoing revision based on a change in circumstances',[63] the SGBC Policy does not articulate any of the factors included in the PEX Policy as they would apply to crimes of sexual violence. This brevity is particularly disappointing because the OTP had invited feedback on its draft policy, and had received advice to expand its policy in this respect, consistent with the terms of its PEX Policy.[64] Nevertheless, the mandate to engage more strategically during preliminary examinations can also be sourced to the OTP's commitment to encourage genuine national investigations and prosecutions in relation to sexual and gender-based crimes.[65]

Assessing the extent to which this OTP commitment has been successfully implemented requires empirical data from contexts subject to a preliminary examination in which crimes of sexual violence have been well-documented. In such cases, and to identify disparities in prosecution efforts, we must look at gaps and

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[61] ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) 3 https://www.icc-cpi.int/iccdocs/otp ('*SGBC Policy*') 23 [41].
[62] Ibid 23 [41].
[63] Ibid 23 [43].
[64] ICTJ Submission to the OTP, drafted by and on file with author; OSJI Submission, on file with author; Redress, *Comments on the OTP Draft Policy* 3, on file with author.
[65] SGBC Policy, above n 65, 24, [46].

silences around sexual violence.[66] The preliminary examinations in Colombia and Guinea were selected for empirical research for several reasons. First, crimes of sexual violence are a prominent category of crime in the situation under OTP scrutiny. Second, a preliminary examination that has been ongoing for several years will allow us to identify an initial national approach to prosecuting international sexual crimes, and any subsequent changes to this, if and when they occur. Third, preliminary examinations that have not (yet) resulted in the OTP opening an investigation are particularly interesting, because this means that the OTP has not concluded whether the State is unwilling or unable to genuinely pursue prosecutions. The State can therefore still, and can be assumed to want to, avoid an ICC investigation altogether.

As illustrated in Table 5.1 above, there are ongoing *proprio motu* preliminary examinations that have reached the admissibility stage in Afghanistan, Colombia, Guinea and Nigeria;[67] in all but the first, the OTP has identified international crimes of sexual violence within the matrix of cases under examination.[68] However, when the OTP issued its first public preliminary examination report in 2011, the Nigerian situation was only at Phase 1 , whereas the Colombian and Guinean situations were already in Phase 3 (admissibility). Nigeria did not reach Phase 3 until 2013. Consequently, there are more iterations of norm-interpretive interactions focused on admissibility in Colombia and Guinea compared to Nigeria from which to assess the OTP's catalytic impact on national proceedings.

4.2 Proposals for a gender-sensitive approach to admissibility

As Chapter 4.5 mentioned, during the Rome Conference the Women's Caucus proposals to incorporate gender-sensitive interpretations into the admissibility test were unsuccessful, partly due to the perceived 'gender neutrality' of jurisdiction

[66] Hilary Charlesworth, 'Feminist Methods in International Law' (2004) 36 *Studies in Transnational Legal Policy* 159; Jelena Obradovic-Wochnik, 'The "Silent Dilemma" of Transitional Justice: Silencing and Coming to Terms with the Past in Serbia' (2013) 7(2) *International Journal of Transitional Justice* 328.

[67] PEX 2015, above n 19, 1.

[68] This is an essential aspect of the comparative analysis to be able to assess whether the OTP's engagement around sexual violence yields any impact in national courts.

provisions.[69] These interpretations have nevertheless informed subsequent feminist critiques of and suggestions for the OTP's implementation of positive complementarity. Specifically, it was argued that the inability test should include 'procedural or evidentiary requirements particular to sexual violence [that] preclude or unreasonably obstruct a proper conviction', such as failing to secure the trust of victims.[70] This gender-sensitive interpretation of inability would involve identifying when sexual violence is 'not defined and/or punished as grave crimes or where procedural or evidentiary requirements particular to sexual violence preclude or unreasonably obstruct a proper conviction'.[71] It would also encompass rules that discriminated against victims of sexual violence, such as valuing a woman's testimony less than a man's or the lack of procedures to protect rape victims from re-traumatisation.[72]

The Women's Caucus suggested unwillingness should include proceedings 'where charges of sexual and gender violence are not considered along with other offences or where discriminatory substantive or procedural rules or the discriminating [*sic]* application of law or rules, preclude impartial proceedings'.[73] Inability on the basis of unavailability of the judicial system was proposed to include 'cases where these crimes were not defined and/or punished as grave crimes or where procedural or evidentiary requirements particular to sexual violence preclude or unreasonably obstruct a proper conviction'.[74]'And further, that State prosecutions requiring proof of the victim's chastity or corroboration of his or her testimony, or permitted the

[69] Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016), 167.
[70] Women's Caucus for Gender Justice (WCGJ), 'Gender Justice and the ICC' (paper presented at the Rome Conference, Rome, Italy, 15 June–17 July 1998), 50.
[71] Ibid 25.
[72] Ibid 24. See also 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' (2013) 7(3) *International Journal of Transitional Justice* 455, 464; Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016) 165.
[73] Women's Caucus for Gender Justice, Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court, United Nations Headquarters, 10-12 December 1997 (1998) 24-25.
[74] Ibid 25.

introduction of irrelevant, inflammatory evidence or the punishment was trivial, would also render the case admissible before the ICC'.[75]

Echoing the Women's Caucus approach, Sácouto and Cleary suggested that the OTP should 'examine a State's laws, procedures, and policies governing the investigation and prosecution of sexual violence and gender-based crimes, even where the State seems capable and willing to try other crimes'.[76] Consistent with this suggestion and also prior to the PEX Policy, I have previously identified the need for 'clear criteria of essential aspects to consider in assessing inability and unwillingness' to promote greater consistency in the results obtained through OTP engagement with States.[77] I also proposed that the OTP could and should assess whether inability and/or unwillingness applies specifically to international crimes of sexual violence in preliminary examinations. Further, I suggested that this assessment target substantive definitions, legal procedures both in court and during investigations, and quantitative outcomes, including conviction and sentence trends for crimes of sexual violence.[78] As Chapter 3 has described, each of these aspects of the criminal justice system must be addressed to overcome the prevailing impunity for crimes of sexual violence, particularly in post-atrocity contexts.

An article by Louise Chappell, Rosemary Grey and Emily Waller offers valuable insights into the ICC's gender and complementarity features, and the impetus to 'gender' OTP assessments in preliminary examinations. However, while the authors sought to address the narrow conception involving 'jurisdictional conflicts between States and the ICC', their critique falls more logically and squarely within the broad interpretation of complementarity.[79] This is apparent throughout their article, in their suggestions that the OTP can evaluate the level of State-sponsored (or State-tolerated) gender discrimination and can interrogate national proceedings, and

[75] Ibid 15.
[76] Susana Sácouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17(2) *American University Journal of Gender, Social Policy and the Law* 337, 344.
[77] Amrita Kapur, 'Complementarity at Work in Unwilling States: Raising the Threshold of Accountability for Gender-Based International Crimes' (paper presented at 'Justice for All' conference, Sydney, Australia, 14–15 February 2012) 18.
[78] Ibid 1-2.
[79] Chappell, Grey and Waller, above n 72, 459.

their choice of Colombia and Guinea as situations under preliminary examination. Indeed, creating 'incentives for States to incorporate Rome Statute crimes into domestic penal codes, enabling the prosecution of perpetrators at the national level'[80] epitomises the OTP's approach to positive complementarity, not a judicial approach to the admissibility test.

In proposing how to 'gender' the narrow concept of complementarity involving 'jurisdictional conflicts between States and the ICC', Chappell, Grey and Waller endorsed the above proposals.[81] However, some of their suggestions appear inconsistent with the PEX Policy. Based on ICC jurisprudence, the OTP assesses unwillingness with respect to the outcomes for cases against particular individuals, rather than systematically reviewing the legal system as a court of judicial review might. In some cases, impunity enjoyed by individuals may be a result of legislative or procedural loopholes specific to sexual violence, which makes it difficult to conclude inability or unwillingness without assessing the background causes. Yet, an interrogation concerning legal architecture is a substantial extension of the OTP's method of scrutiny. Further, there is some conceptual overlap in the aspects they identify as capable of constituting both inability and unwillingness, namely, legal rules and procedures.[82]

In contrast, I propose that unwillingness could be interpreted with respect to specific individuals, and inability could be interpreted as systemic barriers, such as legal definitions, discriminatory legal rules or procedures that make it difficult, if not impossible, to prosecute and punish crimes of sexual violence. This mirrors the distinction between inability and unwillingness in Article 17 of the Rome Statute. It is also more consistent with the PEX Policy, 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. While the ultimate outcome may be the same as that suggested by Chappell, Grey and Waller, to the extent that certain systemic elements, such as legal definitions,

[80] Ibid.
[81] Ibid 463-464.
[82] Ibid.

are assessed by the OTP, the scope of the catalytic effect is shaped by the evidence of crimes of sexual violence and the barriers to their prosecution *in a specific context*. This understanding is applied in the following chapters of this thesis.

For instance, if an individual is prosecuted and punished by a national court 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 that Article 17 requires the term 'justice' to apply to the entire range of crimes for which he/she is responsible. In this situation, a gender-sensitive interpretation of 'inactivity' may be a more appropriate response; that is, assessing whether the national investigation includes the crimes within the jurisdiction of the ICC allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).[83] A gender-sensitive interpretation would result in a conclusion of inactivity if the crimes being investigated at the national level do not include sexual violence in circumstances where there is evidence that the group of persons being investigated may be criminally responsible for such crimes. This interpretation is already well supported by the ICC jurisprudence.[84] On the other hand, if there are charges of sexual violence, but the evidence suggests a much a much higher level of culpability in terms of both the range and number of acts of sexual violence than is being investigated or charged, this is more likely to constitute unwillingness. Otherwise, concluding willingness in such circumstances would defeat the purpose of the Rome Statute because it would re-entrench the impunity for international crimes of sexual violence.

The inability to collect the necessary evidence and testimony necessary to prosecute a crime of sexual violence could be evidenced by the absence of procedural regulations that require female victims of sexual violence to be interviewed in secure and confidential settings. A failure to allocate resources to provide interviewers of female victims of sexual violence or female law enforcement officers

[83] PEX Policy, above n 15, 10-11 [43]-[44], citing Kenya Admissibility Decision [50], [182], [188]. *Situation in the Republic of Côte d'Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire)* (ICC, Pre-Trial Chamber III, Case No. ICC-02/11-14 (3 October 2011) [190]-[191] and [202]-[204].
[84] Chapter 4.3.2.

with gender-sensitive training may result in the judicial system being *de facto* unavailable with respect to these crimes, resulting in an inability to prosecute them. Further, victims of sexual violence are more likely to face discrimination, social stigma, exclusion from their community or physical harm. This means that protection systems appropriate for victims who do not face these additional risks are likely to 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 crimes of sexual violence 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.[85] Downgrading acts of sexual violence to charges of less serious crimes, such as 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 crimes of sexual violence 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.

Unlike Chappell, Grey and Waller, I do not adopt the position that it is necessarily more concerning for sexual crimes to be prosecuted as domestic rather than international crimes, compared to other crimes.[86] Undoubtedly, sexual violence is often instrumentalised in conflicts, and exposing its systemic commission is critical to understanding this strategic use and its underlying structural gender politics.[87] However, in some national contexts, a more pragmatic and victim-centred strategy focused on obtaining some punishment for national crimes rather than attempting to prosecute international crimes (and risking acquittals) is more likely to succeed.

[85] Note that this is a procedural requirement that is distinct from the (practical) inability to secure evidence.
[86] Chappell, Grey and Waller, above n 72, 462.
[87] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law,' (2000) 46(1) *McGill Law Journal* 217,217; Chappell, Grey and Waller, above n 72, 462.

This is particularly likely because of the proven difficulties in establishing indirect responsibility for crimes of sexual violence.[88]

There are two opposing considerations in this context. On the one hand, national prosecutors are likely to have limited experience investigating, gathering evidence for and prosecuting international crimes. This means they are less equipped to prove the contextual elements of international crimes compared to the elements of a national crime of sexual violence. On the other hand, the importance of prosecuting commanding officers is not merely symbolic, it is also strategic when victim witnesses cannot positively identify direct perpetrators (as is often the case in conflict or large-scale attacks). Prosecuting and punishing senior officers is a likely pre-requisite for broader reforms to the military laws, procedures and culture that are essential if such crimes are to be prevented in the future.

The risk of pursuing convictions for international sexual crimes on the basis of indirect responsibility was made obvious in a domestic trial held in a military court in North Kivu, DRC, in December 2013. Only two of 39 Congolese military officers charged were convicted of sexual violence crimes, although 50 of the 75 victim witnesses testified to rape.[89] While military prosecutors and judges applied the Rome Statute provisions on command responsibility, there were many investigation and prosecution flaws. Crucial among them was the failure to gather evidence linking the 25 commanding officers to the sexual crimes perpetrated by subordinate officers, and to appropriately consider whether they could have prevented or stopped the crimes.[90] This outcome was devastating for the more than 1,000 victims who had participated in the case.[91] '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'.[92]

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[88] See Chapter 3.4.2 for a discussion about how this affected the outcome in the ICC *Katanga* case.
[89] Human Rights Watch, *Justice on Trial* (1 October 2015) < https://www.hrw.org>.
[90] Ibid.
[91] Avocats Sans Frontières, *Congo: unsatisfactory verdict for crimes committed in Minova* (7 May 2014) http://www.asf.be/blog/2014/05/07/congo-unsatisfactory-verdict-for-crimes-committed-in-minova/.
[92] Amrita Kapur, 'The Value of International-National Interactions and Norm Interpretations in Catalysing National Prosecutions of Sexual Violence' (2016) 6(1) *Oñati Socio-legal Series* 62, 79.

This outcome was predictably attributable to limited resources, lack of technical expertise and poorly strategized investigation and prosecution. In such circumstances, it is hard to argue that justice is served by a conspicuously unsuccessful attempt to prosecute sexual violence as an international crime. Indeed, a victim-centred approach acknowledges that the experience of sexual violence is not necessarily qualitatively different depending on its legal classification as an international or 'ordinary' crime.[93] On the other hand, in some cases victims may be dissatisfied with a conviction for a particular crime which is perceived by victims as another crime. This was the case for sexual violence prosecuted as a crime against humanity rather than genocide before the ICTR.[94]

Prosecuting sexual violence as a national crime has two implications. The first is that prosecuting on the basis of indirect responsibility, like command responsibility, may not be possible, or it may be possible for war crimes and genocide only if the relevant treaties are part of national law.[95] The second is that, if it is possible to prosecute national crimes based on indirect responsibility, there is no need for the prosecution to prove the contextual elements of international crimes. In theory, this should significantly increase the chances of conviction. It is likely that a balance between a few carefully prepared and investigated cases against senior perpetrators for international crimes and many more cases prosecuted as domestic crimes may better challenge the widespread impunity for crimes of sexual violence that currently exists.

The North Kivu and *Katanga* trials suggest there are additional factors to be incorporated into the OTP's understanding of and strategy for preliminary examinations in relation to crimes of sexual violence crimes. Chapter 6 refers to these in the context of my research in Colombia and Guinea. Whether sexual violence

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[93] Rhonda Copelon, 'Gendered War Crimes: Reconceptualizing Rape in Time of War' in Julie Peters and Andrea Wolper, (eds) *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge, 1995) 197-214.
[94] Usta Kaitesi, *Genocidal Gender and Sexual Violence: The legacy of the ICTR, Rwanda's ordinary courts and gacaca courts* (Intersentia, 2014) 163-165.
[95] Chapter 3.3.

is being prosecuted as an international or national crime, a key outstanding challenge is proving indirect or command responsibility to convict senior officers. *Katanga* suggests that even international judges may currently require more evidence to prove this for sexual violence crimes than for any other crimes, notwithstanding that there is no legal basis for this to be the case.[96] The North Kivu trial demonstrates that obtaining the evidence to link senior officers and direct perpetrators requires the investment of specific resources and technical expertise that national prosecutors are unlikely to possess. In this regard, the ICC conviction against Bemba exemplifies the type and weight of 'linkage' evidence required to secure a conviction based on command responsibility. It is a useful guide for national criminal justice actors and for the OTP in its norm interpretations. Having canvassed various options for how the OTP can incorporate a gender perspective into its catalytic role in preliminary examinations, it is possible to assess its performance in Colombia and Guinea from this perspective.

5. Preliminary examinations and sexual violence in Colombia

5.1 Evolution of criminal proceedings during the Preliminary Examination

Colombia's complex and sophisticated legal environment is characterised by multiple overlapping, amended and superseded laws to address international crimes committed in the context of armed conflict. The Rome Statute was ratified by Colombia in August 2002 and entered into force in Colombia on 1 November 2002. The ICC's jurisdiction commenced in November of that year for all crimes in the Rome Statute except war crimes, jurisdiction for which commenced seven years later, in November 2009.[97] Colombia did not incorporate the Rome Statute text into domestic law, although it did incorporate the ICC Rules of Procedure and Evidence (RPE) into a 2008 law.[98]

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[96] Maxine Marcus, 'Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law' in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 211, 214-215, 232-233.

[97] It should be noted that due to Colombia's invocation of article 124 of the Rome Statute, the ICC's jurisdiction over war crimes committed in Colombia or by Colombian nationals commenced only on 5 August 2009: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#EndDec .

[98] Lei 1268 de 2008 [Law 1268 of 2008] <http://www.secretariasenado.gov.co/senado/basedoc/arbol/../ley_1719_2014.html>. For a summary of laws implemented in Colombia by 2012 relevant to the ICC see Embassy of Colombia,

In 2004, the OTP commenced a *proprio motu* preliminary examination into war crimes and crimes against humanity alleged to have been committed in the context of the ongoing armed conflict in Colombia that dated from the mid-1960s. This conflict was characterised by a multiplicity of armed actors (State armed forces, paramilitary groups, guerrilla groups and criminal gangs)[99] and complicating issues of drug trafficking, terrorism and systematic internal displacement.[100] As the subject of the OTP's longest ongoing preliminary examination, Colombia had been addressing international crimes at the national level for several years. With a sophisticated legal architecture, long-standing engagement with the OTP, and widely-documented sexual violence, Colombia was a rich but complex context within which to assess the OTP's impact during the admissibility phase of its preliminary examination.

While an exploration of the full range of other intersecting and related laws is beyond the scope of this thesis, this section does mention some key laws and responses to international crimes and sexual violence in particular.[101] First, as the OTP noted, 'the proceedings concerned have been conducted under the ordinary criminal justice system as well as under Law 975 of 2005, popularly known as the Justice and Peace Law (Ley de Justicia y Paz) – a transitional justice mechanism designed to encourage paramilitaries to demobilise and to confess their crimes in exchange for reduced sentences'.[102] Law 975 created a process whereby

Response to ICC-ASP/11/SP/PA/12 of 26 June 2012 (8 August 2012) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP11-POA-2012-COL-ENG.pdf>.

[99] ICC-OTP, Situation in Colombia: Interim Report (2012) ('Colombia Interim Report').

[100] Ibid.

[101] There are several other important laws including the 'Law on Victims and Land Restitution '(Lei 1448 de 2012) [Law 1448 of 2012]: Embassy of Colombia, above n 96. This law provides special provisions for women victims of sexual violence. A 2012 'Legal Framework for Peace' Law (*Marco Legal para la Paz*) grants the Colombian Congress the power to suspend prison sentences for crimes committed in the armed conflict and for certain cases to be prioritised but also permitted the suspension of non-selected cases and selected sentences. A 2015 law that extended military jurisdiction was likely to inhibit prospects of prosecuting senior commanders; however, it was considered partly unconstitutional by the Constitutional Court, which confirmed the international norm that international humanitarian law (IHL) and international human rights law must be applied to gross human rights violations committed by State forces: Corte Constitucional de Colombia, *Expediente d-10903 - Sentencia C-084/1* (24 February 2016).

[102] Colombia Interim Report, above n 99, 4 [11].

demobilised paramilitaries were given reduced prison sentences in exchange for their contribution to truth and reparation by confessing to their crimes.

Thus, international crimes may have been addressed either because individuals volunteered their confessions under the Justice and Peace Law regime, or because the Attorney-General of Colombia (the Fiscalía), whose office was and is responsible for criminal prosecutions across the country, had initiated an 'ordinary criminal' investigation. In 2012, the Fiscalía established the National Directorate of Analysis and Contexts (DINAC) to more systematically investigate international crimes committed in the armed conflict. Several other relevant directives and policies are referred to in this section and in Chapter 6.2.2. This section also describes the activities, information and conclusions as at 31 October 2017 included in the OTP's preliminary examination in Colombia. The current status of the peace agreement in Colombia and its implications for criminal accountability are discussed in Chapter 6 following in the context of assessing Colombia's evolving progress vis-à-vis crimes of sexual violence.

While the full procedural complexities of Colombia's engagement with the ICC are discussed comprehensively elsewhere,[103] the current discussion focuses on events and actions that directly relate to the preliminary examinations and national investigation and prosecution of crimes of sexual violence. The first OTP public report on preliminary examinations describing its engagement with Colombia and other countries, was published at the end of 2011. In this report, the OTP noted that the preliminary examination in Colombia itself had become public in 2006, having been initiated on the basis of 69 communications submitted to the OTP.[104] Relying on a report by the Inter-Institutional Committee of Justice and Peace, the OTP acknowledged that a minimum of 700 women had been victims of rape and sexual

[103] See e.g. Kai Ambos, 'The Colombian Peace Process and Complementarity of the International Criminal Court: An Inductive, Situation-Based Approach' *The International Criminal Court and Complementarity: From Theory to Practice* in *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011); Kai Ambos and Florian Huber, 'The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is There Sufficient Willingness and Ability on the Part of the Colombian Authorities or Should the Prosecutor Open an Investigation Now? (5 January 2011) https://www.icc-cpi.int/NR/rdonlyres/2770C2C8-309A-408E-A41B-0E69F098F421/282850/civil1.pdf.

[104] PEX 2011, above n 22 14, [61].

violence in Colombia up until 2009, but that this number was affected by under-reporting and a lack of case registration.[105]

In its legal assessment, the OTP concluded there was a reasonable basis to conclude that rape and sexual violence had been committed as crimes against humanity and as war crimes. In relation to admissibility, the OTP considered national proceedings against a wide range of actors in the armed conflict and noted its continuing efforts to gather information about proceedings on allegations of several crimes, including sexual crimes.[106] However, in the section devoted to complementarity, the OTP failed to include rape and sexual violence in its assessment of the adequacy of domestic proceedings.[107] This is notable for two reasons. First, the report mentioned other crimes committed by actors subsequently found to be implicated in sexual violence crimes.[108] Second, four annual reports monitoring the implementation of a landmark 2008 *Auto 092* Colombian Constitutional Court judgment intended to initiate proceedings for sexual violence were available in 2011. Both that judgment and the reports were referred to in the OTP's 2012 Colombia PEX report[109] but not in its 2011 PEX report. These monitoring reports confirmed the inadequacy of the proceedings, and were referred to in subsequent PEX reports.[110] Taken together, these factors confirm that the 2011 oversight by the OTP was not attributable to the lack of available credible data, but rather the absence of a systematic gender-sensitive approach to assessing national proceedings in Colombia.

On the face of it, in its legal assessment about the existence of war crimes and crimes against humanity in Colombia, the OTP considered rape and sexual violence in a manner similar to the other crime categories. On closer examination, however, it was clear that the OTP's conclusion that there was a minimum of 700 victims was made against the backdrop of substantial evidence from multiple credible sources

[105] Ibid 11 [67].
[106] Ibid 15-16 [72]-[73].
[107] Ibid 16-17, [74-82].
[108] Ibid 16 [75]-[77].
[109] Colombia Interim Report, above n 99, 66-67 [215]-[216].
[110] ICC-OTP, Report on Preliminary Examination Activities (2014) ('PEX 2014'), 30 [123]; PEX 2015, above n 29, 36 [155].

suggesting that sexual violence constituted a core type of crime committed on a much larger scale and that these crimes had failed to be effectively prosecuted before the national courts. For example, the Colombian National Institute of Legal Medicine and Forensic Sciences conducted 22,597 physical examinations for sexual violence in 2011, compared to 12,732 in 2000.[111] Another study (referred to by the OTP) estimated that in the period 2000-2009, 12,809 women had been victims of conflict-related rape,[112] and the Inter-American Commission for Human Rights confirmed this was probably an underestimate, due to under-reporting and under-registration.[113]

The OTP failed to note that according to one estimate, paramilitaries confessed to more than 57,000 crimes as part of the peace process, but only 86 were crimes of sexual violence; and only one paramilitary member had been convicted of crimes of sexual violence at the time.[114] According to the Fiscalía, only 0.24 per cent of the 39,546 confessions related to sexual violence.[115] Taking either estimate, there is a vast discrepancy between the number of confessions related to sexual violence and the most conservative recorded number of sexual crimes related to the armed conflict.

Indeed, in 2008, the Colombian Constitutional Court recognised that sexual violence against women was 'a habitual, extensive, systematic and invisible practice in the context of the Colombian armed conflict'.[116] In its landmark *Auto 092* decision referred to above, it ordered the Fiscalía to accelerate legal procedures and open investigations into 183 conflict-related sexual violence cases, which the Inspector-

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[111] John Vergal, 'Descripción epidemiológica de los exámenes sexológicos forenses', *Colombia Instituto Naciónal de Medicina Legal y Ciencias Forenses* (2011), <http://www.medicinalegal.gov.co/>.

[112] Casa de la Mujer, Campaign 'Rape and Other Violence: Leave my Body out of the War', First Survey of Prevalence, Sexual violence against women in the context of the Colombian armed conflict, Colombia 2001-2009 (January 2011) 16, cited in Colombia Interim Report, above n 99, 16 (n 42).

[113] Inter-American Commission for Human Rights *('IACHR')*, *Violence and Discrimination Against Women in the Armed Conflict in Colombia* (OEA/Ser.LN/II, doc. 67 (18 October 2006) [63]-[69].

[114] Amnesty International, *Colombia: Hidden from Justice - Impunity for Conflict-Related Sexual Violence, a Follow-up Report* (2012), 26.

[115] Fiscalía General de la Nación, *La Unidad Naciónal de Fiscalías para la Justicia y la Paz*; cited in See e.g. ABColombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process* (2013) 2 <http://www.abcolombia.org.uk>.

[116] Ibid 1.

General was required to oversee personally.[117] Three years later, in 2011, only four cases had resulted in convictions, 14 cases had been closed, and the rest were still under investigation.[118]

This continuing systemic neglect prompted an NGO to hold a symbolic tribunal against sexual violence at the end of 2011, to raise awareness of the scale and gravity of crimes of sexual violence that remained uncharged and unpunished.[119] Crimes of sexual violence were clearly on the political and judicial radar as being widespread, grave and conspicuously unaddressed by the criminal justice system. In this regard, while sexual violence is undeniably underreported to authorities, I contest the claim made by Chappell, Grey and Waller that sexual violence is or was poorly documented in Colombia.[120] Despite variations, the estimated numbers of sexual violence victims are still very high and more than sufficient for charges of sexual violence as international crimes to be laid; this is reinforced by findings from institutions such as the Inter-American Commission for Human Rights.[121] The consistent conclusion across years and sources is that State authorities failed to prosecute sexual violence despite the volume of available evidence, including the identity of perpetrators[122] and the Constitutional Court's directive that this failure be remedied.

For its part, the OTP released both its annual report on preliminary examinations, and another interim report specifically on Colombia, in November 2012. It noted there was a reasonable basis to believe rape and sexual violence had been

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[117] Colombia Corte Constitucional, *Auto 092* de 2008, Section III.1.1.1 *('Auto 092')* <http://www.corteconstitucional.gov.co/relatoria/autos/2008/a092-08.htm>. The Inspector-General (*Procuraduría General de Colombia* in Spanish) is an independent, public institution overseeing the public conduct of those in authority or in charge of exercising a public office, charged with safeguarding human rights <http://www.procuraduria.gov.co/>.

[118] Working Group to monitor compliance with Auto 092 of 2008 of the Colombian Constitutional Court, *Fourth follow-up report to Auto 092 of the Colombian Constitutional Court* (May 2011) Confidential Annex, 36-38 (*'Auto 092 Fourth Follow-up Report')*.

[119] For the final declaration (in Spanish) see Humanas Colombia, *Pronunciamiento Final del tribunal Simbolico Contra la Violencia Sexual en el Marco del Conflicto Armado* (2011), http://www.humanas.org.co/archivos/Pronunciamientofinal.pdf.

[120] Chappell, Grey and Waller, above n 72, 466.

[121] IACHR, above n 113, 35 [920].

[122] The group to which the perpetrator belongs to is known in the majority of cases, permitting prosecution under Colombian law, see *A*uto 092 Fourth Follow-up Report, above n 118, 33-34.

committed by non-State actors both as a crime against humanity (under Article 7(1)(g) of the Rome Statute) and by both State and non-State actors, as war crimes (under Article 8(2)(e)(vi)).[123] The OTP acknowledged that Colombia had achieved criminal responsibility for those bearing greatest responsibility within two of the principal armed groups (the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army of Colombia (ELN)) in the ordinary criminal justice system for crimes including killing, forcible displacement, hostage-taking, torture and child recruitment.

The OTP's failure to mention the absence of outcomes for crimes of sexual violence in the ordinary criminal justice system contrasts with the wealth of evidence indicating the scale and pervasiveness of those crimes.[124] In relation to proceedings against State actors, the OTP found there were only a limited number of proceedings (and only four convictions) concerning rape and other forms of sexual violence committed in the context of the armed conflict, despite the scale of the phenomenon. It noted that '[b]oth the Colombian Constitutional Court and United Nations Human Rights Committee have noted the inadequacy of prosecutorial and judicial activity in relation to these crimes'.[125]

In a critically strategic step, the OTP identified five key areas on which its preliminary examination would continue to focus; proceedings related to sexual violence was one of the five.[126] This was a key interaction heightening the importance of the sexual violence accountability norm. That is, the OTP's norm interpretation explicitly included and indicated that national prosecution of crimes of sexual violence crimes would be required to demonstrate ability and willingness.

The OTP's 2012 interim report on Colombia noted the OTP's extensive interactions with Colombia since the OTP initiated its preliminary examination. It specifically noted numerous meetings and missions undertaken by the Prosecutor with the

[123] ICC-OTP, Report on Preliminary Examination Activities (2012) ('PEX 2012') 24-25.
[124] Ibid 26 [109]. Two of 30 convictions under the Justice and Peace Law were for rape.
[125] Ibid 28 [116].
[126] Ibid 28 [119].

State in October 2007 and August 2008, and ongoing communication with Colombian authorities and local and international NGOs.[127] These are exactly the type of norm-interpretive interactions envisaged by the TLP to promote norm internalisation across social, political and legal dimensions.

In assessing the elements that constitute crimes against humanity, the OTP included sexual violence in the list of acts committed as part of an attack against a civilian population. It then acknowledged that in a number of districts 'at least 33,960 women in Colombia were victims of some form of sexual violence committed by armed groups'.[128] This figure comes from the 2001-2009 survey cited above (see footnote 110), which was published in January 2011; this information could have been included in the OTP December 2011 report, yet it was not.

The OTP devoted three pages to describing the nature of crimes of sexual violence committed by non-State actors, such as rape, torture and sexual mutilation, forced prostitution, sexual slavery, forced pregnancy, forced abortions and sexual harassment; the individuals targeted; and the motivations for perpetration. It also referred to reports published as early as 2004, including by UN entities. [129] While the OTP relied on a 2012 report to conclude that non-State actors had committed war crimes,[130] its reliance on a 2011 report to find war crimes had been committed by State actors[131] reinforces the omission from its 2011 PEX report of data that was available at that time. Clearly, the OTP 2012 interim report on Colombia reflected a deliberate decision to rely on documentation from a broader range of sources to confirm the nature and scale of crimes of sexual violence and the extent to which they were addressed by national proceedings. This in turn increased the visibility of such crimes as international crimes and highlighted Colombia's obligation to investigate and prosecute them.

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[127] Colombia Interim Report, above 99, 9 [28].
[128] Casa de la Mujer, above n 112, 74; Colombia Interim Report, above n 99, 28 [93].
[129] Colombia Interim Report, above n 99, 28 [93]-[94].
[130] *Report of the Secretary-General on Conflict Related Sexual Violence*, UN GAOR, 66th sess, Un Doc A/66/657 S/2012/33 (13 January 2012 Report) 6 [18].
[131] Report of the UN Office of the High Commissioner for Human Rights (OHCHR) for 2011, 23 [8](b).

In its assessment of national proceedings, the OTP noted 218 FARC and 24 ELN members had been convicted of national crimes, including those who appeared to bear the greatest responsibility for the most serious crimes.[132] However, the only category for which there was no data regarding these convictions was sexual violence. In considering proceedings relating to paramilitary groups, the OTP referred to the landmark *Auto 092* of 2008 Constitutional Court decision and directive to the Fiscalía, acknowledging that only four high-priority sexual violence cases had been brought to trial by 2012.[133] It referred to several UN documents from 2009 and 2010 in noting the under-representation of sexual violence crimes in confessions made under the Justice and Peace Law.[134] Under ordinary criminal justice proceedings, there were only four convictions for rape or other forms of sexual violence.[135] The overall conclusion was that

> the level of prosecutorial and judicial activity pertaining to the commission of rape and other forms of sexual violence appears disproportionate to the scale of the phenomenon, the devastating consequences of the crimes and the number of victims. The OTP therefore encourages the Colombian authorities to prioritise the investigation and prosecution of crimes of sexual violence.[136]

Two important inferences flow from the report. The first is that the OTP could have, but did not, rely on a range of sources that established the high rate of incidence of sexual violence crimes prior to 2012.[137] The second was that prosecution of crimes of sexual violence was patently inadequate in relation to the scale of their commission. Thus, the OTP's 2012 statements reflect a deliberate strategy to

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[132] Colombia Interim Report, above n 99, 50.

[133] Ibid 60. This decision by the Constitutional Court identified sexual violence as 'a habitual, extensive, systematic and invisible practice in the context of the Colombian armed conflict' and to combat its impunity referred 183 sexual violence cases to the Fiscalía: *Auto 092,* above 117, Section III.1.1.1.

[134] Colombia Interim Report, above n 99, 67 [217]. By the end of 2008, only 4 of the 18,431 crimes confessed were for sexual violence crimes: *Report of the UN Office of the High Commissioner for Human Rights (OHCHR) for 2009)* 17, [60]. This number rose to 79 of 26,026 by March 2012: Fiscalía de la Nación, Gestion Unidad Naciónal de Fiscalías para la Justicia y Paz, Main Crimes confessed until 31 March 2012.

[135] Colombia Interim report, above n 99, 68.

[136] Ibid.

[137] A subsidiary inference is that the OTP did not rely on such information prior to its 2011 PEX report either, since previously published sources could have been included in the 2011 report as well to strengthen OTP conclusions about national proceedings.

highlight the crimes (by making them a focus area)[138] and to interpret the norm that obliges States to investigate and prosecute international crimes to explicitly include prosecutions for sexual violence.

In its 2013 PEX annual report, the OTP noted a draft bill to promote access to justice for sexual violence was pending approval in the Colombian Congress.[139] The OTP sent two missions to Bogota that year; the first was in April to assess the progress on issues identified in the 2012 interim report, and included meetings with senior officials from all three branches of government, national civil society, international NGOs and international organisations. The second mission, in June, focused primarily on issues other than sexual violence.[140] The OTP noted that charges under the Justice and Peace Law and by the Fiscalía's office had been expanded to include sexual violence and forced displacement.[141] However, the report did not note any progress made in criminal cases.

By 2013, only five of the original 183 *Auto 092* cases had resulted in sentences; 14 had been closed with no conviction, 76 were not initiated and 69 were still in a preliminary phase.[142] The NGO group monitoring the progress of these cases concluded that the 'government's efforts to overcome impunity and factors that deny women justice have been insufficient'.[143] The continuing almost total impunity was attributed to '(i) the lack of guarantees for victims who make complaints and of respect for victims, (ii) the persistence of impunity, (iii) the lack of procedural clarity regarding complaints and investigations; (iv) the persistence of a narrow view of sexual violence in armed conflict, (v) the existence of regulations that threaten victims' guarantees to justice, (vi) the persistence of patterns of discrimination and re-victimisation, (vii) problems with training programs, (viii) the lack of measures to guarantee legal accompaniment, (ix) the lack of inter-sectorial approaches, and

[138] This was confirmed by ICC staff: interview I1, I2, I4.
[139] ICC-OTP, *Report on Preliminary Examination Activities (2013)* (*'PEX 2013'*), 44 [135]. This bill became law the following year: see n 150 below and accompanying text.
[140] Ibid 36 [146].
[141] Ibid 35 [145].
[142] Working Group to monitor compliance with Auto 092 of 2008 of the Colombian Constitutional Court, Fifth follow-up report to Auto 092 of the Colombian Constitutional Court - Confidential Annex ('Auto 092 Fifth Follow-up Report') (October 2013) 140.
[143] Ibid.

(x) the lack of reparation measures in criminal proceedings'.[144] These findings were not included in the 2013 OTP PEX report, probably because they were published in October 2013; instead the OTP incorporated this data into its 2014 PEX report.

The OTP's December 2014 PEX report was released six months after the OTP's SGBC Policy was launched, and after only one OTP mission to Colombia, in November 2013, during the reporting period.[145] The OTP referred to the 2013 NGO report monitoring the 183 *Auto 092* cases, which observed that only five of these cases had resulted in convictions. Ninety-five (95) were at the preliminary investigation stage, 16 were in the investigation phase, four were terminated at the investigation phase, 26 were inactive and five, as mentioned above, had resulted in indictments.[146] On the other hand, sexual violence (affecting 2,906 victims) was included in 15 of the 16 macro-investigations taking place under the Justice and Peace Law. In the ordinary criminal system, there were a further 37 cases focusing on sexual violence attributed to FARC, five additional FARC-related situations that could involve sexual violence, and one other situation involving nine victims of sexual violence.[147]

The draft bill referred to in the 2013 report had passed into law in June 2014.[148] Its effect was to (1) eliminate statutes of limitation for sexual crimes, (2) include additional sexual crimes such as forced sterilisation, forced pregnancy, forced nudity, and forced abortion in the Colombian Penal Code, (3) preclude the investigation of sex crimes by military courts and (4) recognise legally that acts of sexual violence in armed conflict could constitute crimes within the jurisdiction of the ICC.[149] Notwithstanding this development, the OTP remained 'concerned with the limited progress relating to sexual crimes, although the creation of a working group in charge of investigating cases of gender-based violence within the DINAC could constitute a positive step'.[150]

[144] Ibid 37. (emphasis in original)
[145] PEX 2014, above n 112, 31 [128].
[146] Ibid 29-30 [123].
[147] Ibid 30 [124].
[148] Colombia Lei 1719 de 2014 [Law 1719 of 2014], art 1.
[149] PEX 2014, above n 112, 30 [125].
[150] Ibid 30 [131].

In its 2015 PEX Report, the OTP again had a specific section on sexual and gender-based crimes, noting a conviction under the Justice and Peace Law for 175 charges of sexual crimes (affecting 2906 victims), including rape, sexual slavery, enforced prostitution, enforced sterilisation and enforced abortion.[151] On the other hand, the OTP recognised the number of convictions in the ordinary criminal justice system remained low, including for the 183 *Auto 092* cases; it identified strategic, institutional and technical obstacles, including the lack of coordination between judicial and administrative institutions, insufficient technical capacity and expertise to investigate and prosecute these crimes, and the lack of a reliable case database.[152] The 2015 report also referred to the *Auto 009* of 2015 decision by the Constitutional Court that followed the 2008 *Auto 092* decision,[153] and the working group established by the Attorney-General to improve and accelerate these proceedings.[154] The figures for *Auto 009* confirmed that the lack of or slow progress over the previous eight years in the majority of cases was cause for continuing concern. Of the original 183 *Auto 092* cases, only 23 had been ruled upon; two resulted in acquittals, seven in convictions for crimes other than gender-based violence and the remaining 14 resulted in convictions for gender-based violence.[155]

The OTP conducted a mission to Colombia in February 2015 and another in May. It subsequently concluded that while relative progress had been made vis-à-vis sexual crimes under the Justice and Peace Law, there was a 'lack of substantial progress in investigations and prosecutions before the ordinary justice system'.[156]

The 2016 OTP PEX report was published in November 2016, after the November 2016 Colombian plebiscite for the peace accord had failed and before Congress had adopted the revised accord on 30 November 2016.[157] The OTP reviewed and

[151] PEX 2015, above n 19, 36 [153].
[152] Ibid 36 [154].
[153] Ibid 36 [155].
[154] Ibid 26 [155].
[155] The report uses the term 'gender-based violence' although the cases were of sexual violence only: Working Group to monitor compliance with Constitutional Court *Auto 092* of 2008 and *Auto 009* of 2015 *Sixth Monitoring Report on Auto 092 and First Monitoring Report on Auto 009* (2015), 8-11.
[156] PEX 2015, above n 19, 39 [166].
[157] The Guardian, *Colombia's government formally ratifies revised FARC peace deal* (1 December 2016) <www.theguardian.com>.

analysed national proceedings regarding sexual violence, relying on open sources such as NGO reports, Colombian court decisions and government reports, in order to identify relevant corroborative or corrective information.[158]

As with other PEX reports from 2012, there was a section devoted to sexual and gender-based crimes, which notably referred to the February 2016 conviction of Ramón María Isaza Arango for 12 counts of rape, four counts of sexually violent acts, two counts of enforced prostitution or sexual slavery and one count of forced abortion.[159] Convictions against two other individuals were confirmed on appeal during the reporting period.[160] All sexual violence cases concerning FARC-EP and ELN leadership members remained at the investigation stage and information about these cases was 'scant'.[161] As a consequence, the OTP concluded that there were limited proceedings, despite 'comprehensive reform of the AGO's [Attorney-General's Office] investigative model aiming at focusing on those most responsible for SGBC'.[162]

5.2 Challenging impunity for sexual violence crimes

Although among the top five types of crime registered with the Fiscalía,[163] impunity for sexual violence is almost absolute. Newspaper articles from 2015 reported the impunity rate was at 98%;[164] this statistic has not only not been refuted by the Fiscalía, it has subsequently been adopted by the UN SRSG SVC.[165] Most authoritatively, the Colombian Constitutional Court's 2015 *Auto 009* judgment, which reviewed compliance with the 2008 *Auto 092* judgment,[166] found that sexual

[158] ICC-OTP, *Report on Preliminary Examination Activities (2016)* ('PEX 2016') 58.
[159] Ibid 56.
[160] Ibid 56.
[161] Ibid 56.
[162] Ibid 56.
[163] Colombia Fiscalía General de la Nación ('*Fiscalía'), Fiscalía adopta protocolo para investigar y judicializar la violencia sexual* (20 June 2016) <http://www.Fiscalía.gov.co/colombia/noticias/destacada/Fiscalía-adopta-protocolo-para-investigar-y-judicialisar-la-violencia-sexual/>.
[164] Oliver Sheldon, *Impunity for sexual violence in Colombia reaches 98%: International forum,* Colombia Reports (2 May 2014) <http://colombiareports.com/impunity-for-sexual-violence-in-colombia-reaches-98-press-silence-makes-it-100/>.
[165] This report refers to a 2% conviction rate for the 634 cases documented by the Constitutional Court: *Report of the Secretary General on Conflict-Related Sexual Violence,* S/2017/249 (15 April 2017) ('*SRSG CRSV 2017 Report*')10 [27].
[166] Chapter 5.4.

violence continued to be a practice used by all actors, including paramilitary groups, guerrilla groups, State security forces and criminal gangs.

The Fiscalía has claimed an improvement in the number of both charges and convictions for crimes of sexual violence; the number of charges increased from 12,531 in the period 2008-2011 to 19,848 in the period 2012-2015, and convictions increased from 6,364 (2008-2011) to 7,731 (2012-2015).[167] However, this also meant that the conviction rate dropped from 51% to 39% over the two reporting periods; a negative, rather than positive, trend. Moreover, the Fiscalía's gender adviser noted that in many instances their own statistics and research were not robust enough to draw conclusions about patterns of sexual violence or its use as a strategy of war.[168]

Sexual violence is not perpetrated on a casual or isolated basis but is the product of 'deliberate incentives and sanctions from the organisations' senior leadership or echelons, directed at all of their combatants'.[169] As one Colombian interviewee with experience from the 1998 Rome Conference remarked, 'the Colombian State doesn't have the information the ICC needs, there is almost 100% impunity with these cases . . . and if the ICC is going to have any impact they are going to have to physically come to Colombia and do the research themselves'.[170] Given the OTP's lack of investigative powers in preliminary examinations and limited resources, this approach is not feasible.[171] However, it does highlight both the OTP's need to be more strategic about the range and quality of information it obtains, and the methods it uses to do so.

This is consistent with the view of the international prosecutor embedded in Dirección Naciónal de Análisis y Contextos (DINAC) that the failure by prosecutors to detect or identify sexual violence and its motives from the evidence was a

[167] Colombia Fiscalía, above n 10.
[168] Interview C12, Fiscalía.
[169] Corte Constitucional Republica de Colombia, *Auto 009 de 2015, Sala Especial de Seguimiento Sentencia T-025 de 2015* (Unreported, 27 January 2015), 13.
[170] Interview C6, NGO.
[171] ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) 10 <http://www.icc-cpi.int> ('*PEX Policy*'), 3.

significant reason it was under-investigated and under-prosecuted.[172] In fact, 'huge amounts of evidence were overlooked because staff did not have the understanding or expertise to put the elements together' and identified only rape, rather than other forms of sexual violence.[173] Certainly, the Colombian culture is patriarchal[174] and chauvinistic,[175] so that under-reporting is attributable to stigmatisation, shame, embarrassment, self-blame and fear of the perpetrator and possible threats he may make.[176]

Accountability in Colombia for conflict-related sexual crimes is complicated by the peace accord, the prospective Special Jurisdiction for Peace that the accord describes, and the uncertainty around the accord's constitutionality. Nevertheless, there is a wealth of information available on the incidence of conflict-related sexual violence and the reasons for its impunity, all of which the OTP has only recently started to refer to. This section established the scope of the OTP's preliminary examination and the context of impunity for crimes of sexual violence. Chapter 6.2 will incorporate the empirical field research to analyse this evolution within the TLP framework and demonstrate how norm-interpretive interactions, especially by the OTP, have contributed to internalisation of the sexual violence accountability norm.

6. Preliminary examinations and sexual violence in Guinea

As noted in Chapter 1 and Chapter 5.4, there were several reasons for selecting Guinea as a country within which to conduct empirical research. Like Colombia, Guinea's intention to avoid a formal ICC investigation can be inferred from its national investigation activities, its publicly disseminated information about their progress and its representations to the ICC-OTP. The OTP preliminary examination, now in its seventh year, includes sexual violence. This extended process provides more information over a relatively long period to assess both the interaction between the OTP and Guinean stakeholders and the progress of its investigations into crimes of sexual violence. This section focuses on the conduct of the preliminary

[172] Interview C12, Fiscalía.
[173] Interview C13, Fiscalía.
[174] Interview C8, NGO; C14, Fiscalía.
[175] Interview C7, NGO.
[176] Interview C6, NGO; C14 Fiscalía.

examination and national criminal investigations following the commission of those crimes, rather than any antecedent events.

This section turns to the preliminary examination in Guinea. The first part confirms that there is in fact pre-existing impunity for crimes of sexual violence, the reasons for and acceptance of this. The second part charts the course of the OTP's preliminary examination. Together these sections provide the contextual framework within which the extent of, and the OTP's contribution to, internalisation of the sexual violence accountability norm is evaluated.

6.1 Pre-existing context of impunity

Guinea has a well-documented history of the State systematically committing crimes against civilians with impunity. Since gaining independence from France in 1958, Guinean civilians who opposed the government have routinely been subjected to torture, starvation, abuse and execution by State security forces.[177] None of the country's leaders, Ahmed Sékou Touré (1958-1984), Lansana Conté (1984-2008), and Captain Moussa Dadis Camara (2008-2009), initiated any accountability mechanisms for violations committed during multiple successful and failed coups, and in response to opposition demonstrations, including in 1971, 1984, 2000 and 2007.[178] Systemic commission of and impunity for human rights abuses committed by State civilian and military agents has occurred throughout Guinean history and human rights defenders and women have been particularly vulnerable targets.[179]

This historical context of impunity anchors our expectations of State responses to state-sponsored crimes; it also suggests what the default response (or lack thereof) to the stadium massacre was likely to have been. Guinea's track record for impunity, coupled with the presidential guard's immediate attempts to destroy evidence from the stadium, strongly suggest the State would not have initiated any criminal proceedings for acts connected with the 28 September 2009 stadium massacre

[177] See Alieu Darboe, 'Guinea: 1958-Present' (October 2010) *International Center on Nonviolent Conflict*, 3-6.
[178] For a brief account of this history see, Human Rights Watch, *"We Have Lived in Darkness": A Human Rights Agenda for Guinea's New Government* (2011), 2-4.
[179] US Department of State, *Guinea* (2011) <https://www.state.gov/j/drl/rls/hrrpt/2010/af/154350.htm> .

(stadium case). Indeed, the Presiding judge of the stadium case noted that Guinea's history was characterised by entrenched and continuous impunity for crimes committed by State security forces.[180] The announcement of national investigations and State representations of ability and willingness only *after* the OTP opened its preliminary examination supports this conclusion.[181]

Impunity for sexual violence is equally entrenched, particularly because there are very low rates of reporting, due to fears of ostracism, shame and stigma, sometimes resulting in divorce.[182] Accurate and current statistics on the prosecution of sexual violence crimes are difficult to obtain. According to a 2011 government study, '91 percent of women had experienced gender-based violence and 49 percent had experienced sexual assault'.[183] Twenty per cent of women who reported to hospital did so after sexual violence.[184] Prior to the stadium massacre, according to one source, '[o]nly 8 cases of rape were reported to the police in 2008'.[185] Such low reports signify very high levels of impunity, which, as discussed in Section 3.4 below, has been publicly acknowledged only since the stadium case. The former President of the Supreme Court noted that the main acknowledged form of violence against women was domestic violence, but that sexual violence is still not talked about; and that this is exacerbated by a culture of polygamy.[186]

6.2 Evolution of criminal proceedings during the Preliminary Examination

Guinea acceded to the Rome Statute in July 2003 and while it has yet to pass any implementing legislation, the crimes from the Rome Statute were included in its

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[180] Interview G5, NGO.

[181] The then-President Camara's announcement of an intention to initiate a 'probe' into the events was undermined by his radio statement on the same day that he was not responsible for the killings and that: "Those people who committed those atrocities were uncontrollable elements in the military ... [e]ven I, as head of state in this very tense situation, cannot claim to be able to control those elements in the military.": Xan Rice, *More than 150 feared dead in Guinea stadium clashes* (29 September 2009) <https://www.theguardian.com/world/2009/sep/29/guinea-killings-protesters-conakry>. For Camara's promise of a probe see: Associated Press, *Guinea opposition protest killed 157, 1,200 wounded, human rights group says; gov't vows probe* (29 September 29), cited in Human Rights Watch (*'HRW'*), *Bloody Monday: The September 28 Massacre and Rapes by Security Forces in Guinea* (2009) 96 < https://www.hrw.org/>.

[182] Interview G1, MJ; G2, G3, G4, NGOs; G13, G14, G17, witnesses.

[183] US Department of State, *2016 Country Reports on Human Rights Practices - Guinea* (3 March 2017) < https://www.state.gov/documents/organization/265474.pdf>.

[184] US Department of State (2011) https://www.state.gov/documents/organisation/160126.pdf

[185] www.africa4womensrights.org/public/Dossier_of_Claims/Guinea-Conakry-UK.pdf

[186] Interview G9, NGO.

2016 Penal Code, discussed further in Chapter 6.3.2. On 14 October 2009, former ICC Prosecutor Moreno-Ocampo opened a preliminary examination into what is known as the '28 September massacre' committed by Guinean national security forces at the national stadium in the capital city of Conakry on 28 September 2009.[187] That day, tens of thousands of opposition supporters had gathered to demonstrate; more than 150 were killed, 1400 people wounded, and more than 100 women estimated to have been raped.[188] A combined force of several hundred presidential guard troops, military police, anti-riot police and irregular militiamen were reported to have been involved in committing these crimes.[189] Evidence suggests that the military systematically hid evidence of the crimes by, among other measures, removing bodies from, and preventing access by medical personnel to, the stadium, as well as taking control of and removing bodies from two morgues to both unknown and known locations.[190]

The opening of the preliminary examination preceded the establishment just two weeks later, on 30 October 2009, of a UN international commission of inquiry (UN COI) proposed by the African Union and Economic Community Of West African States (ECOWAS).[191] The preliminary examination also precipitated the Guinean Foreign Minister's 20 October 2009 visit to the ICC confirming the ability and willingness of the Guinean authorities to proceed with an investigation.[192] Notwithstanding the subsequent opening of a national criminal investigation on 8 February 2010 into the stadium massacre and the appointment of three judges, the OTP's preliminary examination has remained open.[193]

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[187] ICC-OTP, ICC Prosecutor confirms situation in Guinea under examination (14 October 2009) <https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-guinea-09-10-14>.

[188] These figures are based on hospital and humanitarian records but are likely to be an under-estimation due to the stigma experienced by rape survivors in Guinea: Human Rights Watch (*'HRW'*), *Bloody Monday: The September 28 Massacre and Rapes by Security Forces in Guinea* (2009) < https://www.hrw.org/>.

[189] Ibid 7.

[190] Ibid 9.

[191] Office of the UN Secretary-General, Secretary-General Announces Members of Guinea Commission of Inquiry to Investigate Events of 28 September (SG/SM/12581, AFR/1902, 30 October 2009).

[192] ICC-OTP, Guinea Minister visits the ICC – Prosecutor Requests Information on National Investigations into 28 September Violence, 21 October 2009, 236 <http://www.icc- cpi.int>; PEX 2011, above n 22, 23.

[193] The national investigations were opened on the basis of the UN and national commissions of enquiry: PEX 2011, above n 22, 23.

It is worth noting the remarkably short period between the 28 September massacre and the Prosecutor's decision to open a preliminary examination just under three weeks later. Prima facie, it seems unlikely that a thorough assessment of ability and unwillingness could have been conducted in such a limited time and belies the premise of complementarity of national primacy of jurisdiction. On the other hand, given the already available evidence of the Guinean authorities' efforts to destroy evidence of the crimes,[194] Guinea's representation that it was both able and willing to investigate came too late to prevent OTP scrutiny. The OTP did not explicitly identify the underlying factual basis for its decision to open a preliminary examination into Guinea. While it had received eight communications between October and November 2009, it did not disclose whether any of these were received before it opened its preliminary examination on 14 October 2009.[195] The massacre and accompanying crimes of sexual violence were reported in international news sources the day after they occurred.[196]

Prior to the first OTP report on preliminary examination activities released in November 2011, the OTP issued several public statements about the Guinean situation. This constituted very public norm interpretations about the government's legal obligations to criminally address the violence committed by security forces, including violence around elections.[197] This dialogue included specific statements issued in response to news of violence perpetrated by security forces around elections in September[198] and November 2010.[199] Through public statements issued

[194] For a summary of these efforts see HRW, above n 180, 8-10. The international community's response was also swift, damning and in some cases specifically called for the President at the time, Dadis Camara, to be held accountable: ibid 91.
[195] PEX 2011, above n 22, 21.
[196] See e.g. <http://www.independent.co.uk/news/world/africa/horror-of-guinea-stadium-massacre-that-killed-157-1795165.html>; <https://www.theguardian.com/world/2009/sep/29/guinea-killings-protesters-conakry>; <http://www.nytimes.com/2009/10/06/world/africa/06guinea.html>
[197] See e.g. ICC-OTP, Conference de presse d'une delegation du Bureau du Procureur avec les journalistes Guineens (May 2010) <https://www.icc-cpi.int>.
[198] ICC-OTP, Statement by the ICC Prosecutor on the Situation in Guinea (15 September 2010) <https://www.icc-cpi.int/>.
[199] ICC-CPI, *We are keeping an eye on Guinea* (19 November 2010) <https://www.icc-cpi.int/>.

in September 2013,[200] September 2014[201] and October 2015[202], the OTP explicitly committed to accountability for the stadium massacre at the ICC if Guinea failed to achieve this.

In its 2011 PEX annual report, the OTP referred to other investigations into the massacre. The first was the UN COI Report published on 13 January 2010, which reported:

> 156 persons who were killed or who disappeared . . . 109 women were subjected to rape and other sexual violence, including sexual mutilation and sexual slavery. Several women died of their wounds following particularly cruel sexual attacks. The Commission also confirms hundreds of other cases of torture or of cruel, inhuman or degrading treatment.[203]

The actual numbers were likely to be higher, given the authorities' systematic destruction of evidence of the violence and the climate of fear and insecurity it created among the population.[204] The UN COI also referred to the Guinean government's acknowledgement of casualties, including a total of 63 dead and at least 1,399 wounded; hospitals confirmed they treated at least 33 women who had been raped during the events.[205] On this basis, the UN COI stated it was reasonable to conclude that crimes against humanity had been committed by the presidential guard, the police responsible for combating drug trafficking and organised crime, and the militia, among others; and that there were sufficient grounds for assuming criminal responsibility on the part of certain persons named in the report, either directly or as a military commander or supervisor.[206]

Key individuals named in the report included Captain Dadis Camara, Guinea's president at the time of the attack; Lieutenant Abubakar Diakité, head of the

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[200] <https://www.icc-cpi.int//Pages/item.aspx?name=statement-OTP-27-09-2013>.
[201] <https://www.icc-cpi.int//Pages/item.aspx?name=otp-statement-26-09-2014>.
[202] <https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-14-10-2015>.
[203] UN Security Council, Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (S/2009/693, 18 December 2009) 2 <http://www.refworld.org/docid/4b4f49ea2.html>.
[204] Ibid.
[205] Ibid.
[206] Ibid 3.

president's security detail; Commander Moussa Tiegboro Camara, commander of the security forces, and two other officials from the Camara regime, Captain Claude Pivi and Colonel Abdulaye Chérif Diaby.[207]

The 2011 OTP PEX report also mentioned that the Guinean Commission Nationale d'Enquête Indépendante (CNEI) had confirmed that killings, rapes and enforced disappearances took place during and subsequent to the 28 September stadium massacre.[208] In its report published in February 2010, the CNEI concluded on the basis of evidence from 508 people that 1480 individuals had been injured, 58 had died at the stadium and 5 others had died in the following days in hospital.[209] Critically, the CNEI's President confirmed that no woman had spoken of rape, notwithstanding reports of 36 cases of sexual assault, including the rapes mentioned in the UN COI Report.[210] Not mentioned by the OTP was the CNEI's failure to recommend any senior State actor for prosecution except Toumba Diakité, who was the head of the presidential guard at the time of the massacre.[211]

The OTP concluded the massacre could be characterised as a widespread and systematic attack against a civilian population in which more than 100 women and girls were allegedly raped or suffered other forms of sexual violence, including mutilations, mostly in the stadium; several women were also reportedly abducted, detained and used as sexual slaves for a period of several days.[212] As at the end of 2011, after missions to Guinea in October 2010, March 2011 and October 2011, the OTP considered the investigations were progressing at a fairly slow but steady pace, after logistical and security challenges had been overcome.[213]

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[207] Ibid 24.
[208] PEX 2011, above n 22, 22. The CNEI report was published on 2 February 2010.
[209] Adama Hawa Diallo, *Massacre du 28 septembre: 63 morts selon la Commission Nationale d'Enquête Indépendante* <http://www.cheriefmguinee.com/fichiers/livre12-999.php?langue=fr&code=calb458>.
[210] This may be a numerical error in referring to the number of rape instances reported by the Guinean government as reported by the UN Commission of Inqury: ibid.
[211] Aicha Bah, La commission d'enquête nationale indépendante accuse Toumba Diakité <koaci.com/m/commission-d'enquete-nationale-independante-accuse-toumba-diakite-4270-i.html>.
[212] PEX 2011, above n 22, 22. While I adopt the terminology of sexual slavery used by the OTP, I note that the elements of the crime (particularly the ownership element of slavery) have not been proven.
[213] Ibid 23.

In its 2012 PEX report, the OTP specified the relevant crimes against humanity committed, including rape and other forms of sexual violence, under Article 7(1)(g) of the Rome Statute.[214] Since the national investigations were focusing on the same persons and same conduct that would constitute the OTP's prospective case, the OTP focused its admissibility assessment on ability and unwillingness.[215] It concluded the stadium massacre case would be inadmissible for several reasons.

First, six individuals had been indicted, including two listed by the UN Commission of Inquiry as responsible, as follows:

> Lt. Col. Moussa Tiegeboro Camara, head of the national agency for the fight against drug trafficking, organised crime and terrorism (with the rank of minister) was charged on 1 February 2012 for murders, injuries and participation in a crime; Col. Abdoulaye Chérif Diaby, former Health Minister at the time of the events was indicted on 13 September 2012.[216]

Importantly, and as further discussed in Chapter 6.2, the OTP conspicuously failed to mention the third individual named in the UN report – President Captain Moussa Dadis Camara – who was not charged in 2012.

Other factors contributing to the OTP's finding of inadmissibility were the notable progress and 'significant results'[217] despite contextual challenges, which countered the conclusion of unjustified delay; the integrity of the judges, and the indictment of six individuals based on 200 witness statements.[218] Briefly, it should be noted that the language used by the OTP in its PEX report reflects Chapter 4.4's description of the relationship between complementarity as a narrow judicial admissibility test and the broader catalytic concept. The OTP's reference to crimes listed in the Rome Statute, the same person/same conduct text, and ability and willingness (including factors listed in Article 17), all confirm that the OTP anchored its preliminary examination assessment in the narrow admissibility test.[219]

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[214] PEX 2012, above n 125, 34.
[215] Ibid 35.
[216] Ibid.
[217] Ibid 37.
[218] Ibid 35.
[219] Chapter 4.3.

The 2012 PEX report refers to six OTP visits, including Fatou Bensouda's third visit in April 2012 in her capacity as the OTP Deputy Prosecutor, during which she met with the Justice Minister and the President at the time, the panel of judges and civil society organisations.[220] Following a July 2012 letter from Bensouda to President Conde about the lack of progress and provision of adequate material resources to the panel presiding over the massacre case, 'financial and logistical means' were granted to the judges and the case resumed, resulting in the indictment of the former Health Minister, Col. Abdoulaye Chérif Diaby.[221]

By 2013, the OTP had noted additional investigative steps at the national level, including interviews with more than 370 victims, the Chief of Staff of the gendarmerie, General Baldy, and the Head of Presidential Security, Claude Pivi. It also noted the indictment of two individuals, including Pivi.[222] The OTP noted that although two of the indicted, Pivi and Diaby, continued to hold their government posts, given the contextual challenges to the investigation's progress, there was no basis to consider 'the proceedings as being inconsistent with the intent to bring the persons concerned to justice'.[223]

The OTP visited Guinea twice in 2013, in January and June, and continued to liaise with national and international agencies and organisations. While it decided to keep the preliminary examination open, the OTP noted several pending critical steps were required to demonstrate the genuineness of national efforts. However, these critical steps were not included in its report.[224] As discussed further in the next chapter, this represented a missed opportunity to highlight the most significant challenges that need to be overcome for effective investigations of sexual crimes.

The following year, in 2014, the OTP extended its engagement to include meetings with the judicial expert assigned by the UN Team of Experts on the Rule of Law and

[220] ICC-OTP, 'Weekly Briefing' Issue 117, 3-16 April 2012.
[221] PEX 2012, above n 125, 36.
[222] Ibid 44.
[223] PEX 2013, above n 141, 44.
[224] Ibid 45.

Sexual Violence in Conflict to Guinea to provide advice and support. The OTP also specifically identified areas for technical assistance, including medical and forensic expertise and investigation and prosecution of sexual and gender-based crimes.[225] By the end of 2014, the OTP noted that several important steps had been taken by the investigating judges; they had taken evidence from more than 450 victims, including approximately 200 victims of sexual violence, and more than 80 witnesses of enforced disappearances. They had attempted to locate alleged mass graves; they had summoned high-level government officials and high-ranking military officers for interview and they had conducted proceedings relating to individuals residing abroad.[226]

Coinciding with the Global Summit to End Sexual Violence in Conflict held in London in June 2014,[227] the OTP expressed its specific focus on sexual and gender-based crimes, both in its engagement with those involved in the investigations, and in encouraging the Guinean authorities to pay particular attention to these crimes.[228] However, the reported number of victims of sexual crimes in the stadium massacre case interviewed by national authorities dropped from 200 in the 2014 PEX report to 50 in the 2015 PEX report. This suggests that either the number had been inaccurately recorded by those involved in the investigation, or that Guinean authorities shared inaccurate information with the OTP. The implications of this are discussed further in the next chapter.

The OTP noted key events of 2015 included the indictment of the former Head of State, President Dadis Camara (in Burkina Faso), of former ministers and military officials, including one who had committed torture prior to the stadium massacre. Key investigative steps by the national judges included 'visiting the Conakry Stadium and interviewing political leaders and other key witnesses, some of whom were initially reluctant to appear before them'.[229] Reinforcing the relevance of the

[225] PEX 2014, above n 112, 40.
[226] Ibid 39-40.
[227] This summit was sponsored by the UK Foreign Secretary at the time, Sir William Hague: see Chapter 3.3.
[228] PEX 2014, above n 112, 41.
[229] PEX 2015, above n 19, 41.

TLP framework was the OTP's observation (discussed further in the next chapter) that specific requests for further investigative steps by civil society organisations and victims' associations had an important impact on the pace and quality of the national investigation.[230]

2015 also marked the OTP's continued and intensified engagement with other actors, including a UN judicial expert and the UN Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG SVC). In fact, the OTP attributed concrete and progressive steps in the stadium case to the 'positive and constructive dynamic created between the OTP, the UN, civil society and the Guinean authorities'.[231] The next chapter frames this increased intensity of interactions across an increased number of transnational issue networks and norm-interpreting correlated with progress within the TLP framework.

Finally, in its 2016 PEX report, the OTP noted further key developments in the Guinean stadium case and the justice system more generally. In the stadium case, the judges interviewed five high-ranking army officials in response to a request made by legal representatives of the victims.[232] However, General Mathurin Bangoura, who was indicted in 2015, was appointed Governor of Conakry in March 2016, causing civil society and victims' organisations to doubt the State's intention to bring him to justice.[233]

Like other countries, Guinea has also implemented broader legislative reform, which incorporates the Rome Statute into national law. However, its exclusion of rape, along with the exclusion of electric shocks, burns, stress positions, sensory deprivation, mock executions and simulated drowning, from its definition of torture is contrary to international law.[234] Listing these acts as cruel and inhumane treatment[235] rather than torture is considered consistent with an intent to exempt

[230] Ibid.
[231] Ibid 43.
[232] PEX 2016, above n 137, 61-62.
[233] Ibid 62.
[234] Guinea Portant Pénal Code 2016, art 232(1).
[235] Guinea Portant Pénal Code 2016, art 232(2).

security forces from liability for abuses committed 'in the name of crime prevention'.[236] Excluding these acts from the definition of torture can be interpreted as an attempt to avoid international legal obligations to prosecute or extradite the individuals responsible for such acts that would otherwise be invoked by Guinea's ratification of the Convention Against Torture [237][238] and the prohibition of torture as a *jus cogens* norm.[239] Guinea's new 2016 Criminal Code also abolished the death penalty and criminalised torture for the first time, while its new Criminal Procedure Code provides for in-camera proceedings (but not judgments) in sexual assault cases.[240] However, the new laws fail to remedy other challenges associated with prosecuting sexual violence crimes; these are discussed in the context of the OTP's proven and potential impact on national proceedings in Chapter 6.

Continuing the trend initiated in 2014, the 2016 PEX report also referenced several engagements with a range of different international and national actors, including those providing technical and material support for the trial of the stadium massacre case, which, in 2016, the Guinean Justice Minister anticipated would commence in 2017.[241] While the OTP in earlier years had publicly expressed hopes of the trial commencing, this was the first recorded commitment made by a Guinean State representative in this regard. In the context of 14 indictments and hundreds of witness statements, as well as material support from several external actors and agencies, further delays in progressing to trial will be increasingly difficult to justify. On the other hand, these same factors permit the conclusion that the results of the OTP's positive complementarity approach are disappointing:[242] it is now more than seven years since the massacre, and there is still no trial date. However, this negative assessment of progress is anchored in aspirations for justice in Guinea, rather than a realistic contextual assessment.

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[236] Francois Patuel, Guinea: New criminal code drops death penalty but fails to tackle impunity and keeps repressive provisions (5 July 2016) <https://www.amnesty.org/>.
[237] and Other Cruel, Inhuman or Degrading Treatment or Punishment
[238] Guinea ratified this treaty on 10 October 1989 and is thus obliged to extradite or prosecute crimes of torture committed within its jurisdiction.
[239] *Prosecutor v Furundžija (Judgment),* International Criminal Tribunal for the former Yugoslavia, (Trial Chamber, Case No. IT-95-17/1-T, 10 December 1998[156].
[240] Guinée Noveau Code Procédure Pénale 2016, art 397.
[241] PEX 2016, above n 137, 63.
[242] See e.g. Will Colish, 'The International Criminal Court in Guinea: A Case Study of Complementarity' (2013) 26(2) *Revue québécoise de droit international* 23.

As discussed in the next chapter, many factors suggest that without OTP scrutiny and norm interpretations, the Guinean government would never have initiated criminal investigations into the 28 September massacre. Accordingly, since the trial had at the time of writing still not commenced, the focus of this thesis' assessment is necessarily on the conduct of investigations and the OTP's engagement with stakeholders during the preliminary examinations, as perceived by key actors. This is the focus of the next chapter.[243]

7. Conclusion

This chapter has noted the multiple iterations of norm-interpretive interactions in preliminary examinations that provide a useful context within which to assess the OTP's catalytic effect and potential. More specifically, there may be lessons to be learned from ongoing preliminary examinations about how the OTP may persuade unwilling States more effectively to comply with the sexual violence accountability norm. Although the commission of international sexual crimes is well documented in both Colombia and Guinea, the two contexts are very different. In its preliminary examination in Colombia, the OTP engaged with a multitude of actors who have been involved in monitoring and critiquing several different criminal justice processes for more than a decade. Civil society documentation, including for sexual crimes, is extensive and national investigations have already yielded some outcomes. Conversely in Guinea, the OTP is scrutinising crimes committed by well-organised institutional actors over just a few days and weeks. Investigations have already been ongoing for six years, the one criminal case to address the crimes is yet to go to trial, and there is limited non-State documented and/or publicly available evidence for the OTP to draw upon.

In some ways, these contrasting contexts provide an interesting comparison of the OTP's strategies to catalyse national prosecutions during preliminary examinations.

[243] It should be noted the case, as of 31 October 2017, is still in the very first of three stages in the criminal justice system. For the description of these stages see Human Rights Watch, *Waiting for Justice: Accountability before Guinea's Courts for the September 28, 2009 Stadium Massacre, Rapes and Other Abuses* (2012) 28.

While the general obstacles in each context are markedly different, some of the OTP and national prosecution oversights are similar, for example, the historical neglect and lack of technical expertise relating to sexual violence. The same trend of oversights is observed by the OTP, albeit inconsistently, in both Colombia and Guinea.

At this point, after tracking the OTP's engagement in Colombia and Guinea, it is appropriate to turn to field research obtained from actors involved in, critiquing or providing advice in the relevant cases.

CHAPTER 6. RESEARCH AND ANALYSIS ON NORM INTERNALISATION IN COLOMBIA AND GUINEA

1. Introduction

Chapter 2 explained how and why the TLP assists our conceptualisation of the OTP's potential catalytic impact on national proceedings for international crimes. This chapter draws on those TLP features described in Chapter 2 to explore and explain the trends and insights revealed by field research in Colombia and Guinea. The field research confirmed many of the known challenges in prosecuting sexual violence crimes described in Chapter 3. It also highlighted the dynamics between different actors engaged with the OTP's implementation of positive complementarity in preliminary examinations, as described in Chapter 4. Chapter 5's description of the evolution of proceedings regarding sexual violence during the preliminary examinations in Colombia and Guinea grounds this chapter's analysis of internalisation. Incorporating insights from interviews with relevant actors in Colombia, Guinea and at the ICC allows for inferences regarding the ICC's influence on national proceedings and movement towards internalisation of the sexual violence accountability norm.

As acknowledged in Chapters 1 and 2, without specific statements from relevant State actors *attributing* their actions directly to the OTP, it is not possible to isolate the OTP's influence in each instance of legal, political or social internalisation. Accordingly, this chapter triangulates historical, documentary and subjective data to draw plausible inferences about the contribution of OTP activities to the internalisation of the sexual violence accountability norm in Colombia and Guinea. These findings underpin the common themes and analysis in Chapter 7.

The field research in Colombia and Guinea responded to the need for distinct country-specific research and analysis[1] to understand the mechanisms by which compliance with the norms articulated in the Rome Statute is achieved through

[1] Fionnuala Ní Aoláin, 'Gendered Harms and Their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622, 630.

national laws, procedures and practices. Norm-interpretative interactions between norm entrepreneurs and State actors provide insights into how and why international norms are legally, politically and socially internalised or not. The value of interviews with stakeholders is accordingly three-fold: first, to confirm developments in the relevant cases and determine how this compares to public documentation and rhetoric of State actors; second, to identify the content of the norm-interpretative engagements among stakeholders; and third, to determine whether the scrutiny and engagement by the OTP has had or is perceived to have had any impact on norm internalisation.

The third aspect is important to help identify both communicated and perceived reasons for changes in national investigations into crimes of sexual violence. Prosecutors and judges offered insights into (1) which policies and practices are considered adequate for these cases, (2) case developments and challenges to progress, and (3) the extent, if any, of the OTP's influence on national proceedings and reforms. Interviews with government representatives revealed the official narrative and reasons for certain policies and practices as presented to the OTP, to other organs of the ICC, to international organisations and to the community of States. This information reflects State norm interpretations and the extent to which these are challenged and modified through interactions with norm entrepreneurs, and particularly the OTP, over time.

Finally, perspectives from victims, witnesses and NGOs indicated how the criminal justice system regards and functions in relation to crimes of sexual violence, as well as the value and implications of any changes in national sexual violence investigations. Their insights about why certain changes in laws, procedures, investigations and cases occur provided counter-narratives and alternative explanations to the rhetoric expressed by State representatives. This last aspect is important because the information from these actors highlighted the specific barriers demonstrating unwillingness to genuinely investigate and/or prosecute, which the OTP can then incorporate into its norm-interpretive interactions with relevant State actors. This more comprehensive information increases the OTP's capacity to challenge assertions by State actors of norm compliance that are

inconsistent with the experiences of those engaged with the national criminal justice system.

Accordingly, the analysis for each country is divided into two parts: the first part tracks the extent to which legal, political and internalisation of the sexual violence accountability norm has occurred. The second part examines evidence of the role (if any) played by norm-interpretive interactions and statements in promoting internalisation of the sexual violence accountability norm and other related trends. That is, this chapter both demonstrates the value of analysing the data within the TLP framework and uses the empirical evidence to assess the OTP's capacity in preliminary examinations to affect (directly and indirectly) national investigations and prosecutions of sexual violence crimes.

As a preliminary note, both Colombia and Guinea are civil law monist legal systems.[2] Since both States have ratified the four Geneva Conventions and the Convention against Torture, the requirement to prosecute or extradite those who have committed crimes under these treaties is part of both legal systems. The same obligations apply with respect to the Genocide Convention, which has been ratified by Colombia, and acceded to by Guinea. In addition, it is worth noting that interviewees in both countries typically referred to the 'ICC' rather than the 'OTP', even when the context indicated the entity to which they referred was the OTP.[3] The exceptions to this were references to the Prosecutor as an individual, and judgments by the ICC as an institution. As noted in Chapter 1.1, the term 'OTP' is used unless the reference is to the ICC as an institution, in which case, 'ICC' is used.

The robustness of any inferences about the quality and genuineness of national proceedings depends on the range and quality of data available. Accurate data is needed on the range of crimes committed, the number and identity of direct and

[2] Both are regarded as monist systems because *some* ratified treaties are incorporated into the domestic legal order without the need for any legislative act other than the act authorizing the executive to conclude the treaty. This contrasts with dualist systems in which *no* treaties have the status of law without implementing legislation. Colombia Constitution, arts 93 and 94; Guinée Constitution, art 151.

[3] Most of these references were to the ICC visits and activities they included, which are all conducted by OTP staff.

indirect perpetrators, the quality of evidence available, the quality of the investigations and the conduct of the investigators. Such data for crimes of sexual violence has typically not been collected consistently or systematically by national authorities in either Colombia or Guinea. NGO documentation has compensated for this dearth in some respects, but several NGO interviewee opinions and insights into motivations and reasons for developments and challenges in national proceedings were not based on formal documentation. This does not render such information inherently unreliable, but it does make it harder to verify.

Moreover, the data collected and relied upon by the OTP is neither comprehensive nor guaranteed to be accurate; the ICC Legal Advisor acknowledged that it was 'very difficult to have accurate information because we haven't opened an investigation'.[4] On the Colombian side, the international prosecutor sponsored by UN Women and embedded in the Colombian Fiscalía's DINAC unit observed[5] that the information presented in the OTP's Preliminary Examination (PEX) reports was incomplete and sometimes inaccurate.[6] In one instance, this was partly due to 'copying and pasting statements from the Inter-American Commission for Human Rights . . . that were incorrect'[7] and partly due to a misunderstanding of the Colombian case classification methodology. The consequent errors in OTP reporting reduced the credibility and therefore the influence of the OTP within the Fiscalía's office.[8]

Similar challenges emerged in Guinea, most clearly manifested in discrepancies between OTP impressions of case processes and developments and the status of the case as a matter of fact.[9] One example also appears in the OTP PEX reports: 200 victims of sexual violence were reported to have given testimony to the courts in the 2014 PEX report; however, in 2015 this number had dropped to 50 victims out of the same total of 450 interviewed by the panel of judges. These challenges provide

[4] Interview I1.
[5] The Dirección Naciónal de Análisis y Contextos (the Unit for National Analysis and Context) ('DINAC') is responsible for investigating and prosecuting international crimes in the context of the armed conflict. The term Fiscalía is used to refer to the Colombian Attorney General's Office within which DINAC operates.
[6] Interview C13, Fiscalía.
[7] Interview C13, Fiscalía.
[8] Interview C13, Fiscalía.
[9] Interview G3, NGO; interview G11, NGO.

additional perspectives from which to consider how OTP engagement during preliminary examinations could achieve a greater impact, a topic discussed in Chapter 7.

As Chapter 2 described, the empirical research tests the explanatory value of the TLP vis-à-vis internalisation of the sexual violence accountability norm through norm-interpretive interactions between the OTP and other actors during preliminary examinations. I conducted interviews in Colombia and Guinea to identify changes that TLP would deem to be indicators of norm-interpretive interactions and political, social and legal internalisation, that is, changes that were known to facilitate effective investigation and prosecution of crimes of sexual violence. Examples of such changes include legislative reform allowing a broader range of crimes of sexual violence to be prosecuted (legal internalisation), new and improved protection policies, procedures and programs for victims (political internalisation), and improved attitudes towards and engagement with women victims of sexual violence by criminal justice actors (social internalisation). Other key changes included, but were not limited to, prosecutorial prioritisation of crimes of sexual violence, as reflected in policies or in the number of sexual violence charges laid, the number of cases initiated or progressed (particularly if there is pre-existing available evidence but no previously initiated charges or cases), procedural improvements (such as more sensitive treatment and support of victims), and in-trial protection measures to minimise re-traumatisation.

As the discussion below illustrates, the TLP is a helpful explanatory framework within which to understand how the OTP can catalyse national prosecutions as intended by its approach to positive complementarity. However, as was predicted in Chapter 2.3.2, the TLP's gender neutrality limits its capacity to explain the extent to which a gender-based norm, like the sexual violence accountability norm, may not be internalised, and the reasons for this failure.

Drawing on interviews with numerous actors and pre-existing data, this chapter confirms how and why impunity for crimes of sexual violence persists despite evidence of their commission and, in some cases, laws and policies providing for

their prosecution. This data illustrates that impunity (1) is a product of intersecting legal, social and political structures and norms, (2) foreshadows what is required to challenge this impunity, and (3) identifies some instances where such changes have been made, and the OTP's contribution to such changes.

2. Internalisation of the sexual violence accountability norm in Colombia

2.1 Legal internalisation

Indicators of legal internalisation include executive action, legislative action, judicial interpretation, or some combination of the three, which, based on the factors identified in Chapter 3, are known to facilitate investigation and prosecution of sexual crimes. As discussed further below, these laws may cover substance as well as procedure, as opposed to political internalisation, which relates only to the policies (typically comprising procedures) adopted by relevant actors to implement the laws.

First, the 2005 Justice and Peace Law has defined Colombia's criminal justice response to the armed conflict, but is regarded negatively by human rights lawyers,[10] for its 'failure to realise victims' rights'.[11] Further, of approximately 25,000 confessions, only 86 included sexual violence.[12] Since the documented incidence of sexual violence is so high, it appears the vast majority of beneficiaries of this law chose not to disclose crimes of sexual violence voluntarily in the same way as they did other crimes.[13] As canvassed in Chapter 5.5.2 above and the end of this section, this reflects a widespread perception that sexual violence is not a

[10] Interview C9, NGO; C10, NGO; Amnesty International, *Colombia: Hidden from Justice - Impunity for Conflict-Related Sexual Violence, a Follow-up Report* (2012), 12; see also Justine Tillier, 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?' (2013) 13 *International Criminal Law Review* 507, 530.

[11] In 2012, the UNOHCHR reported that the government had publicly recognised the need to reform the Justice and Peace Law in noting that 'the right to truth has not been fully upheld, the political and economic structures used by paramilitary organisations have not been completely dismantled in order to guarantee non-repetition, and only six sentences have been handed down': *Annual report of the United Nations High Commissioner for Human Rights: Addendum Report on the situation of human rights in Colombia*, Human Rights Council, 19th sess., Agenda Item 2, A/HRC/19/21/Add.3 (31 January 2012) 1, 10.

[12] Benjy Hansen-Bundy, *Sexual violence employed methodically in Colombia's armed conflict* (18 March 2013) <http://colombiareports.com/>. But note that the Fiscalía's own statistics with respect to sexual violence are inconsistent, both within the Justice and Peace confessions process and with respect to progress on the *Auto 092* cases: Amnesty International, above n 24, 25-26.

[13] This process was based on 'free confessions' whereby individuals volunteered their confessions.

serious crime, and its commission is not. This outcome is a function of the gender neutrality of the law, which failed to consider and challenge the socio-cultural norms, attitudes and tolerance towards sexual violence in its design. That is, the failure of lawmakers to recognise the embedded social norm of tolerance and blindness to sexual violence as a serious crime resulted in the failure to effect legal internalisation of the sexual violence accountability norm.

It should also be noted that the subsequent failure to identify and remedy this oversight reflects a lack of political and social internalisation as well. That is, neither political elites nor national criminal justice actors sought to ensure accountability for crimes of sexual violence when the low rate of confessions for these crimes perpetuated impunity for them. Understanding this failure to hold perpetrators of sexual violence to account requires acknowledging not only that social and political internalisation are as important as legal internalisation of a norm, but also that all processes of internalisation need to be analysed from a gender perspective. Unfortunately, the Justice and Peace Law reinforces the impunity for crimes of sexual violence in comparison to other crimes; this creates yet another barrier for female victims of these crimes to overcome.

With respect to sexual violence specifically, the international prosecutor embedded in DINAC, the Colombian prosecutor and the Fiscalía's DINAC gender adviser attributed problems in achieving convictions not to the laws but rather to the procedures, which needed to be better adapted to the differentiated needs of female victims. These are discussed in the next part of the chapter.[14] Nevertheless, there are flaws in Colombia's otherwise comprehensive criminal laws, including the lack of recognition of certain crimes and uncoordinated laws regarding victim and witness protection. Law 1719 of 2014 corrected some of these, including eliminating a statute of limitations for sexual crimes, and defining sexual crimes that had previously not been explicitly criminalised, such as forced sterilisation, forced

[14] Interview C12, Fiscalía; interview C14, Fiscalía. These interviewees noted that the procedures needed to be more agile and sentences increased; interview C13, Fiscalía, in which the interviewee noted that the laws could be improved but they were not the problem causing impunity for sexual violence crimes.

pregnancy, forced nudity and forced abortion.[15] Two members of Congress, working with the Ombudsman's Delegate for Women and Youth, imported Rome Statute definitions into Law 1719, essentially to complete legal internalisation so that the full range of international crimes of sexual violence was defined and prosecutable. This is a clear example of legal internalisation promoted by governmental norm sponsors, namely, the two members of Congress who proposed the bill.[16] Again, while there is no evidence to suggest this internalisation was a result of norm interpretations, at the very least it is an example of norm diffusion.[17]

Law 1719 was intended 'to guarantee the right of access to justice for victims of sexual violence, especially sexual violence associated with internal armed conflict . . . [and] address as a priority the needs of women, children and adolescent victims'.[18] A key element to this is its comprehensive guarantee of protection, privacy and other measures throughout the judicial process.[19] Further, Law 1719 defines 'crimes against humanity' as they are defined in Article 7 of the Rome Statute.[20] It also amended the Criminal Code to reflect international standards in other ways, for example, by including in the definition of violence, 'the use of coercive environments and similar circumstances prevent the victim from giving their free consent'.[21] By defining sexual slavery as a crime, it facilitates the accurate prosecution of this crime committed in the armed conflict, which had previously been mischaracterised by some prosecutors as forced prostitution.[22]

Another key aspect of reducing impunity is holding senior commanders and superior officers criminally responsible if they fail to exercise their power to prevent or punish their subordinates' commission of international crimes. Ensuring criminal accountability for these superiors is particularly important in Colombia, where the

[15] Lei 1719 de 2014 [Law 1719 of 2014] art 1.
[16] Amnesty International, above n 24, 8.
[17] Chapter 2.2.4; Kathryn Sikkink and Thomas Risse, 'The Socialisation of Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 2016), 5.
[18] Law 1719 of 2014, art 1 [author's trans].
[19] Law 1719 of 2014, art 13.
[20] Law 1719 of 2014, art 15
[21] Law 1719 of 2014, art 11.
[22] Interview C9, NGO; interview C10, NGO.

use of sexual violence as a strategy or weapon of war is well established.[23] It is also critical for challenging the dominant pre-existing narrative, especially in the State armed forces, which denies any systemic element to the commission by labelling those who commit sexual violence as 'rotten apples'.[24] This type of criminal liability is possible under Colombian law, but complicated by various legal frameworks and the military justice reform to the Constitution in 2015.

In September 2015, the Colombian government and FARC-EP issued a joint communiqué announcing their agreement to the creation of a 'Special Jurisdiction for Peace', to have jurisdiction over crimes of sexual violence, among others.[25] This framework (see Annexure 5) was shaped both by FARC's demand that its members do not spend time in gaol, and the government's desire to achieve some measure of justice for extensive crimes committed by multiple actors over the course of the armed conflict. The minimum term for those who accept responsibility is five to eight years of 'effective restriction of liberty in special conditions';[26] those who do not accept responsibility are liable to prison sentences of up to 20 years.

However, this framework was modified in the revised peace accord reached between the government of Colombia and the Revolutionary Armed Forces of Colombia (FARC), passed by Congress on 30 November 2016.[27] The perceived lack of criminal accountability for FARC perpetrators of war crimes was a key reason the Colombian population rejected the first peace accord in a popular referendum in November 2016.[28] The revised accord clarified that rebels accused of various offences, including war crimes and drug trafficking, would go before a special court,

[23] For instance, contrasting the claim from the Fiscalía Gender Advisor, a prosecutor interviewee confirmed that although the documentation exists, the State does not have statistics to support and inference of strategy: C14, Fiscalía. However, extensive NGO documentation does establish this: see Chapter 6.2.1.
[24] Interview C5: Ombudsman's office, quoting press and public statements issued by the Colombian military.
[25] Other crimes included are the taking of hostages, torture, forced displacement, enforced disappearances, extrajudicial executions: *ICC-OTP, Report on Preliminary Examination Activities 2014* (2014) 34 [148].
[26] Oficina del Alto Comisionado para la Paz, Joint Communique # 60 regarding the Agreement for the creation of a Special Jurisdiction for Peace (23 September 2015) point 7.
[27] Nicholas Casey, 'Colombia's Congress Approves Peace Accord With FARC' *New York Times* (New York), 30 November 2016.
[28] Ibid.

but it did not introduce prison sentences for FARC members who confessed to war crimes.[29] However, in May 2017 the Constitutional Court declared two aspects of the legal framework implementing the peace agreement as unconstitutional and, as at 31 October 2017, it had yet to review (1) the amnesty law that established the legal status for demobilised guerrillas and was about to review (2) the law that established a special justice system to judge war crimes.[30]

Also relevant is a March 2017 constitutional reform passed pursuant to the revised peace accord that defines the term 'command responsibility' for army officers inconsistently with and more narrowly than international law. Specifically, the wording implies direct knowledge is required, making it harder to argue that constructive knowledge ('should have known') satisfies the *mens rea* requirement.[31] As we know from the *Katanga* and North Kivu DRC cases, and as discussed further below in relation to incomplete social internalisation in Colombia, the implicit tolerance of sexual violence means that excluding constructive knowledge could have a disproportionately damaging impact on convictions for sexual violence compared to other crimes. As at the end of August 2017, the Constitutional Court had yet to review the legality of this reform.

Legal internalisation of the norm requiring the investigation and prosecution of international crimes has largely been achieved in Colombia; the gaps with respect to international crimes of sexual violence were addressed in 2014 through Law 1719.[32] While the Constitutional Court is yet to determine the ramifications of the peace accord on command responsibility and other legal principles, impunity in practice is likely to be a question of political and social internalisation. As the OTP Director of the Prosecutions Division noted, impunity is less a result of inadequate

[29] Ibid; see *Acuerdo final para la terminación del conflict y la construcción de una paz Estable y duradera*, 148: <https://www.mesadeconversaciones.com.co/sites/default/files/24-1480106030.11-1480106030.2016nuevoacuerdofinal-1480106030.pdf>.

[30] Germán Duque, 'Así quedaría la JEP, según ponencia de la Corte Constitucional' *Noticias* (30 October 2017) <http://www.noticiasrcn.com/nacional-pais/ponencia-corte-constitucional-hace-ajustes-justicia-especial-paz>.

[31] For a discussion on the evolution through the peace accords to the legislation see Juan Pappier, *The 'Command Responsibility' Controversy in Colombia* (15 March 2017) <https://www.ejiltalk.org/the-command-responsibility-controversy-in-colombia/>.

[32] The UN SRSG SVC described it as 'an exemplary legal framework for addressing conflict-related sexual violence: SRSG CRSV 2017 Report, above n 12, 10 [27].

laws and more a result of 'a combination of lack of expertise, lack of nationwide policy, lack of cultural attitude to prosecute'.[33]

2.2 Political internalisation

There are several indicators of political internalisation, including government policies, protocols and political support for initiatives that facilitate compliance with the sexual violence accountability norm. For instance, in response to the 2008 Constitutional Court *Auto 092* decision, the Fiscalía created a specific methodology for investigating conflict-related sexual violence,[34] carried out specialist gender training for prosecutors,[35] created a Gender Committee to facilitate inter-institutional cooperation and appointed three prosecutors specialising in conflict-related sexual violence cases.[36] This is a good example of legal internalisation (in the form of a court judgment) catalysing political internalisation for the sexual accountability norm.

Beyond this, the main instances of political internalisation of the sexual violence accountability norm – Fiscalía policies, protocols and initiatives – date from 2012, although there was political internalisation with respect to other crimes prior to 2012. For instance, former Prosecutor Moreno-Ocampo visited Colombia in 2008 and highlighted in a public letter the OTP's concern about ensuring accountability for the 'parapoliticians', political leaders and Congress members tied to demobilised groups.[37] His 2008 visit focused on the extradition to the USA earlier that year of 15 former paramilitary members to face drug trafficking charges, and on support from international networks to armed groups committing crimes under the ICC's jurisdiction.[38] Human rights organisations criticised former Prosecutor Ocampo's withdrawal from this more aggressive approach to a more reticent style of

[33] Interview I4.
[34] Fiscalía, Resolution 0266 of 2008 and Memorandum 0117 of 2008.
[35] Fiscalía, Resolution 3788 of 2009.
[36] As at 2012 it was not clear if these were working full-time on the 183 cases: Amnesty International, above n 24, 19.
[37] See for example, 'Letter from ICC Prosecutor Luis Moreno Ocampo, to the Colombian Ambassador in The Hague, Francisco José Lloreda', [undated], transcribed in "Corte Penal Internaciónal Hace Requerimientos a Gobierno Uribe," *El Nuevo Siglo* (15 August 2008) <http://www.elnuevosiglo.com.co/noticia.php>.
[38] The OTP did not name the international networks referred to: ICC-OTP, 'ICC Prosecutor vistis Colombia' (Press Release, ICC-OTP-20080821-PR347 (21 August 2008).

engagement after 2008, insisting that a more proactive approach would have expedited Colombian judicial processes.[39] Nonetheless, by August 2012, more than 50 former congressional representatives had been convicted by the Colombian Supreme Court for collaborating with and supporting illegal armed groups, a result that directly answered Prosecutor Ocampo's 2008 concerns. During this period, there was no emphasis on crimes of sexual violence. Notwithstanding one keynote speech at a colloquium on sexual violence, Prosecutor Ocampo's publicly available statements around the Colombian preliminary examination did not mention sexual violence except as part of a long list of crimes.[40]

The appointment of ICC Deputy Prosecutor Fatou Bensouda to the position of ICC Prosecutor in June 2012 coincided with increased attention to the strategy, scope and pace of proceedings vis-à-vis sexual crimes. It preceded the first in-depth interim preliminary examination report on Colombia in November 2012, which introduced the OTP's narrowed focus to just five categories of crimes, including sexual violence. As discussed in the previous chapter, every preliminary examination report since has included an assessment of progress with respect to crimes of sexual violence. On the other hand, as late as June 2015, the OTP was criticised for its lack of a comprehensive gender perspective in its assessment of the Colombian conflict, including its failure to consider crimes of sexual violence as crimes against humanity.[41]

One key initiative of the Fiscalía's office[42] referred to above was the creation in 2012 of a special unit (DINAC) to analyse the context of crimes committed in the armed conflict in order to prosecute international crimes effectively. This was created on a recommendation from the OTP that the Fiscalía 'look at these crimes not as isolated sporadic events but cross-referencing *[sic]* and as systematised'.[43] More specifically,

[39] See e.g. Human Rights Watch, *Course Correction, Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"*, (June 2011) 16; Tillier, above n 24, 530.
[40] Luis Moreno-Ocampo, 'Keynote Address-Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence' (2010) 35(4) *Law and Social Inquiry* 839.
[41] Anna V Gall, *Sexual and Gender-Based Violence in the Colombian Conflict Should Not Get a Raw Deal before the International Criminal Court* (1 June 2015) <https://ilg2.org/>
[42] Interview C1, MFA.
[43] Interview C1, MFA; interviews I1, I4.

the OTP's mission and norm interpretations around the need to include investigators (rather than just analysts) trained in sexual violence in the unit 'triggered the inclusion of a team on sexual violence in the unit. It only happened after [the] OTP mission. The Attorney-General recognised it was a recent development and that there was international pressure to do more for sexual violence, including ICC'.[44]

Another initiative was the Fiscalía's Directive 001 of 2012, establishing the criteria by which cases and situations would be prioritised for prosecution. The Fiscalía's office considered the Rome Statute when outlining how prioritisation under this policy directive would operate.[45] While the creation of DINAC, including a sexual violence team, demonstrated political internalisation due to norm interpretations, the policy directive was an example of 'norm diffusion'.[46] While not an example of internalisation of the sexual violence accountability norm specifically, the Directive is nevertheless an instance of norm internalisation obliging international crimes to be investigated and prosecuted more generally, and it included sexual violence as a phenomenon related to organised crime.[47]

Earlier in 2012, the Fiscalía published its equality and non-discrimination policy to facilitate a 'differentiated approach', including on gender, in the investigation of crimes.[48] Notwithstanding this initiative, the Fiscalía's approach to sexual violence crimes has been characterised by disjointed procedures and a lack of consistent treatment,[49] epitomised particularly by the distribution of sexual violence cases across seven different units without any coordinating mechanism or procedure.[50] Compounding this was the failure of any policies to ensure that adequate resources – human, economic, and technical – were allocated to investigating and prosecuting crimes of sexual violence.

[44] Interview I4.
[45] Interview C1, MFA; Fiscalía, *Directiva 001/2012* (2012).
[46] See Chapter 2.2.4; Sikkink and Risse, above, n 31, 5.
[47] Fiscalía, *Directiva 001/2012* (2012), 25.
[48] Amnesty International, above n 24, 9.
[49] Interview C4, Ombudsman's office; interview C10, Fiscalía.
[50] Sisma Mujer, *Access to Justice* (2016) 44, http://www.sismamujer.org/> ; interview C13, Fiscalía.

Only in June 2016 did the Fiscalía adopt a protocol for investigating and prosecuting sexual violence that aimed to overcome these failings.[51] This protocol, adapted from a version submitted by the NGO Sisma Mujer in June 2015,[52] aimed to be comprehensive and to develop existing international standards within a national context, including by incorporating 'the jurisprudence on sexual violence adopted by international criminal tribunals and human rights . . .[and] the Rome Statute, which establishes criteria to punish sexual violence as a war crime, against humanity or genocide'.[53]

As a general trend, these instances of political internalisation appear to have occurred after legal internalisation, and more specifically since 2012. However, the lack of a systematic and coherent approach is reflected in the lack of evidence demonstrating implementation of the policies, and continuing absence of social internalisation, as discussed below.

2.3 Social internalisation

Legal and policy initiatives to investigate and prosecute international crimes existed prior to 2004, when the OTP first opened its preliminary examination, and have continued to evolve since then. Notwithstanding the weaknesses identified above, these initiatives have catalysed formal improvements within the Colombian criminal justice system. While a range of crimes of sexual violence have been prosecuted,[54] impunity remains high.[55] The interviews for this thesis confirm that this is attributable to attitudes and behaviours identified in Chapter 3 that inhibit their prosecution. As the Ombudsman's representative for women and youth confirmed, the armed conflict did not create new behaviours but rather reflected and magnified phenomena that already existed in Colombian society: 'the problem is not the armed conflict, but how to change the structural sources of violence against women . . . this kind of crime is not considered important by the system

[51] Fiscalía, above, n 10.
[52] Sisma Mujer, above n 66.
[53] Fiscalía, above n 10.
[54] Report of the Secretary-General on conflict-related sexual violence, UN Doc. A/66/657 – S/2012/33 (13 January 2012) 5 [17].
[55] Interview C4, Ombudsman's office; Working Group to monitor compliance with Constitutional Court *Auto 092* of 2008 and *Auto 009* of 2015 *Sixth Monitoring Report on Auto 092 and First Monitoring Report on Auto 009* ('*2015 Follow-up report*')(2015) 13.

because most of the victims are women and children, and all the perpetrators are men'.[56]

This statement encapsulates why laws and procedures do not on their own reduce impunity for sexual violence. It also reinforces the insights provided by TLP's framework, namely, why it is important that OTP's norm interpretations target social internalisation elements of norm compliance. Social internalisation of the sexual violence accountability norm would be reflected in adherence to it by criminal justice actors such as police and prosecutorial investigators, prosecutors, judges and other government agencies interacting with female victims in the criminal justice process. To facilitate social internalisation, norm interpretations by the OTP and other norm entrepreneurs need to consider and counter the socio-cultural attitudes towards sexual violence that are responsible for non-adherence by these actors to the sexual violence accountability norm.

For instance, an interview with a (male) representative from the Ministry of Foreign Affairs confirmed the general social perceptions of the reasons for impunity for sexual violence. He attributed the prevailing impunity to the fact that there were so many other crimes; that sometimes the only evidence was the victim's testimony; and that, although there had been many other confessions in the Justice and Peace process, the absence of sexual violence confessions was due to the time needed for the Supreme Court to confirm the validity of such confessions.[57] This position did not account for the extreme under-representation of crimes of sexual violence in the confessions, given the high rate of their incidence (e.g., only 4 of 18,431 confessed crimes in 2008 and 86 of 57,000 in 2011 related to sexual violence).[58] It also misrepresents what proof is required to sustain a conviction for sexual violence. However, it is consistent with the claim made in Chapter 1 that without explicitly identifying crimes of sexual violence as a neglected category for prosecution,

[56] Interview C4, NGO; this NGO leader went further and said the reason there are few confessions about sexual violence is because rape is not considered a crime but rather 'part of how you fight a war:' interview C6, NGO. See also interview C8, NGO.
[57] Interview C1, MFA.
[58] See Amnesty International, '*This Is What We Demand. Justice!' Impunity for Sexual Violence against Women in Colombia's Armed Conflict*' (2011) 23. On the disparity between these figures and the incidence rates of crimes of sexual violence in Colombia, see Chapter 5.5.

national actors will not necessarily recognise the existence of a discrepancy or the need for more targeted initiatives to combat it.

Interviewees identified a range of erroneous or problematic attitudes held by criminal justice actors that inhibited the investigation and prosecution of crimes of sexual violence. These included, for example, discomfort with a psychologist's presence to support the victim during interviews and while providing a statement and the belief that that the death of the perpetrator precluded prosecution of sexual violence (which excluded the possibility of prosecuting commanding officers):

> She said that because the perpetrator was already dead there was nothing to do. I said that I know that there is a chain of command and a guy in the chain of command commits a crime then there is a responsible one, even though the guy who committed the crime is dead. She said that she had to read more.[59]

Female victims reported problems, such as a male interviewer conducting the interview in a public area with other male colleagues present and questions that implied the victim was responsible for the crime or was not telling the truth: [60]

> He asked, "but nobody saw what happened?", "why didn't you tell sooner?". Those kinds of questions felt like aggression, like attacks. "What did you do? Did you just stay still?" "Why were you dressed that way, and why were you walking in that neighbourhood?[61]

Another interviewee recounted:

> He asked, 'if I point at you with a gun, how would you know if it's a pistol or another type of gun', 'why were you going that way?', 'how did they manage to push you into the car?' . . .and he asked me about my sexual behaviour before and after this event.[62]

[59] Interview C2, witness. Note that these impressions relate to the Public Defender assigned to support the victim witness through the court process.
[60] Interview C6, NGO; interview C7, NGO; interview C8, NGO; interview C10, NGO; interview C2 and C3, witnesses. These questions include asking why the witness did not run, what she was wearing, why did she report sooner, why she not fight, why she was dressed that way and why she was in that area, for example.
[61] Interview C2, witness.
[62] Interview C3, witness.

These practices reflect social norms followed and attitudes held by national criminal justice actors that are inconsistent with the standards contained in the ICC's constituent documents recognised as necessary to prosecute crimes of sexual violence.[63]

Similarly, one key obstacle that the Ombudsman's office identified and sought to overcome when training government agencies was the perception that physical and medical evidence was required to prosecute sexual violence, partly because witness testimony was considered unconvincing.[64] This attitude was more prevalent in areas controlled by guerrilla groups, where women who reported rape to the police or the army were assumed to be part of the guerrilla force, and no criminal process was initiated.[65] These attitudes, and the reluctance to believe female victims, was contrary to the practices described by the gender adviser in the DINAC unit, who stated that such complaints are taken in good faith and acted upon accordingly.[66] This discrepancy implied either a failure to implement policies systematically beyond Bogota, a failure in the clarity of the policies outlining interview procedures, or entrenched societal attitudes that persisted despite policy changes.[67]

More systemically, the attitude that sexual violence is relatively unimportant was reflected in the reasons identified by police and prosecutors for unsuccessful investigations, including failure to allocate adequate staff and that more 'serious' crimes took priority.[68] Indeed, even the 2008 and 2009 policies to promote prosecutions of conflict-related sexual violence did not appear to have had any

[63] On the impact of such attitudes and perceptions, see also Sara Sharratt, 'Voices of Court Members: A Phenomenological Journey – The Prosecution of Rape and Sexual Violence at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Bosnian War Crimes Court (BIH) in Anne-Marie de Brouwer et al (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 353-372, 363-364; Anne-Marie de Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes' (2015) 48 *Cournel International Law Journal,* 639, 649-658.
[64] Interview C5, Ombudsman's office; interview C6, NGO.
[65] Interview C6, NGO.
[66] Interview C12, Fiscalía.
[67] Interview C12, Fiscalía.
[68] Interview C5, Ombudsman's office.

discernible impact on survivors' experiences.[69] In 2012, Amnesty International reported that 'the gender training programme continues to be implemented in an ad hoc manner and is still not a pre-requisite for working on such cases so that many prosecutors working on sexual violence cases have not been appropriately trained'.[70] While prosecutors in the large cities may have been aware of the relevant protocols and apply these to varying degrees, the experience of survivors, especially in more remote areas, suggests that many prosecutors working on cases of sexual crimes were not aware of or were unwilling to implement them consistently and effectively'.[71] Thus, while political internalisation may have been partly achieved through the creation of the gender training programme, the continued trend of untrained prosecutors reflects the need for further political internalisation (establishing the training as a pre-requisite and enforcement measures to ensure compliance) and social internalisation (implementation of the program as designed).

This is consistent with the very low number of convictions for crimes of sexual violence, and the lengthy delays in initiating investigations and laying charges,[72] which were also often a result of prosecution de-prioritisation.[73] For instance, the Fiscalía's DINAC gender adviser explained that the main practical significance of prosecuting sexual violence as a war crime rather than an ordinary crime was the 'access to more severe punishment'.[74] This approach offered some insight as to why sexual violence was not recognised or charged as a war crime as often as the evidence suggested it should be.[75] If prosecutors believe sexual violence is a less serious crime, then there is no incentive to prosecute it as a war crime 'to access more severe punishment', particularly when it requires additional work to obtain

[69] This conclusion dates from 2013: Amnesty International, *Colombia: impunity perpetuates ongoing human rights violations: Amnesty International Submission to the UN Universal Periodic Review* (2013), 4; Amnesty International, above n 24, 32.
[70] Amnesty International, above n 24, 19.
[71] Ibid 19.
[72] Interview C6, NGO; 2015 Follow-up report, above n 69.
[73] Interview C10, NGO.
[74] Interview C12, Fiscalía.
[75] Interview C12, Fiscalía (on how sexual violence is not committed as a war crime in a generalised way). For evidence of the prevalence of sexual violence committed as war crimes see e.g. Amnesty International, above n 24, n 74; interview C9, NGO; interview C10, NGO.

evidence of the contextual elements. Of course, the same attitude explains why sexual violence is still not prosecuted regularly as an ordinary crime.

Affording a lesser priority to such crimes also explains the questionable consistency with which the protection laws passed in 2014 have been implemented with respect to sexual violence cases.[76] The DINAC gender adviser's statement that there are protective procedures, like withholding the victim's identity and conducting proceedings in camera, reflects some degree of implementation.[77] One NGO lawyer representing female victims noted that the degree to which witness protection measures were implemented was inadequate, partly because of a lack of training in the different protection needs of female witnesses (for example the need to incorporate the protection of children into the plan[78]). Another lawyer noted that many women victims of sexual violence did not fit into one of the three restrictive categories of individuals eligible for protection, even though the circumstances and the nature of the violation render them particularly vulnerable.[79]

Leadership personnel (governmental norm sponsors) appears critical to promoting social internalisation. For instance, the international prosecutor embedded in the DINAC unit observed that, typically, prosecutors trained in sexual violence cases were always the first to be reallocated, resulting in an understaffing of these teams and discontinuity in prosecutors trained in sexual violence cases.[80] On the other hand, the appointment of a new prosecutor to head the Justice and Peace Unit coincided with greater flexibility and responsiveness to sexual violence cases. Under the new leadership, a woman's complaint of sexual violence (without other evidence) became sufficient to initiate a criminal investigation, where previously additional, 'objective', evidence was required.[81] Importantly, this procedural change endures, although this leadership position is now held by yet another prosecutor.[82] Similarly, training and appointing experienced female prosecutors to the DINAC unit

[76] See e.g. 2015 Follow-up report, above n 69, 53-57; interview C10, NGO.
[77] Interview C12, Fiscalía.
[78] Interview C9, NGO.
[79] Interview C10, NGO.
[80] Interview C13, Fiscalía.
[81] Interview C9, NGO.
[82] Interview C9, NGO.

influenced their colleagues' internalisation of more effective prosecutorial practices vis-à-vis sexual violence crimes.[83]

One interesting observation stems from the DINAC gender adviser's claim that it was an achievement to have obtained 19 judgments for sexual violence committed in the context of armed conflict of the 183 cases referred to the Fiscalía's office by the Constitutional Court in 2008.[84] This contrasts with other sources that as at 2015 had documented only 14 convictions.[85] At the same time, even 19 judgments of 183 high-priority cases in five years seems like a remarkably low threshold for 'achievement'.[86] The gender adviser was also reluctant to disclose the number of cases that had reached court, the time taken for these cases to reach court, or the criteria used to decide whether to prosecute sexual violence as a war crime or as a domestic crime. The distinct impression during the interview was that this reluctance was based on either ignorance or a resistance to disclosing unfavourable information about these crimes, some of which had nonetheless been reported elsewhere.[87]

High (but credible) conviction rates are the ultimate expression of social internalisation of sexual violence accountability norm. This is because they reflect, and are only possible through, widespread adherence to adequate legal frameworks and implemented policies and procedures; that is, complete legal, political and social internalisation. Encouragingly, there are increasing numbers of cases challenging impunity for sexual violence crimes in Colombia; three landmark judgments, all from 2014, are briefly mentioned here. The case against Marco Tulio Pérez Guzmán (*aka* 'El Oso', 'The Bear') marked the first time that a former paramilitary leader had been found ineligible for reduced sentences for confessions available under the Justice and Peace Law based on his failure to tell the truth about crimes of sexual

[83] Interview C13, Fiscalía.
[84] Interview C12, Fiscalía.
[85] 2015 Follow-up report, above n 69, 9.
[86] Interview C12, Fiscalía.
[87] For instance, her reluctance to disclose statistics related to other crimes of sexual violence.

violence.[88] He will now face trial for charges of sexual violence and could be sentenced to up to 40 years' imprisonment.[89]

In a second case, Salvatore Mancuso and eleven co-accused (all senior paramilitaries) were convicted of 1426 crimes, including 175 crimes of sexual violence (including rape, enforced prostitution, forced sterilisation and forced abortion) committed as war tactics to gain control of territory, intimidate civilians and destroy the social fabric of communities.[90] In the third case, a judgment at first instance found that the evidence did not establish a sufficient link between the perpetration of rape and the armed conflict to sustain a conviction of rape as a war crime against *Pérez Guzmán*.[91] This is consistent with traditional social perceptions that sexual violence is committed 'for personal reasons' despite documentation and advocacy by women's NGOs that sexual violence committed by paramilitaries in the context of armed operations and attacks is a war crime, that is, connected to the armed conflict.

In legal environments where conservative socio-cultural attitudes erroneously shape perceptions of sexual behaviour and sexual violence, reliance on alternative authoritative legal sources can increase the 'palatability' of progressive arguments to judicial actors.[92] Reflecting this, in finding a strong enough link to support a conviction as a war crime, the appeal judgment in *Pérez Guzmán* overturned previous national jurisprudence by prohibiting the inference of consent in coercive circumstances; instead it relied on ICC RPE (Rule 70) and jurisprudence from the ICTY and ICTR to reach this conclusion.[93] It is not unusual for national courts to refer to jurisprudence from other jurisdictions for illustrative purposes. However, citing

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[88] El Tiempo, *Corte Suprema dejó en firme exclusión de alias 'El Oso' de Justicia y Paz* (9 March 2015) <http://www.elespectador.com/>.

[89] El Tiempo, *Por delitos no confesados, el 'Oso' pagaría 40 años de cárcel* (10 March 20150) http://www.eltiempo.com/archivo/documento/CMS-15368935. There was no further progress reported publicly on this case as at 31 October 2017.

[90] *Salvatore Mancuso Gómez (Sentencia)* Tribunal Superior de Bogota, (20 November 2014) https://ilg2.files.wordpress.com/2015/04/mancuso-et-al-judgement.pdf

[91] Corte Supreme de Justicia, Sala de Casacion Penal, SP15512-2014, Radicación No. 39392, (Aprobado Acta No. 385).

[92] See e.g. interview C5, Ombudsman's office; interview C14, Fiscalía.

[93] El Tiempo, *Corte Suprema dobló pena para agresores sexuales de una mujer* (25 November 2014) <http://www.eltiempo.com/archivo/documento/CMS-14884545>.

and incorporating a specific procedural rule from the ICC's RPE more closely resembles the application of a 'legal test' that would typically be sourced in national, rather than international, legislation. It is no longer merely a norm interpretation consistent with the standards of the ICC, but instead a direct incorporation of international criminal procedural law into national jurisprudence. It also provides an important national precedent for national norm entrepreneurs to use as leverage in their advocacy efforts.

While these three judgments could represent the initial stages of a norm cascade, implementation of the norm is far from uniform. The Constitutional Court's 2015 *Auto 009* decision illustrates that even explicitly high-priority sexual violence cases referred to the Fiscalía proceed slowly, if at all. Further, in contrast to the *El Oso* precedent, in another case, a paramilitary officer's reduced sentence remains intact, despite direct victim testimony suggesting that sexual violence committed by inferiors was pursuant to policy, rather than on an individual basis.[94] Beyond the inconsistent logic regarding what evidence is sufficient to indicate a policy, this outcome validates concerns around how testimony of sexual violence victims continues to be regarded.

Colombia provides an interesting context within which to understand the importance of each type of internalisation and, specifically, the value in analysing non-legal forms of internalisation even when the relevant norm is legal in nature. Notwithstanding a few gaps in the legal framework addressed in 2014 through Law 1719, Colombian law has recognised a range of sexual violence crimes. While political internalisation is less complete, the Fiscalía has made significant efforts to improve and coordinate its policies and programs regarding crimes of sexual violence, especially since 2012. However, my research suggests only sporadic instances of social internalisation of the sexual violence accountability norm. This internalisation profile suggests that closer monitoring and norm interpretations targeting political and social internalisation by norm entrepreneurs and the OTP will be required to achieve total internalisation. The next sub-section looks at how

[94] El Tiempo, above n 100.

norms have been incorporated into various norm interpretations to promote this outcome.

2.4 Using norm interpretations to promote internalisation

The length and complexity of Colombia's armed conflict and the plethora of post-conflict responses make it difficult to isolate individual causes that demonstrate increased compliance with the sexual violence accountability norm. For several years, Colombia has received both attention and support from international organisations, including various UN agencies and the ICC, as well as from a number of States. While this makes it impossible to disentangle and isolate the OTP's influence on national investigations and prosecutions for international crimes, it provides an opportunity to examine how various actors have incorporated norms from the Rome Statute and the ICC's practice into their own norm-interpretative interactions with State actors. The multiplicity of norm entrepreneurs, government sponsors and interpretive communities provides a range of norm-interpretative engagements from which to infer how internalisation occurs, even if a singular causal relationship cannot be proven.

2.4.1 Use of ICC norms by Colombian norm entrepreneurs

Norm entrepreneurs within Colombia have sought to re-interpret the international norm requiring the prosecution of international crimes to 'include a gender-sensitive perspective in its assessment'.[95] Consistent with the TLP's understanding that norm entrepreneurs use international norms in their own dialogue with relevant State actors, Colombian actors have incorporated ICC definitions, provisions and jurisprudence into their work.

One example of a key governmental norm sponsor is the former Colombian Human Rights Ombudsman's Delegate for children, women and seniors, Pilar Rueda.[96] Ms Rueda ensured the Rome Statute and ICC RPE principles were included in training

[95] E.g. European Center for Constitutional and Human Rights, Sisma Mujer, Collectivo de Abogados, *ICC Communication on Sexual Violence in Colombia* (*'Joint NGO Communication')* (27 April 2015) <https://www.ecchr.eu/en/international-crimes-and-accountability/sexual-violence/colombia.html>.

[96] Pilar Rueda held this position until 2015.

the Ombudsman's office undertakes for its staff and other government agencies. These standards also guide her office's own psycho-social support and protection work with victims engaging with the criminal process.[97] Similarly, although ignorance of international norms remains a prominent challenge,[98] prosecutors in national cases have used definitions of crimes of sexual violence in their submissions;[99] or used procedures to protect vulnerable witnesses by using a separate room for testimony to avoid re-victimisation.[100] NGO lawyers use ICC jurisprudence, definitions and rules of procedure and evidence in court and government submissions, reports and capacity-building training for lawyers.[101] One NGO lawyer noted that international language was starting to be used by prosecutors, although not consistently or to maximum effect.[102]

Just as prosecutors and human rights lawyers incorporate ICC definitions and standards in their arguments to obtain convictions for sexual violence crimes, so too do judges in national courts, particularly in the Colombian Constitutional Court. Beyond the example mentioned in the previous section about social internalisation, another Constitutional Court judgment explicitly refers to the Rome Statute and the ICC RPE in reaffirming victims' rights to be treated with dignity and to enjoy security and privacy, among others.[103] Three other judgments acknowledged the value of provisions in the *ad hoc* tribunal judgments and the ICC RPE regarding the prohibition on inferring consent of victims of sexual assault.[104] One judgment also adopted Rules 16, 88, 94 and 95 of the ICC RPE regarding the participation and protection of sexual violence victims throughout court proceedings.[105]

Since Constitutional Court judgments cannot be directly attributed to OTP scrutiny or norm interpretations in its preliminary examination and they draw from ICC

[97] Interview C4 and C5, Ombudsman's office.
[98] Interview C10, NGO; Amnesty International, above n 24, 19.
[99] Interview C14, Fiscalía.
[100] Interview C5, Ombudsman's office.
[101] Interview C10, NGO.
[102] Interview C9, NGO.
[103] Corte Constitucional, *Sentencia* T-458 de 2007, M.P. Clara Inés Vargas Hernández.
[104] Corte Constitucional, T-554 de 2003, T- 453 de 2005 and T-458 de 2007: M.P. Manuel José Cepeda Espinosa, referring to Rules 70 and 71 of the ICC RPE, adopted into Colombian law through Law 1268 of 2008.
[105] Corte Constitucional, T-453 de 2005, M.P. Manuel José Cepeda Espinosa.

documents independently of any engagement with the OTP, they are better understood as instances of 'norm diffusion'. Nonetheless, they are included here for two reasons. First, they reinforce the TLP's characterisation of how different norm entrepreneurs and national interpretive communities internalise international norms and, second, because they provide additional material that the OTP could use to strengthen its norm interpretations when engaging with government actors. For example, since the Constitutional Court has reinforced victims' rights regarding security and privacy under Colombian law, a systemic failure to provide this for victims of sexual violence could be interpreted as inability or unwillingness to prosecute international crimes for sexual violence. That is, interpreting compliance with the sexual violence accountability norm as requiring victims' rights to security and privacy to be respected is less radical or objectionable if that requirement is already explicitly recognised by Colombia's own courts. This is one example of how the OTP could incorporate more strategically context-specific information to strengthen its norm interpretations with the Colombian State.

Norm entrepreneurs such as women's NGOs play a particularly key role in Colombia because they are both mobilised and proactively use international norms in their advocacy, litigation and public education initiatives. One NGO, the Initiative of Colombian Women for Peace (IMP), reported using ICC standards to work with the judicial police responsible for interviewing witnesses in order to *exclude* inappropriate questions about prior sexual activity, and to *include* questions to establish the military and political context and the motives necessary to prove the elements of international crimes.[106] While this trend was most pronounced in cases where victim witnesses were assisted by NGOs, it was and is also present to a lesser degree in other cases. IMP similarly succeeded in arranging for sexual violence victim witnesses to give testimony from a remote location, so that they were not in the same physical space as the defendants.[107] It is unclear whether this improvement has spread beyond cases in which IMP is involved.

[106] Interview C9, NGO.
[107] Interview C9, NGO.

Since the OTP is perceived by NGOs as a source of international legal authority to guide criminal responses to sexual violence,[108] its failure to critique the inadequacies in national criminal responses to international crimes of sexual violence is a lost opportunity to press for or encourage reform.[109] Similarly, a better knowledge of how ICC norms are already understood and utilised by domestic norm entrepreneurs, and including this information in its norm interpretations, would enhance the OTP's capacity to target more strategically the practices most responsible for inhibiting norm internalisation.

2.4.2 Use of norms in international dialogues

Beyond the formal public dialogue with Colombia and other systemic institutional efforts to focus on sexual and gender-based crimes, Prosecutor Bensouda has responded to specific national developments. Two leaked letters from the OTP to Colombia in 2012 expressed concerns about manifestly inadequate sentences for high-ranked officials guilty of crimes under the Rome Statute and about the inconsistencies between the Colombian 'Legal Framework for Peace' passed earlier that year and the OTP's case prioritisation and selection criteria.[110] In response to the first peace agreement reached between the Colombian government and FARC, Prosecutor Bensouda issued a statement expressing satisfaction that 'the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute'.[111]

Prosecutor Bensouda has been explicit about the areas under the OTP's scrutiny and the genuine 'threat' of an ICC prosecution, should Colombia 'fail to effectively prosecute military and guerrilla commanders over war crimes or crimes against humanity'.[112] In a January 2017 interview with a major Colombian newspaper, Prosecutor Bensouda noted that all direct references in the initial peace agreement

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[108] Interview C9 and C10, NGO.
[109] Interview C11, NGO.
[110] Semana, *Una 'carta bomba'* (17 August 2013) http://www.semana.com/nación/articulo/una-carta-bomba/354430-3
[111] ICC-OTP, Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army (Press Release, 1 September 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>.
[112] Colombia Reports, *Prosecutor warns ICC will try military commanders if Colombia transitional justice fails* (26 January 2017) <http://colombiareports.com/>.

to Article 28 of the Rome Statute, regarding the obligation to prosecute responsible commanders or other superiors, had been eliminated in the revised version. She went on to articulate the definition of command responsibility, and observed that despite language in the agreement that could be interpreted to limit this definition, the implementing legislation would have to conform to the Rome Statute definition.[113] In TLP terms, ICC Prosecutor Bensouda, as a norm entrepreneur, used this interview as a law-declaring forum to interpret the norm obliging investigation and prosecution of international crimes in response to a very specific provision in a particular document. This was not dissimilar to making a statement in response to an inadequate legal provision, policy or practice that would inhibit prosecution of crimes of sexual violence.

The use of ICC norms by other norm entrepreneurs in their various dialogues with Colombian State actors in recent years has also reinforced the content and specific requirements of the norm with respect to crimes of sexual violence. For instance, coinciding with the OTP's increased attention to crimes of sexual violence since 2012, the SRSG CRSV visited Colombia in May 2012 to meet with a range of institutions and called on the Ministry for Defence to revise its ineffective policy of zero tolerance of sexual violence.[114] As SRSGSVC, Mrs Zainab Bangura visited the Havana peace talks in May 2015 to discuss how sexual violence could be addressed in the peace agreement with FARC; her visit coincided with the inaugural commemoration of the 25th of May, which Colombia had declared the National Day for the Dignity of Women Victims of Sexual Violence in the Internal Armed Conflict.[115] This followed a visit two months earlier to Colombia to discuss 'important legislative and policy measures' to address sexual violence in the context of Law 1719.

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[113] Semana, *El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad* (21 January 2017) <http://www.semana.com/nación/articulo/deseo-corte-penal-internaciónal-justicia-transicional-en-colombia/512820>.

[114] Annual report of the United Nations High Commissioner for Human Rights: Addendum Report on the situation of human rights in Colombia, Human Rights Council, 22nd sess, Agenda item 2, A/HRC/22/17/Add.3 (7 January 2013), 11.

[115] SRSG SVC, Communiqué to Commemorate the National Day for the Dignity of Women Victims of Sexual Violence in the Internal Armed Conflict in Colombia (Press Release, 26 May 2015)http://www.un.org/sexualviolenceinconflict/.

Other entities have also noted aspects contributing to Colombia's failure to comply with international obligations and norms. For instance, the CEDAW Committee[116] and the Inter-American Commission for Human Rights[117] have noted the high rate of under-reporting of crimes of sexual violence and, in its 2016 report, the UN Human Rights Committee said, '[t]he situation of utmost concern was the widespread violence against women, including sexual violence. . .'[118] These statements do not refer to criminal justice efforts to combat sexual violence specifically, but they offer additional reliable sources from which the OTP can identify the causes for continued non-compliance with the sexual violence accountability norm in its norm-interpretive interactions.

2.4.3 The value of norm-interpretive interactions

After establishing the nature and extent of norm internalisation, and how national and international actors are invoking the norm, the final step of this analysis is to look at how norm interpretations were the vehicle for promoting internalisation in Colombia. Without explicit statements from the Fiscalía that the OTP's statements shape their prosecutorial priorities, we can only infer that the Rome Statute and the OTP influence compliance with the sexual violence accountability norm. This inference is supported by statements from other actors (and data confirming the veracity of such statements) that the OTP exerted influence. It is also supported by data illustrating how well changes in laws and prosecutorial policies and practices match OTP articulations of the norm and, conversely, whether silences in OTP norm interpretations correlate with an absence of improvements in national criminal processes.

A Colombian foreign affairs representative confirmed that the OTP PEX reports put the country on notice of 'where the gaps are'.[119] Certainly, prosecutors are motivated by their desire to avoid an ICC investigation.[120] This was reflected in the

[116] CEDAW Committee, Observations on the combined seventh and eight periodic reports of Colombia, CEADW/C/COL/CO/7-8 (29 October 2013) [17]-[18].
[117] IACHR, Violence and discrimination against women in the armed conflict in Colombia, OEA/Ser.L/V/II.Doc.67 (18 October 2006).
[118] UNOHCHR, Human Rights Committee considers the report of Colombia (20 October 2016) <http://www.ohchr.org/>.
[119] Interview C1, MFA.
[120] Interview I4.

inclusion of some form of punishment in the peace agreement:[121] '[t]he ICC in some way pushes the Colombian State to do some things. For instance, if you analyse the peace process, the easiest path to facilitate a negotiation was an amnesty but the ICC played an important role'.[122] Similarly, OTP PEX reports function as indicators of where the OTP considers there are gaps in the Colombian criminal justice response to international crimes.[123] NGO representatives confirmed that the OTP's articulation of standards and failings in the Colombian legal system had created pressure for improvement.[124] For the Ombudsman's representative, part of the reason paramilitary and guerrilla groups were trying to prevent their members from committing rape and forced recruitment was because they knew that these were two crimes the OTP was 'watching' in Colombia.[125] This suggests a trend towards obedience (but not internalisation) of the norm of non-commission of crimes of sexual violence: that is, the norm intended as the outcome of deterrence achieved by the widespread internalisation of the sexual violence accountability norm.

On the other hand, the perception within the Fiscalía's office was that the ICC did not understand the complexities of the Colombian context or its criminal justice system.[126] The OTP's influence would be improved with increased cultural sensitivity and a more nuanced, in-depth, knowledge about developments, progress and ongoing challenges 'on the ground'.[127] This would also facilitate more targeted norm interpretations, focused on the most significant and concerning obstacles to prosecuting sexual violence crimes. While it may not be feasible for the OTP to do the 'research' itself, it could draw (and has already drawn) more extensively on documentation and analysis of the criminal justice system's treatment of crimes of sexual violence from a range other norm entrepreneurs, both national and international.

[121] Interview C13, Fiscalía.
[122] Interview C1, MFA.
[123] Interview C1, MFA; interview I4.
[124] Interview C11, NGO.
[125] Interview C4, Ombudsman's office.
[126] Interview C13, Fiscalía.
[127] Interview C13, Fiscalía.

If articulating certain norms in norm-interpretive dialogues facilitates their internalisation, then any 'blind spot' in the OTP's norm interpretations may be expected to result in a corresponding national failure to address that blind spot. Of course, such silences do not prove the existence of a causal relationship, but they are consistent with the claim that such dialogues correlate to and may contribute to national efforts to pursue criminal accountability for international crimes. For example, the OTP's PEX focuses on sexual violence committed by non-State actors only; this is reflected in the Colombian criminal justice system's focus on the same actors, and not State military actors[128], even though the latter are responsible for more than 50% of the sexual violence committed.[129] Negating the argument that the State will always prioritise the prosecution of non-State actors over State actors is former Prosecutor Ocampo's specific focus on Congress members implicated in crimes committed by armed groups, and the subsequent conviction of fifty of these individuals. Further, the courts have consistently convicted soldiers for other crimes, including what are known as 'false positive' killings, whereby the military kills civilians and claims they are guerrillas to inflate their 'success rates'.[130]

The capacity of international norms to challenge and ultimately replace pre-existing national norms is realised through their invocation by the relevant actors. Thus, one of the indirect effects of the Rome Statute standards is the communication of these by norm entrepreneurs, transnational issue networks and interpretive communities to relevant Colombian State actors. One interviewee noted, 'the international attention has increased the number of cases and testimonies and led the Colombian system to meet certain standards. For example, [in 2012] the UNSR SVAC Margot Wallstrom came to Colombia and this increased the pressure on the Colombian State to do more on sexual violence'.[131] Another interviewee observed, 'when a prosecutor has a cultural concept this influences the way they investigate . . . [n]ormally judges make their decisions on the basis of law and social norms but sometimes judges make decisions to alter how society works to challenge social

[128] See Joint NGO Communication, above n 106.
[129] Hansen-Bundy, above n 26.
[130] ICC-OTP, *Report on Preliminary Examination Activities 2011* (2011), 17.
[131] Interview C7, NGO.

norms'.[132] Rome Statute provisions on command responsibility have also guided the approach to prosecuting senior members of paramilitary groups for sexual slavery associated with the armed conflict.[133]

Across several issues, there was a discrepancy regarding prosecutor practices between representations made by the Fiscalía's DINAC gender adviser and by the NGO lawyers and women victims witnesses. This is not surprising and could be due to inconsistent policy formulation and implementation manifested in ad hoc positive practices (consistent with NGO lawyer observations). It may also indicate an absence of political internalisation. Or it may be attributable to prosecutors' reluctance to implement policies that do exist, indicating an absence of social internalisation. Regardless of the reason(s), Colombia's compliance with the sexual violence accountability norm will require internalisation beyond appropriate laws.[134]

Colombia now has a relatively comprehensive legal framework, and there have been efforts to promote compliance with the sexual violence accountability norm by national governmental norm sponsors, interpretive communities and law-declaring fora in the form of national courts (particularly the Constitutional Court). However, most substantial improvements in procedures, policies and convictions for crimes of sexual violence date from 2012. This coincided with the OTP's first interim report on Colombia, which identified sexual violence as one of five focus areas in its preliminary examination. It also coincided with Prosecutor Bensouda's appointment in June 2012.

These changes were not a result of new information or data confirming the scale of commission or degree of impunity for crimes of sexual violence, since such data was publicly available prior to 2012. While some of the time lag could be argued to stem from the time required to investigate and prosecute a case to the stage of conviction,

[132] Interview C8, NGO.
[133] Interview C9, NGO.
[134] Note that the Fiscalía's DINAC gender adviser confirmed the laws are adequate: interview C12, Fiscalía.

the requisite policies, appointment of expert staff, integration of international experts and shift in practices (on an *ad hoc* basis) date from 2012 as well. Indeed, the OTP Director of the Prosecutions Division framed the shift in this way:

> We were sending various messages for a long while but it was only when we had the report in 2012 that the office showed that it is following national developments and monitoring them closely. Secondly, that the official report identifies the areas of concern for the national actors to be aware of. It was a game-changer because the court was now engaging in a different way. You're letting them know that you're aware of what is transpiring. I also got the feeling that it was perceived that way by civil society. Clearly, they realised that for the first time we were watching. Before then they did not know that.[135]

The research demonstrates there is significant scope for the OTP to enhance its catalytic impact. By drawing from a broader range of sources to articulate and support more informed and nuanced norm interpretations, the OTP could target the specific barriers to political and social internalisation better. Moreover, it could build on and use progress, standards and practices already being applied by Colombian norm entrepreneurs, interpretive communities like the Constitutional Court and government sponsors. This may be particularly important given that incomplete social internalisation presents the most significant challenge to promoting compliance with the sexual violence accountability norm. Similarly, the OTP's own investigative conduct, and how gender-sensitive it is, offers a standard for national criminal justice actors to reinforce the behavioural changes required to investigate crimes of sexual violence effectively.

In the context of pre-existing impunity, the research also demonstrates that the OTP has contributed to varying extents to the legal, political and social internalisation of the sexual violence accountability norm in Colombia. Regular instances of internalisation suggest that Colombia can be considered to be genuinely investigating and prosecuting international crimes, but also that OTP scrutiny and engagement is continuing to prompt improvements towards norm compliance.

[135] Interview I4.

3. Internalisation of the sexual violence accountability norm in Guinea

3.1 Legal challenges and legal internalisation

At the time of the stadium massacre, and up until 2016, the 1988 Guinean Penal Code was restrictive in its definition of crimes of sexual violence and did not include international crimes as such. Article 321 of that law defined the act of rape in gender-neutral terms, 'sexual penetration, whatever its nature', but the *mens rea* element was 'violence, constraint or surprise' and the sentence range was from five to ten years. Indecent assault was defined as any indecent act with or without violence and carried no minimum sentence.[136] This means the sexual mutilation, kidnapping accompanied by various forms of sexual abuse, and other forms of sexual assault committed during the stadium massacre and in the following days could be charged only as indecent assault or some form of physical assault.

While several acts committed by the military, and in times of war, are criminalised, they do not encompass or match the grave breaches listed in the Geneva Conventions. There are no provisions establishing command or superior responsibility as a basis for criminal liability; complicity and co-perpetration were the only available methods to establish indirect responsibility under the 1988 Penal Code, and required a specific intention to assist another in the commission of a crime.[137]

Indicators of legal internalisation since the stadium case commenced would include laws that define crimes of sexual violence more accurately and more expansively and facilitate their prosecution. However, legal internalisation has been impeded by the absence of cases; the human rights lawyers most engaged with women openly acknowledge that rape cases are rare. Only one lawyer identified the problem as being that the law defines only rape as an offence of sexual violence. This means that indecent assault is the residual 'catch-all' crime for any other sexual offences; 'other

[136] Guinée Code Pénal 1988, art 322.
[137] Guinée Code Pénal 1988, art 51, which states: Complicity is the participation of an individual in full knowledge of the facts, a crime or a crime of which another is the principal perpetrator. Article 52 states: A co-perpetrator shall be deemed to be the co-perpetrator, who shall co-operate in the material realisation of the offense, shall act at the same time as the principal author, shall give the latter and receive mutual assistance. [author's trans]

forms of sexual violence have not [been defined], for example forced nudity, rape by more than one person, and when you touch the girls on sexual parts'.[138] To some extent the general failure to identify inadequacies in the legal definition of sexual violence may be a product of this dearth of cases.[139] That is, without reports of other forms of sexual violence that can only be charged, manifestly inappropriately, as indecent assault, which then result in sentences that are manifestly inadequate, there is no evidentiary basis from which to challenge the law's deficiencies.

Nevertheless, there has been some recent legal internalisation of the sexual violence accountability norm. In 2016, a revised Penal Code and Penal Procedure Code were passed by the Guinean Parliament. The Penal Code includes in its text genocide, war crimes, and crimes against humanity. War crimes include other violations of the laws and customs applicable to international and non-international armed conflicts within the established framework of international law. These include any of the following acts: rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation and all other forms of sexual violence constituting offences under the Geneva Conventions and their additional protocols.[140] Crimes against humanity similarly include all the internationally recognised crimes of sexual violence appearing in Article 7 of the Rome Statute: 'rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence of comparable gravity'.[141] This is a rudimentary but straightforward example of legal internalisation in TLP terms. Entire provisions were 'copy-pasted' into the new law, indicating an acceptance of the Rome Statute's articulation of international crimes and notwithstanding any inconsistencies with pre-existing national laws.

The new Penal Code's chapter on sexual offences defines the crime of 'sexual assault' as any sexual offence committed with violence, coercion, threat or surprise, but does not identify its sentence.[142] The law otherwise retains the previous distinction

[138] Interview G8, NGO.
[139] Only two of the human rights identified problems with the law (interview G1, MJ; G8, NGO); others said it was a problem of enforcement (interviews G4, G6, G7 - NGOs).
[140] Guinea Portant Pénal Code 2016, art 789(22), 792(6).
[141] Guinea Portant Pénal Code 2016, art 194(7).
[142] Guinea Portant Pénal Code 2016, art 267.

between rape and indecent assault without identifying other crimes of sexual violence. However, Article 148 prohibits a suspended sentence for several crimes, including sexual assault, an option that had been available under the previous law. A new offence of trafficking (including sexual abuse) is also included in the new Penal Code.[143]

This legislative scheme has two implications in the Guinean criminal justice system. First, it creates a two-tiered justice system whereby some crimes, such as forced nudity and forced pregnancy, can be prosecuted as an international crime under Articles 232(2) and 789(22) respectively, but cannot be prosecuted as an ordinary crime. Second, it raises the question relevant to many other countries: can acts recognised as ordinary national crimes committed before 2016 be prosecuted as international crimes without offending the *nullum crimen sine lege* (*legality)* principle? If the judges appointed for the trial of the stadium case interpret the legality principle in accordance with international law, the *legality* principle poses no obstacle to national prosecutions of international crimes. However, as was the case in Senegal for the Hissène Habré case, it is also possible for national judges to apply the test according to national law and conclude it illegal to prosecute international crimes that were not criminalised as such in national law at the time of their commission.[144]

The incorporation of international crimes into national legislation is important, but so is the parallel failure to incorporate crimes of sexual violence into the general criminal provisions for sexual violence. The failure to reconcile discrepant definitions of sexual violence crimes in the law is also disappointing, given the intensity of the OTP's, and other international actors', scrutiny and engagement with Guinean State actors. It seems counter-intuitive, or at least very unlikely, that the OTP was unaware of the criminal law reform process, given its regular engagement with Guinean authorities. On the other hand, if the OTP was unaware of the reform process and content, this may have been a strategic decision by the State to avoid

[143] Guinea Portant Pénal Code 2016, art 323(4).
[144] Valentina Spiga, 'Non-Retroactivity of Criminal Law: A New Chapter in the Hissene Habre Saga' (2011) 9(1) *Journal of International Criminal Justice* 5.

criticism of the significant inconsistencies in the new Penal Code with international law standards.

It is not in the purview of the OTP to examine or review national criminal legal systems on a wholesale basis, as a court of appeal or human rights institution might. Nevertheless, until May 2016, when the new Criminal Code was adopted, the OTP could have accurately and appropriately indicated Guinea's inability to prosecute appropriately those crimes committed in the stadium case, due to its failure to identify crimes of sexual mutilation and sexual slavery in its laws.[145] If the new provisions incorporating war crimes and crimes against humanity do not apply to the stadium massacre due to concerns about retroactivity, this inability continues to exist.

Unfortunately, the new Penal Code also fails to incorporate command or superior responsibility, except for deeming it to be 'manifestly unlawful' to order either genocide or a crime against humanity.[146] The wealth of international criminal jurisprudence demonstrates such a provision is wholly inadequate to capture the conduct of most senior perpetrators who stop short of explicitly ordering their subordinates to commit crimes.[147] This failure to adopt international standards for accountability of military commanders and senior government officials is disappointing, but not unsurprising, given Guinea's entrenched history of impunity for crimes committed by these individuals. The 2016 Penal Code does add to the pre-existing provisions on complicity and co-perpetration so that they apply to

[145] Chapter 7.5 discusses how a gender-sensitive assessment of inability could incorporate an examination of whether the legal framework enables prosecution for the international crimes under OTP scrutiny during preliminary examinations.

[146] Guinea Portant Pénal Code 2016, art 197. Article 15 of the same law allows for criminal liability in cases of carelessness, negligence or breach of an obligation of prudence or security provided for by law or regulation, if it is established that the author of the facts did not perform due diligence, taking into account, where appropriate, the nature of his duties or functions, his powers and the power and means at his disposal. However, this does not explicitly extend to responsibility for inferiors' crimes.

[147] See Chapter 3.4.2 for the discussion on *Katanga;* see also See Prosecutor v *Kajelijeli (Judgment and Sentence)* (ICTR, Trial Chamber, Case No. ICTR-98-44A-T) [681] (describing how a witness's account of her sexual assault is not sufficient to prove the existence of an order to commit that particular sexual assault).

crimes of torture, sexual violence and sexual harassment, which constitutes a significant development.[148]

There also continue to be procedural loopholes, notwithstanding the revised gender-neutral Criminal Procedure Code passed in 2016, which provides for in-camera proceedings; for example, women's testimony is valued less than men's testimony under Islamic and customary law.[149] Article 8 of the Constitution explicitly enshrines equality and prohibits discrimination by reason of sex, birth, race, ethnicity, language, beliefs and political, philosophical or religious beliefs. Article 151 of the Constitution ensures that any draft bill or proposal that does not conform to the Constitution cannot pass into law. However, evaluating whether this constitutional provision is or has been used to invalidate discriminatory procedural customary practices requires determining the extent to which the constitutional equality provision has been applied to preserve gender equality (which would constitute social internalisation), the answer to which requires further field research.

Guinea has only partly legally internalised the sexual violence accountability norm; unfortunately, the remaining gaps continue to limit the range of sexual crimes that can be prosecuted and the prospects for holding senior commanders criminally responsible for crimes committed by their subordinates. Challenging the entrenched impunity enjoyed by the military for crimes committed against civilians in Guinea may thus depend on activism by government norm sponsors and norm entrepreneurs to trigger legal and political internalisation. That is, a public demand for accountability coupled with political leadership may be required to precipitate a culture of accountability for international crimes.

3.2 Political internalisation

Political internalisation in Guinea is characterised by the juxtaposition between the political rhetoric at the international level and domestic policies (or lack thereof); both are mentioned here. At the level of political rhetoric, the Minister of Justice as

[148] Guinea Portant Pénal Code 2016, art 281, which refers to articles 233, 234, 268, 270 and 277.
[149] See e.g. US Department of State, *Country Reports on Human Rights Practices 2013: Guinea* (2013) <https://www.state.gov/documents/organisation/220332.pdf>.

at June 2013, who presented Guinea's progress to the UN in New York the same month he was interviewed for this thesis, repeatedly emphasised Guinea's commitment to justice. It is assumed that the representations made in this interview were consistent with those communicated by him in his capacity as a State representative to the ICC, the UN and other international actors. Some of the key relevant representations made (not always verbatim) are extracted below:

* The government inherited the responsibility to address the stadium case but 'is not guilty or responsible for what happened in 2009'.[150]

* The government will not 'protect or privilege anyone'; 'those in power at the time need to be held responsible'.

*The judges have "everything at their disposal" and could have travelled to meet women witnesses but had not.

*'There has been a lot of progress made since the government came into power, much more than the previous government could do because that government was implicated'.

*'Before who would have thought to even charge members of the government, no one else has done this'.

*'With the ICC or without the ICC, anyone who was involved in this case will face justice and they will answer to the court. It's a point of pride. All the reforms of the gendarmerie and armed forces is because of our commitment to justice'.

* 'As the Minister of Justice, I want to show to the world that the Guinea judiciary is capable'.

*'Those who thought they were untouchable have been touched. By the end of [2013] you will see will we have done a lot of things'.

Three key messages emerge. The first is that the government has a commitment to justice that encompasses those who are most responsible; second, that this is a definitive and unprecedented break with the past record of impunity for coups and election-related episodes of violence in Guinea's history; and, third, that completing

[150] I note this is not the position under international law with respect to State responsibility: International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', 53rd sess, Vol.II(2) *Yearbook of the International Law Commission,* art 2, 35 [6].

the case is a matter of national pride, rather than any connection to OTP scrutiny.[151] Each of these messages is contradicted to varying degrees by the government's actual policies and practices, revealed through interviews with non-State actors in Guinea, as explored below. Yet, the three individuals initially identified by the UN Commission of Inquiry report[152] as criminal suspects have all been charged. Understanding the implications of these discrepancies is ultimately a matter of understanding how norm-interpretive interactions affect each type of internalisation processes differently, as discussed further in Chapter 6.3.5 below.

With respect to sexual violence, given the limited experience that national criminal justice actors have with sexual violence crimes, it is perhaps unsurprising that there are no policies or set procedures in Guinea for interviewing or gathering testimony from victims of sexual violence. All three judges hearing testimony as part of the investigation stage in the stadium case are male, and none have received training related to crimes of sexual violence.[153] This had a material impact on the comfort of women witnesses, one of whom recounted: 'I was not comfortable because it is not easy to tell this story just to men'.[154] It was not possible to determine whether there were or are prosecutorial policies for case selection and prioritisation, treatment of witnesses, investigative methods, and case management; it seemed at the time of the research that victim and witness protection and support measures by way of legal or institutional structures did not exist.[155]

It is difficult to conclude any meaningful political internalisation of the sexual violence accountability norm in such circumstances. However, the statements from the Minister of Justice provide a unique insight into the dynamics of norm-interpretive interactions at a macro-level and a telling counterpoint to the

[151] This point was also made by the former President of the Supreme Court, but he linked national pride to the need to prove capacity so the case can proceed without ICC intervention: interview G9, NGO.
[152] See Chapter 5.3.
[153] Interview G1, MJ; interviews G2, G6, G7, NGOs. One interviewee noted only one of the six officials in court was a woman – she was a secretary. Note that the judges subsequently received training from UN experts, including on interviewing techniques, but this occurred after over 300 witnesses had already testified. There are no charges laid at the investigation stage of a case: this happens at its conclusion in advance of the trial stage.
[154] Interview G17, witness.
[155] Interview G7, NGO.

experiences as narrated by victims and human rights lawyers involved in the stadium case. They provide a more explicit account of how States may frame their responses as norm-compliant, and how the OTP exerts influence over national prosecutions of international crimes at a practical level.

3.3 Social internalisation

It is difficult to isolate social internalisation of the sexual violence accountability norm from that related to other international crimes in Guinea. This is because the investigation of all crimes related to the stadium case has been slow and flawed, and because sexual violence is such a taboo topic in Guinean society.[156] In other words, the absence of general adherence to the norm obliging prosecution of international crimes of sexual violence is a product of both behaviour relating to all the international crimes committed in the stadium case, and the fact that sexual violence is so infrequently criminally investigated at the national level. One important contextual factor in the current analysis is the well-documented corruption of and political interference in the judicial system.[157]

Human rights lawyers openly admitted that before the stadium case people would not report rapes because it was culturally taboo, and that there was no administrative willingness to investigate and prosecute such crimes; however, they thought that this changed after September 2009.[158] Women identified the very well-founded fear of ostracism and abandonment by their husbands as the reason for their reluctance to report.[159] Accompanying this was the judges' misapprehension, expressed in their questions, that female victims may want compensation rather than justice[160] or that compensation would be an acceptable substitute for criminal justice outcomes.[161] One woman recounted:

> I was asked by the people inside the court whether I would like compensation but I said what I experienced nothing can compensate me. Outside there were military.

[156] Interview G2, NGO.
[157] See e.g. HRW, above n 151; HRW, *Waiting for Justice: Accountability before Guinea's Courts for the September 28, 2009 Stadium Massacre, Rapes and Other Abuses* (2012), 34.
[158] Interview G2, G3, G4, G6 – NGOs.
[159] Interview G 12, G14, G16, G21 - witnesses; this was also referred to in interviews G2, G6, G8 – NGOs.
[160] Interview G1, MJ; interviews G2, G8 – NGOs.
[161] Interview G3, G8 – NGOs.

> And we were very afraid because they would call us by name individual and we would go into the courtroom in front of the military. It was very scary. I was asked to give my medical certificate and documents but I didn't because I really didn't trust them.[162]

In addition, insensitive questions caused victims emotional distress.[163] Conversely, some women found the judges empathetic, sometimes to the point of tears, and committed to doing their best to 'deliver justice'.[164]

Social internalisation is in its nascent stages, the first precondition being public recognition of both the incidence of sexual violence and, more importantly, the continuing impunity of perpetrators. Prosecuting high-profile instances of sexual violence is one initial aspect of social internalisation, and it seems to have highlighted impunity in other contexts, particularly in relation to crimes against minors, and those committed in military operations beyond the stadium case.[165] In late 2015, women's organisations filed demands with several ministers and held a protest march against impunity for sexual violence. One representative explained, 'impunity has become institutional in Guinea. Even when you are entitled to ask for justice and to lodge a complaint, it is the society which pressures you so that you abandon justice'. [166]

The second precondition of social internalisation is that the relevant actors understand the applicable laws. In Guinea, this is not necessarily the case. For instance, the perception that a prosecution is impossible if the woman cannot identify her rapist precludes any inquiry into indirect forms of responsibility.[167] Yet, and as the former President of the Supreme Court noted, a criminal case following the 1996 attempted military coup case involved commanders being held

[162] Interview G14.
[163] Interview G7, NGO.
[164] Interview G12, G13, G14, G17, G20 – witnesses.
[165] Interview G4, G6 – NGOs.
[166] Les Guinéennes manifestent contre les violences sexuelles (4 November 2015) <http://www.rfi.fr/afrique/20151104-guinee-manifestation-violences-sexuelles-viols-conakry-ong>.
[167] Interview G9, NGO.

responsible for the actions of their subordinates.[168] Similarly, when stating that the laws (at the time) adequately addressed sexual violence, the Prosecutor of the stadium case incorrectly stated the maximum sentence for attempted rape was five years; Article 321 of the Penal Code specifies the penalty for attempted rape is the same as rape, namely 5 to 10 years. When asked whether the law adequately defined sexual crimes other than rape, the Prosecutor's response was, 'Yes, like attempt to rape'.[169] This is particularly concerning, given it was highly likely that the Prosecutor knew (or should have known) of the documented instances of sexual mutilation and sexual slavery in the stadium case, which were not adequately covered by the offence of rape. As foreshadowed in Chapters 1.3 and 6.2.4, the barriers to social internalisation are two-fold. They include community-wide factors that inhibit reporting or continuing to engage with criminal investigations, and also national criminal justice actors' knowledge, attitudes and behaviour in cases of sexual violence.

At a subtler level, the Prosecutor's perception that sexual violence was exceptional, committed by 'delinquents and sick people', may have contributed to his inability to identify why rape was committed in the stadium case.[170] This is, of course, the problematic attitude that predisposes criminal justice actors to fail to detect or identify sexual violence as international crimes and instead presume they are committed by a few deviant individuals. Similarly, while acknowledging victims' fears as a key obstacle to obtaining convictions for crimes of sexual violence, the Prosecutor suggested the solution was to 'sensitise' the people so they would meet with authorities. His failure to mention the reasons for such fear or how those reasons could be addressed was compounded by his reference to the availability of 'security services' employed by the Ministry of Justice to protect women, at the request of the Prosecutor.[171] There was no acknowledgement that women feared the security sector because of its role in the stadium massacre, but rather complete

[168] Interview G9, NGO; but he did not know the exact legal basis for this finding (whether command responsibility or co-perpetration for example); and this conflicts with some reports that superiors were not prosecuted: http://www.refworld.org/docid/3ae6ac5a8.html.
[169] Note that while the Prosecutor had an opportunity to elaborate on this response but did not, it is not possible to conclude he intended this to be an exhaustive description: Interview G11, Prosecutor.
[170] Interview G11, Prosecutor.
[171] Interview G11, Prosecutor.

confidence that women 'are very well treated; they can talk to the police officers, and during that meeting they are listened to and recorded'.[172] When asked whether a defendant's status as a police officer or gendarme makes prosecuting difficult, his response was, 'if they are perpetrators they will be prosecuted'.[173] It is understandable that an officer of the court would have faith in the system's capacity to deliver justice, but failing to acknowledge the basis for victims' security concerns – namely the commission of sexual violence by security sector personnel – renders the prosecutor's office less able to address them.

Further, there was no standardised procedure for hearing the victims, explaining the court procedure and recording their testimonies. Even without confirming whether political motives were at play, allocating the case to a room in a building surrounded by members of the gendarmerie severely intimidated victims who attended that first location (before the case was relocated).[174] Several women interviewees reported going to a building surrounded by members of the gendarmerie and consequently not believing they were appearing before judges: 'the first building was the one with the gendarme and women didn't give testimony because of that and were intimidated'.[175] One woman recounted,

> I was very afraid because there were soldiers at the entrance and we had to ask them to open the door for us to even walk into the court. The offices of the security forces were right next to the building. The gendarme were right there (green cap), they were responsible for security in the election. They were there to make sure only people who were authorised could enter the court. The gendarme were leaving when I arrived and asked me what I am doing there at the court and I was intimidated.[176]

One woman thought she was going to be killed; when she said this to the individuals in the building they laughed at her.[177] A few women became so suspicious and

[172] Interview G11, Prosecutor.
[173] Interview G11, Prosecutor.
[174] Interview G14, G18, G21 – witnesses.
[175] Interview G14, witness.
[176] Interview G15, witness.
[177] Interview G15, witness.

fearful they refused to testify or hand over their documents because they did not believe the process was genuine.[178] These fears are partly a product of inadequate outreach, training and communication; however, they also reflect an ignorance of procedures required to encourage vulnerable witnesses to testify and participate fully in criminal justice processes. These investigative challenges are observable at the level of social internalisation, through behaviour, but are also symptomatic of systemic incapacity or inadequacies at the legal and policy levels.

As noted in Chapter 5.6, the stadium case is at a preliminary hearing stage and the investigating judges must recommend the charges to be laid to trial judges before individuals are brought to trial.[179] In the initial stages of the preliminary hearings, there were no lawyers present to support the victims while they gave testimony before the investigating judges.[180] Some women faced an all-male panel of three judges, with one judge asking questions;[181] others were questioned by one individual judge while other women were questioned by other individual judges at the same time in the same room.[182] Although rape cases were and are very rare in Guinea, investigating judges expressed scepticism as to the truth of the allegations, which in turn affected the chances of prosecution; this is because these judges' reports influence the prosecutor's decision to proceed with a case or not.[183] One other unusual experience that women reported when interviewed for this thesis was being asked by the judges whether they would prefer compensation or a judgment. All the women who mentioned this question reported that they wanted justice, and that no amount of money could properly compensate for their suffering.[184] When questioned further, one woman clarified that the question she was asked was, 'If I had to choose, would I choose justice or compensation?'[185]

[178] Interview G14, G15, G20 – witnesses.
[179] Procédure Pénale 1988, Chapter III. This is reproduced in Chapter III of the Guinée Noveau Code Procédure Pénale of 2016.
[180] Interview G10, NGO; interview G15, witness.
[181] Interview G12, G16, G19 – witnesses.
[182] Interview G13, G14, G15, G18 – witnesses.
[183] Interview G6, G8 – NGOs.
[184] Interview G14, G15, G18- witnesses.
[185] Interview G18, witness.

While inquiring what forms of reparation may assist victims is not so concerning in cases of significant and multi-faceted suffering, framing the options as potentially mutually exclusive creates the misleading impression that (1) the victim may be required to choose at some point in time and (2) that the process for criminal punishment may not be independent. However, the intention behind this question may be more disturbing: to assess whether women are reporting crimes solely to receive compensation money. This concern was voiced explicitly by the Minister of Justice: '[t]here are many people who are claiming that they were raped but they are asking for 100,000 francs so it is uncertain if it is real or if they are doing it to get money'.[186] This attitude of doubting the credibility of rape victims is not uncommon in patriarchal conservative societies, where the absence of evidence and corroborative testimony weakens the perceived reliability and strength of the prosecution case and the impression that the victim is telling the truth.[187]

Women interviewees reported that they gained the confidence to testify from the support they received from an association established in response to the 28 September stadium events and that they would not have reported their experiences to authorities otherwise, in part because the perpetrators were themselves members of the police and the military.[188] Changing the location of the hearings and coordinating with victim support organisations to arrange for lawyers or other support staff to accompany victims to the court were key improvements to bolstering the victims' confidence. This underlines the importance of supporting victims' organisations being present and advocating on behalf of the women appearing before the investigating judges. These representatives – norm entrepreneurs in TLP terms – appealed to the judges to introduce themselves, to re-ask questions that victims did not understand, to take breaks if it was clear the victims were under emotional stress, to ask questions about issues that were not

[186] Interview G1, MJ.
[187] UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52-54. <http://www.unwomen.org >
[188] This is the Association of Victims, Parents and Friends of September 28, 2009, known as AVIPA: G16, G17, G19, G20, G21 – witnesses.

raised or were not clear, and to ensure there was enough time to hear a victim's entire story.[189]

Social internalisation appears to have improved since Mr Cheick Sako, who had previously practised law for 37 years in France, was appointed Minister for Justice in January 2014. Minister Sako is considered by international norm entrepreneurs as a key governmental norm sponsor.[190] Building trust with the victims' association, informing them of case developments and receiving their suggestions for reparations allowed the minister to generate internal pressure based on the information received from such norm entrepreneurs. His markedly different approach to the stadium case underscores how instrumental governmental norm sponsors can be in promoting social internalisation, as well as legal and political internalisation.

In Guinea, social internalisation has centred on the stadium case; there is no indication that this will extend to encourage command responsibility or accountability for sexual violence more generally. On the other hand, the stadium case has both prompted more activity by norm entrepreneurs around impunity for sexual violence and raised the public profile of the issue sufficiently to invoke reciprocal initiatives by the State. The conduct and outcome of the stadium trial is likely to influence the degree to which all three types of internalisation continue beyond OTP scrutiny during a preliminary examination.

3.4 Contributions by the ICC to norm internalisation

There are some indications that the OTP has influenced the trajectory of the stadium case. As acknowledged in Chapter 1, explicit statements from government representatives that the progress in the case was *attributable* to the ICC are unlikely, given State interests in protecting the perception of absolute sovereignty and capacity. Further, statements by norm entrepreneurs and the ICC (norm interpretations) can only be considered to *coincide* with State action in the stadium

[189] Interview G7, G8 – NGOs.
[190] Interview I5.

case unless there is evidence suggesting they have influenced or *contributed* to increased norm compliance.

Nonetheless, the Minister of Justice provided a clear temporal and substantive link between the concerns raised by the OTP in norm-interpretive dialogues and the State responses to those: 'When they came recently and addressed issues such as the slow progress, after they left I called in the magistrates and asked them what the possibilities are and what they can change'.[191] This explicit, albeit informal, acknowledgement of his responsiveness to OTP concerns is consistent with a causal relationship between OTP norm interpretations and State compliance with those norm interpretations.

There were also actions or events from which a contribution of OTP activities to internalisation in Guinea may plausibly be inferred. These include the coincidence between OTP or international actions and steps taken at the national level (and how criminal justice actors perceive this relationship); State explanations of action (such as failing to arrest any accused working in the current government) that would otherwise indicate unwillingness; and correlation between aspects of the stadium case included in the OTP's norm interpretations and aspects that were not part of their engagement (for example, the failure to prosecute certain sexual violence crimes under Guinean law) and Guinea's response, or failure to respond, to these challenges.

3.4.1 Coincidence of OTP interactions and case developments

The very initiation of national proceedings was temporally tied to the OTP's preliminary examination. Only six days after the PEX was opened, the Guinean Minister of Foreign Affairs at the time visited the ICC to set out what measures had been taken by the Guinean authorities to ensure that the crimes allegedly committed would be suitably investigated. Using words from the Rome Statute, he stated that the national judiciary was 'able and willing' to proceed.[192] The Presiding judge

[191] Interview G1, MJ.
[192] ICC-OTP, Guinea Minister visits the ICC – Prosecutor Requests Information on National Investigations into 28 September Violence (Press Release, 21 October 2009).

openly acknowledged that this case was the first time in the country's history that senior State actors were being tried, despite many other instances of crimes committed by the military, and that 'the prosecution was due to international pressure and the panel of judges was set up due to international pressure'.[193] Further, the Presiding judge viewed the OTP's recurring review of the case (and any problems or mismanagement of it) as supporting the progress of the case.[194]

The 2012 OTP PEX report refers to a July 2012 letter from Prosecutor Bensouda to President Conde of Guinea about lack of resources provided to the panel hearing that precipitated their provision later that year. As referenced in Chapter 4.4.1, the timing of the remedy suggests that the initial failure may have been due to unwillingness rather than inability in these circumstances (and there were no reports of judiciary-wide supply scarcities). Interviews of victims and witnesses resumed shortly thereafter, which led to the indictment of the former Health Minister Col. Diaby.[195] In stating that the ICC had an impact, one human rights lawyer noted, '[m]ostly when they are here, everyone is active because the boat is sinking but I think the ICC is another body that can pressure the system over here'. Another lawyer commented that every year the ICC comes to investigate the progress and uses the same language, 'if there is no progress in the next year, then we will investigate'.[196] The halting, but continuing, progress of the case has precluded this threat from being proven either genuine or false.

All NGO representatives, the Presiding judge in the stadium case and the former President of the Supreme Court agreed that the OTP's engagement had positively affected the stadium case.[197] This impact is tied to several ICC visits per year, as reflected in key steps in the case being taken by State actors around the time of OTP visits.[198] Table 6.1 below lists key case developments and OTP visits to Guinea. While it does not include key internal decisions (such as the government decision

[193] Interview G5 - NGO.
[194] Interview G5 – NGO.
[195] ICC-OTP, *Report on Preliminary Examination Activities 2012* (2012), 36.
[196] Interview G4, NGO.
[197] Interview G2, G3, G4, G5, G6, G7, G8, G9 – NGOs.
[198] The first three ICC visits were claimed to precede the first three indictments: interview G7, G8 - NGOs.

required to trigger an arrest warrant through Interpol) and the temporal link is more obvious for some events than others, generally only one key event, if that, seemed to occur between OTP visits.

Table 6.1: Notable events in Guinea investigations and OTP interactions

Date	**Events (in order of occurrence)**
Sept 09	Stadium massacre
Oct 09	Preliminary examination opened Guinea Justice Minister visits ICC
Dec 09	UN Commission of Inquiry Report published
Feb 10	Guinea appoints three judges and investigation opens prior to **OTP mission to Guinea**
May 10	**OTP mission to Guinea;** more than 200 witnesses interviewed
Jun 10	First two individuals detained for involvement in stadium massacre
Nov 10	**OTP mission to Guinea**
Jan 11	Arrest warrant for Aboubacar Sidiki 'Toumba' Diakité, the head of the Guinean Presidential Guard, circulated through Interpol
March 11	**OTP mission to Guinea**
Oct 11	**OTP mission to Guinea**
Feb 12	Commander Moussa Tiegboro Camara, commander of the security forces, indicted
April 12	**OTP Bensouda mission to Guinea**
Sept 12	Colonel Abdulaye Chérif Diaby indicted
Jan 13	**OTP mission to Guinea**
Jun 13	**OTP mission to Guinea** Colonel Claude Pivi, Head of Presidential Security, indicted
Feb 14	**OTP mission to Guinea**
May 15	**OTP mission to Guinea**
Jul 15	Guinean judges travel to Burkina Faso to question former President Captain Moussa Dadis Camara. They indict him. OTP mission at Guinea's invitation
Feb 16	**OTP mission to Guinea**
Jun 16	**OTP mission to Guinea**

Dec 16	Aboubacar Sidiki "Toumba" Diakité arrested in Senegal
Mar 17	Aboubacar Sidiki "Toumba" Diakité extradited to Guinea

This is consistent with the perception that the government's strategy was to demonstrate to the OTP one tangible step in the period around each visit to illustrate continuing progress in the case.[199] This impression is reinforced by the Guinean Prosecutor's observation that the stadium case judges were appointed as a result of an ICC request.[200] One interviewee noted the diminishing attention from the international community once the case opened and suggested the progress of the case would similarly stall if international scrutiny continued to decrease. This appears to have been the case in the period from 2014 onwards,[201] with government promises to commence trial dating from 2014 remaining unfulfilled as of 31 October 2017.[202] While such delays may suggest the State was not genuine in pursuing national proceedings, the extradition of the former head of Guinea's Presidential Guard from Senegal to Guinea in early 2017 indicates that the momentum towards a trial continues; it seems politically unlikely that the trial will not proceed, given the number of accused already indicted.

There are explicit acknowledgements of the ICC's positive effect, including from the Minister for Justice, who framed it in the following way:

> I'm always happy to meet with the ICC because they offer external assistance.[203] There are some changes they do bring sometimes and they try to see if there are obstacles or positive developments. When you feel like someone is helping you move on, you have to move on – it increases the improvement. When the ICC left, there were two suspects asked to appear from the gendarmerie, one of them is a Commander, and the other is General who will appear in court tomorrow. When the ICC asked if he will appear, I said yes of course he will appear.[204]

[199] Interview G8 - NGO.
[200] Interview G11, Prosecutor.
[201] Interview G8 – NGO.
[202] PEX 2014, above n 112, 40; ICC-OTP, *Report on Preliminary Examination Activities 2015* (2015), 43; ICC-OTP, *Report on Preliminary Examination Activities 2016* (2016), 62.
[203] Note that the ICC interviewees were very clear that their mandate did not extend to material assistance, and that there were other organisations who provided capacity-building support: interview I1, I2, I3, I4.
[204] Interview G1, MJ.

Human rights lawyers unanimously thought that increased pressure by the OTP would improve the quality of the stadium case proceedings:[205] partly because of the reputational costs to Guinea of being perceived as a government without control over perpetrators.[206] One lawyer suggested the OTP's impact on national proceedings would increase if it pressured the public prosecutor to assist the judges with their requests to compel individuals to appear before the court, and the government to remove or suspend indicted government officials from their positions, and set a timeline for trial.[207] Of course, if norm-interpretive interactions result in deadlines for such benchmarks of progress, the pressure for the OTP to open an investigation itself would increase if the State failed to meet them.[208] It also introduces the risk that the OTP's threats will prove to be empty if an investigation is not opened in such circumstances. It is a difficult tightrope that the OTP walks, to leverage the threat to maximise progress without creating a situation that would compel it to follow-through with an investigation.

3.4.2 Indications of unwillingness

If the national criminal justice response to the stadium massacre is considered in the context of a preliminary examination, the possibility of inability is raised by the impact of resource limitations on the progress of the case. For the period from May to September 2012, proceedings were stalled due to the Ministry of Justice's failure to provide necessary material resources, such as a weekly stipend for judges, computers, pens, paper, equipment and transport.[209] However, this thesis proceeds on the basis that in the Guinea case inability was not a material consideration under Article 17 of the Rome Statute, for several reasons.

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[205] Interview G2, G4 – NGOs.
[206] Interview G2, NGO.
[207] Interview G7, NGO.
[208] This suggestion has been made by others, and was the case in Kenya: Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'' (2012) 10 *Journal of International Criminal Justice* 325, 334; Carsten Stahn, 'Taking Complementarity Seriously' in Carsten Stahn and Mohammed M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* in *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011) 233; Will Colish, 'The International Criminal Court in Guinea: A Case Study of Complementarity' (2013) 26(2) *Revue québécoise de droit international* 23, 43.
[209] HRW, above n 160, 5.

First, Guinea's Justice Minister declined offers of technical assistance from the United Nations Office of the Special Representative of the Secretary-General on Conflict-Related Sexual Violence (SRSG CRSV) from late 2011, and accepted this assistance only in October 2012.[210] More damning was the fact that, by the end of 2012, judicial police had still not responded to a 2010 request from the judges to access a potential mass grave and interview individuals in the area.[211] While inability applies for a period of five months, the evidence suggests unwillingness applies both prior and subsequent to this period.

The fact that the resources needed were so basic (pens, paper, computers) and available to other judicial and government offices during the same period, further strengthens the impression that the five-month period without them reflects State unwillingness rather than inability. Indeed, several interviewees noted similar basic resources were provided for the court case about the attempted assassination of the President in December 2010, which proceeded far more swiftly.[212] The trial of 40 defendants in that case, held in 2013, resulted in 16 convictions the same year, while as at 31 October 2017, only 14 defendants had been charged in the stadium case (commenced one year earlier) and the start of the trial had not yet been scheduled. This contrast is more stark given that the judges had heard testimony from 200 witnesses in the stadium case by May 2010.[213]

Second, Guinea represented to the ICC that it was able and willing to investigate and prosecute crimes committed related to the 28 September massacre only after the preliminary examination was opened. However, deliberate and systematic government attempts to destroy evidence of stadium crimes and misrepresent the number of individuals killed provide a strong basis for the enduring domestic scepticism towards the Guinean government's genuine willingness to prosecute

[210] Ibid.
[211] Ibid.
[212] Interview G4, G5, G10 – NGOs.
[213] HRW, above n 148, 3.

those most responsible for these crimes.[214] In the days following the stadium massacre, security forces sealed off the stadium and morgues, removed scores of bodies and buried them in mass graves.[215] Prominent human rights defenders who spoke out immediately after the massacre were followed by security forces and in some cases held and injured by members of the gendarmerie. [216] These actions went beyond mere indifference to or neglect of international crimes, and reflect an intention to deliberately and actively prevent future investigations that could result in prosecutions and convictions.

Third, there were certain clear investigative and procedural steps that the investigating judges could and should have taken as early as possible but did not. These included visiting the stadium, authorising collection of evidence from the stadium, and indicting the more senior perpetrators (based on at least 200 testimonies gathered by May 2010).[217] However, as Table 6.1 above demonstrates, of the individuals named in the 2010 UN Commission of Inquiry report, the three senior security force members were indicted only in 2012. Given the case itself did not progress between May and September 2012, it is clear that the evidence supporting the indictments was available before that time, and there were avenues of investigation available to the judges that could have been pursued.

Finally, the rhetoric of government representatives has not been to claim that the State was unable to investigate, but on the contrary, to re-enforce Guinea's capacity and willingness to bring the perpetrators of the stadium massacre to justice.[218] When asked to identify the challenges facing the stadium case, the former President of the Supreme Court stated, 'what is lacking here is a strong State and leaders who apply the law as it is, and are not there for personal interests . . . but the people currently in that position are so far from the right path that it's impossible for them

[214] UN Security Council, Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea (S/2009/693, 18 December 2009) ('UN Guinea COI')2. For other interviews with these actors see HRW, above n 150; HRW, above n 164.
[215] HRW, above n 177, 17.
[216] Interview G4, NGO.
[217] HRW, above n 177, 28-30.
[218] See e.g. Interview G1, MJ; G11, Prosecutor. Note, this sentiment was not expressed by the presiding judge of the case.

to accept the laws are supposed to be applied, which makes it difficult for any system in that case to prosper'.[219] This is consistent with State unwillingness, and the government's refusal of offers for technical assistance from the UN from late 2011 until October 2012.[220]

Other indications of how unwillingness explains the delay and certain State decisions in the conduct of the case are discussed below. These support the conclusion that any progress made has not been due to a genuine commitment to pursue criminal accountability for senior perpetrators, but rather ongoing scrutiny from and engagement by the OTP.

The first and most systemic aspect of willingness is enabling the judicial system to work independently and with adequate resources. The Guinean Minister for Justice claimed at the time, 'the judges are independent and they work with the prosecutor, who does [the case]. I just ensure they have resources to be comfortable doing their work'. However, this directly contradicts evidence from numerous interviews for this thesis, including with the Presiding judge of the stadium case, and reports from external observers,[221] who considered the case heavily politicised and influenced by the Ministry of Justice. This impression is reinforced by the absence of minimum appointment terms for judges; rather, they are appointed by Presidential or Executive degree and can be moved or replaced by political will at any time.[222]

The Prosecutor for the stadium case also confirmed the Ministry's involvement in the case: 'when [the judges] issue a summons I also inform the hierarchy. This is what happened. If I have difficulties I talk to the Minister of Justice, who resolves difficulties'.[223] The Prosecutor was referring to high-ranking individuals within the government who, although indicted, remained at liberty and in their government positions, and was expressing confidence that they would appear in court when

[219] Interview G9, NGO.
[220] HRW, above n 177, 5.
[221] Interview G2, G3, G4, G7, G8 – NGOs.
[222] This is the case because the Constitution empowers a High Council of Judges to perform these roles, but the President has never established the council and performs these functions instead: interview G7, NGOs.
[223] Interview G11, Prosecutor.

requested (by the Minister of Justice). The normalisation of the minister's involvement in an individual case to ensure individuals appeared in court suggests a deeply entrenched culture of political interference in the judicial system.

In this context, it is difficult to dismiss the decision by the Ministry of Justice to hold the stadium case proceedings in a building shared by the gendarmerie and the police responsible for security around the 2010 election as a mere coincidence or oversight due to lack of social internalisation. The Justice Minister claimed it was his initiative that prompted the relocation of the case to another building, but NGO interviewees claimed it was a result of advocacy and pressure from NGOs and the ICC because victims were too scared to attend the court.[224]

Judicial independence is undermined by significant unexplained deviations from the normal criminal justice procedure. For instance, typically there is a case timeline and judges allocated for the next stage of proceedings; neither of these are yet in place for the stadium case.[225] NGO representatives told me that judges' requests for certain senior government individuals to appear before court were (atypically) required to indicate whether the appearance was as a witness or a perpetrator, [226] and many of these requests had been ignored.[227] The Presiding Judge stressed the difficulty of moving forward when 'you don't have anyone before you':[228] an oblique reference to the refusal by senior government officials to attend the court to testify. While far too vague to communicate the exact difficulties, this statement is consistent with lawyers' understanding that requests for attendance were being blocked in the Ministry for Justice.

These statements strengthen the inference that 'the judges are under the executive power's control so that all the decisions taken by them are controlled by the political authorities [and] whenever they need to charge someone they have to get consent

[224] Interview G3, G4, G5 – NGOs. This is supported by interviews from the victims referred to in Section 3.4 above.
[225] Interview G2, NGO.
[226] Interview G7, G8 - NGOs.
[227] Interview G2, G5, G6 – NGOs.
[228] Interview G5, NGO.

of the Minister'.[229] Bolstering this conclusion is the observation that sometimes judges blocked the stories told by witnesses that appeared to be implicating 'big authorities,' prompting arguments between the lawyer and the judge on the importance of allowing the testimony to continue.[230]

When asked why high-profile officials who had been indicted remained at liberty and working in their government positions, the Minister of Justice replied, 'will I be arrested only on that testimony or arrested only after investigating to determine if it's true or false?'[231] This sentiment is telling in two ways, given that seven defendants had been arrested very early in the investigation, and that the three senior perpetrators indicted (but not arrested) at the time of the interview, namely Commander Moussa Tiegboro Camara, commander of the security forces, Colonel Abdulaye Chérif Diaby, Health Minister, and Colonel Claude Pivi, Head of Presidential Security, had all been identified by the 2010 UN Commission of Inquiry report. First, the rhetorical question is legally redundant because the evidence was already sufficient to support indictments, and the crimes were sufficiently grave to carry a custodial sentence, which is one of the bases for pre-trial detention, along with the need to prevent pressure on witnesses or their families.[232] Second, given the evidence and these individuals' senior positions, it demonstrates a wilful disregard for the credibility and integrity of the trial when several defendants retain the public power implicated in the commission of international crimes.

NGO representatives and the Presiding judge also highlighted the importance of security to protect judges in such an important case.[233] In his interview with me, the Presiding judge explained that the judges' request to relocate for security purposes witnesses who reported being threatened had not been responded to; and that if judges were threatened the case could not continue.[234] This was an important admission, given NGO observations that a security detail for judges was assigned

[229] Interview G7, NGO.
[230] Interview G8, NGO.
[231] Interview G1, MJ.
[232] Guinée Code Pénal 1988, art 235.
[233] Interview G3, G5 – NGOs.
[234] Interview G5, NGO.

only in advance of ICC visits and ceased shortly after they were concluded.[235] A number of responses by the Presiding judge to my questions reinforced indirectly the importance of judges' security and independence. These responses included the fact that he avoided answering several questions within his purview by suggesting that the prosecutor had the answers to those questions and he also transparently avoided answering a question as to whether there was sufficient security.[236] One woman interviewee reported, 'even for the judges, there are people standing somewhere threatening them'.[237] One NGO representative suggested the judges' failure in over three years of the investigation to visit military sites to gather evidence was due to intimidation by the military.[238]

Direct evidence of political interference in contexts where such interference is reasonably suspected is highly unlikely. Climates and cultures of impunity breed fear and insecurity about disclosures that reflect negatively on those in power. Individuals responsible for prosecuting the powerful are also the most likely targets of political pressure to maintain the status quo. Nevertheless, judges have clearly shared some of these concerns with both lawyers and women witnesses, and government representatives openly admitted the positive impact of the OTP's engagement. Combining and comparing information from the full range of actors involved in the stadium case – the prosecutor, the Presiding judge, the Minister for Justice, women witnesses and supporting lawyers – supports the inference that there is institutional unwillingness; and that despite this, the OTP has significantly contributed to the development of the stadium case. As outlined in Chapter 5.6, the OTP has consistently included references to the sexual violence crimes committed in the stadium case in its norm interpretations, including its PEX reports. This has certainly maintained the scrutiny on this category of crime and, correspondingly, State reporting on this aspect of the stadium case.

[235] Interview G7, G8 – NGOs.
[236] Interview G5, NGO.
[237] Interview G15, witness.
[238] Interview G7, NGO.

3.4.3 Instances where more could have been said by the OTP

The above section highlights perceived positive correlations between OTP actions and statements around what State action constitutes compliance with sexual violence accountability. Identifying a specific catalytic effect on crimes of sexual violence is difficult when the flaws in proceedings are global (e.g., delays, withholding resources). However, the OTP's influence on the national proceedings is clear.

This section supplements the preceding two sections by examining examples where the opposite is the case, namely, issues that could have been raised by the OTP and were not, and the corresponding lack of any internalisation with respect to these issues. Given the above correlation between OTP statements and State responses to progress in the stadium case, it is reasonable to infer that if the OTP had raised the issues below, Guinea would have taken *some* action in response.[239]

In its 2012 PEX report, the OTP identified the alleged crimes but looked only at the individuals of interest and not the conduct, even though it referred to the same person/same conduct test in concluding that the prospective OTP case would be inadmissible.[240] This was an unfortunate oversight for two reasons. First, it is not clear how national investigations satisfy the same person/same conduct test without identifying the crimes charged and the acts to which they refer. The OTP could have confirmed whether there were concerning gaps in light of its assessment of the four main categories of alleged crimes. This would have mirrored the strategy it has pursued in Colombia since 2012, increasing its impact on national proceedings there. Second, the OTP missed the opportunity to highlight any substantive gaps that would have notified the Guinean authorities about the scope of conduct expected to be investigated in order to demonstrate genuineness. That is, articulating the scope of OTP scrutiny may have avoided national investigations that excluded significant criminal conduct, and may have prompted more specific communications from Guinea about *how* such conduct would be prosecuted.

[239] This is not to claim that Guinea would have comprehensively addressed the concern, but that it would no longer have been overlooked by the State.
[240] PEX 2012, above n 198, 35.

This is particularly important with respect to command responsibility or other indirect responsibility, because it is unclear how this mode of liability could be charged. The OTP could have questioned how the law permitted this course of prosecution; alternatively, it could have raised its concern that the law could preclude this possibility, or make it very difficult. Since all the key individuals named in the UN Commission of Inquiry report were responsible for subordinate officers, and the head of the Presidential Guard and commander of security forces were indicted by the time the 2012 PEX report was published, this was already a live issue.

The OTP has also been partially silent on some aspects of the impetus for the laws, procedures and practices of criminal justice actors to overcome specific or exacerbated challenges faced by victims of sexual violence. For instance, with respect to substantive crimes, the OTP PEX reports identify a range of crimes of sexual violence committed in the stadium case. Noting that the legal framework precluded recognition and prosecution of crimes such as sexual mutilation and sexual slavery would have been a logical next step. It would also have put Guinea on notice about barriers to prosecutions that could constitute inability to prosecute the relevant sexual violence crimes.

The consequent challenge is that any subsequent reform can apply retrospectively only if it is legal under Guinean law to reclassify crimes, rather than create new crimes. That is, since crimes such as sexual mutilation and sexual slavery could have been prosecuted as indecent assault, that is, as a 'catch-all' crime of sexual violence or physical assault, the principle of legality is not violated. As referred to above, the interpretation and application of the legality principle in Guinea is uncertain. Given the characteristic impunity for crimes of sexual violence in Guinea, the scale and horrific characteristics of its perpetration in the stadium case and the confidence in impunity that the perpetrators seemed to possess, I would propose the OTP interpret the legality principle to facilitate the most extensive prosecution of sexual violence crimes possible. That is, that OTP norm interpretations with Guinean State and non-State actors include the international interpretation of legality, such that

the absence of national laws permitting prosecution of responsible commanders at the time of the stadium case events is not a barrier to their prosecution and conviction. Otherwise it is likely that impunity will be re-entrenched for these crimes but challenged through convictions for other categories of crimes.

Local critiques of the case proceedings are an important complement to the OTP's articulation of obstacles impeding genuine prosecutions. While this thesis has focused on how OTP norm interpretations may influence national actors, including local norm entrepreneurs, the field research suggests the opposite is also possible. The leader of the Guinea NGO delegation to the ICC in 2013 explained: 'we need[ed] to change the strategy after the mission [to the ICC] . . . to say how the case is not progressing. We have decided to show the world what the real difficulties are and the lack of results on the ground'.[241] Indeed, the OTP observed that requests by civil society and victims' organisations for further specific investigative steps had an important impact on the pace and quality of the national investigation.[242]

The corollary to this approach is that OTP meetings with these entities could have been more strategically targeted to identify specific concerns, such as failed judicial requests for government officials to appear in court, and the failure to suspend or remove indicted individuals from senior government positions. Instead, the OTP acknowledged: '[t]he fact that two indicted officials [in the 28 September case] have retained their post in government is undoubtedly shocking and frustrating for the victims, [but concluded that it was] insufficient for the office to determine that the proceedings are not being conducted with the intent to bring to justice the persons bearing responsibility for the crimes committed'.[243]

Without a qualification or suggestions about what indicators may make such a conclusion more likely, the OTP's statement could be interpreted by the Guinean government as a tacit concession or resignation to the status quo. It undercuts any civil society pressure to suspend or arrest these individuals, and could embolden

[241] Interview G3, NGO.
[242] PEX 2015, above n 205, 41.
[243] https://www.irinnews.org/fr/node/253860

the government to test the boundaries of 'willingness' further, or at least continue to refrain from issuing arrests.

This was apparent in 2013, when the Minister of the Presidential Guard, Colonel Claude Pivi, who was in all likelihood present at the stadium and was witnessed committing crimes later the same day,[244] was indicted but not arrested in June. There is strong evidence against Pivi as a direct perpetrator; this would typically be sufficient to warrant pre-trial detention because the prospects of a conviction are high and the crimes are serious. Yet his continued liberty and employment in the very position that was instrumental to allegedly committing the crimes was not mentioned in subsequent PEX reports.[245] Drawing attention to this in a PEX report would not only have been logical, it would have maintained scrutiny on an already-criticised practice and provided an opportunity to qualify the previous OTP tacit acceptance of it. This was a lost opportunity for the OTP to encourage a more visible commitment to genuine national proceedings in its norm interpretations. It also made it politically less viable to conclude unwillingness since the OTP had not explicitly stated that the State failure to arrest could be interpreted this way.

4. Conclusion

Notwithstanding the reasons outlined in Chapters 5.5 and 5.6 for selecting Colombia and Guinea as the field research case-study countries,[246] the two contexts are quite different. In Colombia, crimes within the ICC's temporal jurisdiction date from 2002 at the earliest,[247] cover several different State and non-State armed groups, and some have already been addressed through the Peace and Justice Law, the military justice system or the ordinary criminal justice system. In contrast, the ICC's scrutiny in Guinea focuses on crimes committed over several days rather than weeks, largely by State actors in a command structure.

[244] UN Guinea COI, above n 231, 53-54.
[245] See PEX 2014, above n 12, 44 where Colonel Pivi's indictment is noted.
[246] In both countries, these include the prevalence of sexual violence committed as international crimes and the inference that the State wishes to avoid an ICC investigation
[247] For crimes deemed political crimes, the jurisdiction commenced only in 2009.

Another key distinction affecting the ability to identify the OTP's catalytic effect on national proceedings of sexual violence is the number of engaged norm entrepreneurs and related processes. The context of Colombia's criminal justice proceedings features a multiplicity of executive, legislative, judicial and non-State actors, combined with a number of inter-related transitional justice or post-conflict processes. These features make it more difficult to identify the OTP's singular influence on Colombian national proceedings, and how this influence is reduced, enhanced or otherwise mediated by other actors, relative to the many other influences operating on the criminal justice system.

By comparison, the OTP's influence on national proceedings in Guinea is more discernible. This is partly because of the coincidence in the timing of the OTP's engagement and the steps taken by Guinea in the stadium case, and partly because it appears there are fewer internal State processes to mediate this influence. Accordingly, evidence of the OTP's contribution to norm internalisation in Colombia may not be as robust as that in Guinea. On the other hand, the rich and varied nature of norm interpretations from Colombia provides more insights into how the OTP could use more specific information about national proceedings in its norm interpretations to enhance its effect on compliance with the sexual violence accountability norm.

The OTP's approach to interacting with both State and non-State actors also differed significantly between the two countries. While in Colombia there were only a few instances of direct OTP influence, in Guinea several aspects of the stadium case were identified as influenced by the OTP. On the other hand, and notwithstanding pre-existing evidence in Colombia that crimes of sexual violence had been committed and remained unpunished, there seemed to be a clear shift in the OTP's strategy towards this category of crime from 2012. This shift coincided with significant changes in policies and prosecutorial behaviour. In Guinea, the government is perceived as, and initially behaved as if it was, unwilling to pursue expeditiously prosecutions against senior members of government. Over several years those initially identified by the UN Commission of Inquiry as responsible have all been indicted, if not arrested. However, completely overcoming the challenges of

addressing sexual violence specifically requires a more nuanced scrutiny of laws, policies and procedures; these are discussed in the next chapter.

This chapter has examined the norm interpretations and the roles played by norm entrepreneurs, government sponsors and other TLP entities to promote legal, political and social internalisation of the sexual violence accountability norm in each country context. In both Colombia and Guinea, there is evidence consistent with unwillingness and a lack of internalisation, and evidence that norm-interpretive interactions have promoted some measure of internalisation. The next chapter examines whether there are concrete indicators or suggestions that the OTP's catalysing influence in each of these contexts is growing, and whether the thesis' findings could have broader application, both for the OTP's strategic approach to preliminary examinations more generally and for other international norms.

CHAPTER 7. ANALYSIS, THEMES AND RECOMMENDATIONS

1. Introduction

This thesis tested the capacity of the Transnational Legal Process (TLP) theory to explain the internalisation of a gender-specific international legal norm regarding sexual violence; and the OTP's catalytic influence on national prosecutions of sexual violence crimes during preliminary examinations in Colombia and Guinea. By examining the content, scope and dynamic of norm-interpretive interactions between the OTP and other stakeholders around the sexual violence accountability norm, we can understand whether and how States may be encouraged to comply with it. Understanding the legal, political and social internalisation required to comply with the norm allows us to identify the barriers to norm compliance and what may be required to overcome them.

The desk-based and field research elicited narratives from a range of actors involved in norm-interpretive interactions around national investigations and prosecutions for international crimes of sexual violence in Colombia and Guinea. Using a qualitative research methodology facilitated in-depth analysis and assessment of TLP as a theory, and answered *how* and *why* internalisation occurs, or not, with respect to the sexual violence accountability norm. Identifying the OTP as *the* catalyst for national proceedings is almost, if not entirely, impossible in such complex politico-legal contexts and it was not the purpose of this thesis. However, triangulating different forms of data[1] permitted reasonable inferences about the OTP's catalytic impact on national proceedings for international crimes, including those of sexual violence.

Further, the subjective data discussed in Chapter 6 included direct evidence of the OTP's influence and the factors limiting this influence. Examples include statements from key actors, such as ICC staff members, the Minister for Justice in Guinea, and an international prosecutor embedded in the Colombian Attorney-General's office.

[1] The data included objective data from documents, statements, events and reports by the OTP and other actors, with subjective data from interviews with key relevant stakeholders.

Diverse, and sometimes conflicting, norm interpretations demonstrated how stakeholders may shift from complying with pre-existing national norms to international norm compliance. Moreover, because the interviews were conducted in 2013, it was possible to compare statements, predictions and assessments about the national proceedings against subsequent case progress and engagements by the OTP.

Building on the preliminary examination process conducted by the OTP described in Chapter 5, the empirical research in Chapter 6 identified the content of norm interpretations, the extent to which internalisation had occurred, and factors from which an inference could reasonably be drawn that the OTP contributed to internalisation. Drawing particularly on the data in the last two chapters, the second section of this chapter analyses themes and phenomena emerging from the two case-study contexts. These include oversights in, and State responses to, OTP norm interpretations, and the second degree, or indirect, effects of OTP engagement on national proceedings. In the third section, the findings are assimilated into the TLP framework to support theoretical conclusions around the TLP's explanatory value and its limitations.

The fourth section describes how the thesis contributes to compliance literature and to empirical research about norm internalisation. The fifth section recommends how the OTP's catalytic influence in preliminary examinations can be enhanced, through reconceptualising its approach to, and the content of, norm interpretations during preliminary examinations. It also analyses the important role played by norm entrepreneurs and how their impact on norm compliance can be maximised. The final section broadens the discussion to potential implications for other human rights regimes and the value of further research to explore *why* transnational legal processes promote internalisation, and the value of a gender-sensitive approach in this regard.

2. Themes emerging from case-study research

The qualitative analysis across two contrasting contexts such as Colombia and Guinea revealed different dimensions to the OTP's engagement and suggest

potentially generalisable phenomena or emerging principles. These themes were identified using qualitative content and discourse analysis, as described in Chapter 2.4.2. In each context, notwithstanding some indicators that impunity may eventually prevail, the OTP has repeatedly determined that there has been sufficient progress in the cases of interest to justify keeping the preliminary examination open without progressing to a formal ICC investigation. To that extent, these OTP decisions may also reflect an intention to persist with engagement as long as it continues to yield results. Certainly, there is evidence in both countries that without OTP scrutiny through a preliminary examination impunity for sexual violence crimes would not have been addressed by the State.

In Colombia, this can be inferred from the systemic institutional neglect of crimes of sexual violence until approximately 2012, notwithstanding abundant and credible evidence of its widespread commission as an international crime for several years prior. In Guinea, there were several factors from which impunity for international crimes generally could have been reasonably predicted. These included the historical trend of impunity for crimes against civilians committed by State actors and concerted government attempts to destroy evidence immediately after the 28 September stadium massacre. Beyond the instances of the OTP's contribution to legal, political and social internalisation explored in the previous chapter, similarities or common phenomena emerge from the two contrasting contexts.

One preliminary commonality, foreshadowed by other research[2] and by Chapter 6.2.3, is that ICC definitions and standards are legally internalised into national systems even without explicitly targeted norm-interpretive interactions. One example is the Fiscalía's consideration of the ICC's jurisdiction in formulating its Directive 001 of 2012, which established prioritisation criteria for prosecuting crimes related to the armed conflict.[3] Another example is the new Penal Code in Guinea, passed in May 2016, which incorporates the Rome Statute definitions for

[2] See e.g. Fionnuala Ní Aoláin, 'Gendered Harms and Their Interface with International Criminal Law' (2014) 16(4) *International Feminist Journal of Politics* 622.
[3] Colombia Fiscalía de la Nacion, *Directiva 001/2012* (2012).

international crimes.[4] This process has been described by other scholars as **'norm diffusion'**.[5] The themes discussed below emerge more specifically from the norm-interpretive transnational legal processes occurring in the preliminary examinations in the two States.

2.1 Challenging State narratives of success

Conflicting or varying interpretations of norms and what constitutes compliance with them is an implicit aspect of TLP. Interactions between norm entrepreneurs and State actors are assumed to diminish the variance in norm interpretations between them, precipitating legal, political and social internalisation. In the cases of Colombia and Guinea, State narratives asserted the State's ability and willingness to investigate and prosecute international crimes from the outset of engagement with the OTP. OTP narratives may recognise State actions consistent with this position, but they may also identify issues that suggest the State's ability or willingness is less than the State itself may have represented.

State representatives in both Colombia and Guinea clearly framed the steps taken to investigate and prosecute international crimes as a positive achievement *despite* significant challenges. For example, the Minister of Justice in Guinea (as at June 2013) contrasted the failure of every previous government to ensure accountability for abuses against civilians with his government's unprecedented commitment to justice; it was a 'point of pride'.[6] Similarly, the Gender Advisor of the DINAC unit in Colombia regarded 19 convictions out of the 183 cases referred to the Fiscalía by the Constitutional Court over a period of five years as a success.[7]

However, the facts used to support the claim of progress can also be used to show a lack of progress. Only 19 (or 14)[8] of 183 high-priority cases (7%) concluded in Colombia over five years is a low case completion rate; in Guinea, only two senior

[4] Guinea Portant Pénal Code 2016, arts 789(22), 792(6), 194(7) and see Chapter 6.3.3.2.
[5] Chapter 2.2.2.4.
[6] Interview G1, MJ.
[7] Interview C12, Fiscalía.
[8] Chapter 6.2.3 notes that only 14 convictions were documented as at 2015, rather than the 19 claimed by the Fiscalía in 2013: see The Working Group to monitor compliance with Constitutional Court *Auto 092* of 2008 and 009 of 2015, *Sixth Monitoring Report on Auto 092 and First Monitoring Report on Auto 009* (2015) ('*Working Group 2015 Report')* 9.

perpetrators were indicted after three years of investigations, including 200 witness statements, which is also slow progress for a high-priority case. In both contexts, other evidence and interviews also contradicted the positive claim of progress, but the State narratives *interpreted* the facts so that they supported the State's assertion of a genuine intent to achieve individual criminal accountability for international crimes.

State assertions of compliance, regardless of whether the facts are objectively consistent with willingness, are unsurprising, given the interest in retaining control over the cases being scrutinised.[9] However, it also means that the OTP must always interrogate the underlying factual basis and content of State claims of 'success' or 'progress' to be able to assess the accuracy of that State's claim of willingness and ability. Interrogating or countering the State's interpretation effectively requires invoking more specific facts more robustly to support the inference of non-compliance, or expressing concerns about non-compliance. The research in Chapters 5 and 6 suggest that the OTP's norm interpretations were weakened by the absence of accurate and detailed facts. While the OTP was (and is) unlikely to obtain this information independently because of its limited resources and the absence of investigative powers during the PEX stage,[10] it did miss opportunities to use available facts from other reliable sources to support its alternative *interpretation* of what constitutes norm-compliant conduct. Examples referred to in Chapter 6 include NGO documentation of barriers to prosecuting sexual violence in Colombia, and the initial logistical challenges for female victims of sexual violence to testify in the stadium case in Guinea.

Even without data, the OTP should challenge inconsistent, implausible or inaccurate narratives and claims made by States, including by inviting the government to confirm the correct facts and explain discrepancies. This would encourage greater State diligence and accuracy in reporting, and consequently improve factual clarity and certainty around national proceedings. There were examples of missed opportunities in both States. For instance, the OTP PEX reports included factual

[9] See Chapter 4.4.2 for a discussion on why States prefer to retain control of these cases.
[10] Interview I1.

errors regarding the Colombian proceedings, which reduced its credibility with the Fiscalía. In Guinea, the OTP was silent on the unexplained drop from 200 to 50 reported witnesses who testified about sexual violence in Guinea between 2014 and 2015[11], when it could have challenged the accuracy of such figures used to support claims of progress in the stadium case.[12]

The value of this proposal is evidenced by the consequences of OTP challenges to State statements and its expressions of concern; for example, Colombia's improved record regarding crimes of sexual violence dating from approximately 2012, and Guinea's changed courtroom venue for the stadium case. In both these instances, the OTP's questioning of State narratives of norm compliance, whether based on additional data or not, catalysed State responses that promoted norm compliance. While it is theoretically possible that a State could refuse to change its conduct,[13] neither Colombia nor Guinea seem to have done so. As long as OTP norm interpretations remain tethered to Article 17 and supported by the evidence, there are incentives (see Chapter 4.4.2) for a State to continue to demonstrate willingness by attending to the OTP's articulated concerns.

2.2 Opportunities missed by the OTP

The OTP missed several other specific opportunities to apply the PEX Policy in a gender-sensitive way. Doing so would have put the States on notice about omissions or problematic practices with respect to sexual violence, and provided an impetus to remedy them. This sub-section highlights one example from each country with respect to each aspect of internalisation – legal, political and social.[14]

Earlier chapters documented the almost total failure of the gender-neutral Justice and Peace Law in Colombia to challenge impunity for sexual violence crimes related to the armed conflict, notwithstanding their wide-scale perpetration by paramilitaries.[15] This constituted a clear absence of *legal internalisation*; in other

[11] Chapter 6.1.
[12] Whether this discrepancy is an ICC typographical or reporting error is not immediately apparent.
[13] I note that while this conclusion is based on public sources, and not confidential interactions, the latter are generally requests for information and the provision of information: interview I4.
[14] For other discussions on this see: Chapter 6.2.4.1; 6.2.4.2; 6.2.4.3; 6.3.2; 6.3.5.
[15] Chapters 5.4 and 6.2.3.

words, the law's failure in its design and process to consider socio-cultural realities around crimes of sexual violence led to thousands of confessions for other crimes, but not for sexual violence.[16] Of course, the subsequent failure to remedy this glaring discrepancy reflects the absence of political and social internalisation.

The conviction of Marco Tulio Pérez Guzmán for crimes of sexual violence and the revocation of his reduced sentence for his failure to disclose these crimes reinforces this conclusion. Under the Justice and Peace Law, Guzmán benefited from a reduced sentence on the basis that he confessed to all crimes connected to the armed conflict for which he was responsible. Although women testified in the confessions process to Guzmán's responsibility for sexual violence, Guzmán denied the sexual acts involved were non-consensual and initially continued to benefit from the reduced sentence.[17] On appeal, the courts found that the coercive circumstances precluded consensual sexual acts.[18] This was a ground-breaking legal re-assessment of sexual violence practices that challenged the very social and political attitudes responsible for its impunity. However, it was an exception to the general practice of accepting perpetrators' perceptions of consent and sexual acts as independent of the armed conflict.

The Colombian Justice and Peace Law had been operating as the principal legal mechanism for individual accountability for six years by the time of the OTP's first PEX report in 2011. At the time of that or in any subsequent PEX report, the OTP could have easily evaluated it as inadequate for achieving compliance with the sexual violence accountability norm. That is, the OTP could have interpreted this systemic failure as an inability due to 'the absence of the required legislative framework to prosecute the same conduct [sexual violence] or forms of responsibility' in accordance with the PEX Policy.[19] Alternatively, the OTP could

[16] Chapter 6.2.
[17] Marcelle Cohen, *Sexual Violence: The Invisible, Mute, and Exempt Crime Against Humanity* (4 August 2015) https://www.strausscenter.org/strauss-articles/sexual-violence-the-invisible-mute-and-exempt-crime-against-humanity.html.
[18] El Tiempo, *Corte Suprema dobló pena para agresores sexuales de una mujer* (25 November 2014) <http://www.eltiempo.com/archivo/documento/CMS-14884545>.
[19] ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) 10 <http://www.icc-cpi.int> ('*PEX Policy*') 13 [51].

have determined there were 'manifestly insufficient steps in the investigation[s]'[20] of these cases due to the almost total absence of charges of crimes of sexual violence. Unfortunately, the OTP's silence on these issues meant that, apart from specific cases that were or are revisited,[21] the vast majority of individuals who benefited from reduced sentences under the Justice and Peace Law will continue to enjoy impunity for crimes of sexual violence that they personally committed or for which they could otherwise have been found criminally responsible.

In Guinea, the failure of human rights lawyers to identify gaps and inadequacies in the legal definitions of sexual crimes highlights an important precondition to international norm internalisation. The relevant behaviour – in this case, sexual violence – must be detected by those capable of and most likely to articulate norm interpretations related to it. In Guinea, very few crimes of sexual violence are reported, even to human rights organisations, and those are typically rape cases.[22] This has limited the recognition that other forms of sexual violence, including those committed in the stadium case, cannot be adequately prosecuted. Only one lawyer interviewee acknowledged the Guinean Penal Code defined rape restrictively and did not include sexual slavery and rape by more than one person.[23] Thus, challenges by national norm entrepreneurs to the State's assertion of compliance with the sexual violence accountability norm have been limited to insisting on rape prosecutions, and have not targeted the restrictive criminalisation of sexual violence crimes.

In such situations, external norm entrepreneurs with knowledge of more expansive legal definitions and standards can more readily identify definitional gaps in national contexts. For instance, the OTP 2011 PEX report recognised in the Guinean stadium case that women had been subjected to sexual mutilation and abduction as well as sexual slavery;[24] a cursory examination of the Penal Code reveals that these

[20] Ibid.
[21] Such as the case of Marco Tulio Pérez Guzmán discussed at Chapter 6.2.3.
[22] Note that there is no data on the incidence rate to human rights organisations for other crimes of sexual violence.
[23] See Chapter 6.3.2 and interview G8, NGO.
[24] ICC-OTP, *Report on Preliminary Examination Activities 2011* (2011) 22 [110].

crimes were simply not defined as such under national law at the time.[25] As at 31 October 2017, the OTP had still not commented on the challenges to achieving criminal responsibility for crimes that are inadequately addressed by national laws. This continuing oversight is a lost opportunity for the OTP to reinforce the interpretation that Guinea's inability is due to 'the absence of the required legislative framework to prosecute the same conduct or forms of responsibility,' [26] in accordance with the PEX Policy.

It is impossible to know before the stadium case trial commences whether the other crimes of sexual violence described by women victims will be recognised and punished appropriately. However, the OTP missed another opportunity in its 2016 PEX report by failing to note that the new Penal Code did not remedy the inadequate legal definitions regarding national crimes of sexual violence. Only the provisions criminalising sexual violence perpetrated as war crimes and crimes against humanity mirror the relevant Rome Statute provisions, including an expansive list of acts defined as sexual violence. This is unfortunate for at least two reasons. First, as noted in Chapter 6.3.2.2, depending on how the *ne bis in idem* principle is interpreted in national courts, it may create a problematic two-tiered system of justice. This would mean, for example, that documented sexual slavery could be prosecuted as a crime against humanity, but if there is insufficient evidence for the contextual element of this crime, the same conduct could be prosecuted only by laying charges of either indecent assault (less serious but with a sexual element) or physical assault (which ignores the sexual element of the crime) together with kidnapping. Either combination of charges manifestly fails to capture significant aspects of the crime of sexual slavery such as the relationship of ownership that characterises the victim's experience of the crime.[27] In addition, prosecuting the

[25] The consequence of inadequate definitions is that sexual mutilation can only be charged as the less serious offence of indecent assault or physical assault (which obscures the sexual nature of the violation); and sexual slavery would need to be charged using rape and kidnapping provisions, which fails to capture the relationship of ownership that characterises crimes of slavery. Neither of these approaches is satisfactory: see the discussion on the next page.
[26] PEX Policy, above n 19, 13 [51].
[27] Chapter 3.2.

conduct as a less serious domestic crime may not only result in an inadequate sentence, but could also render the case inadmissible before the ICC.[28]

Similarly, sexual mutilation could arguably be prosecuted under Article 267 of Guinea's Penal Code, which prescribes five- to ten-year sentences for mutilation or the infliction of bodily harm resulting in permanent disability. However, this too obscures the sexual dimension of harm intended by the perpetrator and experienced by the victim.

On the other hand, conduct involving sexual mutilation and sexual slavery, if prosecuted as sexual assault under Article 267 of the 2016 Guinean Penal Code (not as an international crime), could result in a sentence as low as one year for the direct perpetrator. Unless the sentence is considered so inadequate as to be judged 'inconsistent with an intent to bring the person concerned to justice',[29] the case would be inadmissible before the ICC. As described in Chapter 5.4.2, even this minimal sentence for a direct perpetrator does not guarantee ICC intervention, particularly if the defendant is charged cumulatively or receives longer sentences for other crimes committed in the stadium case. It would be difficult for the ICC to justify intervention, or the investment in resources, when sentences for other crimes make it difficult to conclude unwillingness due to an intent to shield the perpetrator from responsibility. Further, the ICC's interpretation of 'inactivity' is not supported if the same person is charged for the same sexual conduct, but the charge and sentence itself are manifestly inadequate.

Ideally, a proactive OTP gender-sensitive 'policy of cooperation aimed at promoting national proceedings'[30] would incorporate more specific recommendations for law reform, investigation procedures and prosecution strategy.[31] This would help avoid

[28] This is particularly true if the sentence is not 'manifestly inadequate', and if the defendant receives substantial sentences for other crimes. In these circumstances, the OTP is unlikely to intervene (interview I1).
[29] *Rome Statute*, art 17(2)(b).
[30] ICC-OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) 5 <http://www.icc-cpi.int>.
[31] This is consistent with Paul Seils' proposal that the OTP develop initial hypotheses in preliminary examinations to allow for more focused investigations, although he suggests sharing the details of this analysis be determined by the individual circumstances. Paul Seils, 'Putting Complementarity in

both the possible trivialisation of crimes of sexual violence and exacerbating discrepancies with sentences for other crimes. Drawing attention to inadequate definitions falls squarely within the ambit of OTP PEX and SGBC policies.[32] Thus, the OTP missed an opportunity to incentivise Guinea to combat the historical legal and cultural causes of impunity for crimes of sexual violence, including through explicitly criminalising a broader range of such crimes.

Turning to *political internalisation*, both Colombian and Guinean national political actors failed to design and implement a coherent and gender-sensitive policy to protect vulnerable witnesses or to allocate resources for its implementation. In Colombia, none of the various protection decrees prior to 2016 guarantee or allocate resources to protecting victims of sexual violence;[33] in Guinea such policies and programs simply do not exist.[34] The research confirmed that the absence of protection measures was and is highly likely to preclude female victims of sexual violence from testifying at trials, and for several reasons.[35] In Guinea, this was compounded by the presence of the gendarmes at the court venue for the first year of proceedings; and it will also most likely fail to account for the full range of crimes committed and to recognise the full number of victims (more than 10,000 civilians were gathered in the stadium on 28 September 2009), because the investigation stage is nearly over.

Excluding these additional charges of sexual violence could only affect the admissibility of the case before the ICC if there is documented evidence of a larger-scale perpetration of crimes of sexual violence than prosecuted. However, this is impossible when the crimes have not been reported for the very same reasons that women do not testify before investigating judges. Thus, the OTP again missed an

Its Place' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 305, 319-320.

[32] PEX Policy 14 [54]; ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) ('*SGBC Policy*') 15 [26].

[33] Chapter 6.2.2.

[34] Chapter 6.3.3.

[35] Chapter 3.2.

important opportunity to identify 'the absence of conditions of security for witnesses . . . or the lack of adequate protection systems'.[36]

In Colombia, the 2016 protocol for investigating sexual and gender-based crimes is intended to be comprehensive. However, earlier OTP insistence on overcoming the failure of pre-existing policies could have catalysed political internalisation to ensure sufficient resource allocation prior to 2016; it may also have led to swift social internalisation of the 2016 protocol. Addressing security concerns of victim witnesses encourages their participation in criminal prosecutions, which would have raised the number of cases progressing to trial and conviction stage.

In terms of *social internalisation*, the lack of convictions for sexual violence on the basis of command responsibility is a particularly important phenomenon to address in Colombia. Sexual violence is clearly prohibited by policies of State security and armed forces, as well as numerous paramilitary forces, and yet it has been perpetrated by members of all the different types of armed groups.[37] Indeed one paramilitary beneficiary of the Justice and Peace Law process has retained his reduced sentence on the basis that perpetration was not attributable to a policy, despite victim testimonies to the contrary.[38] The OTP's emphasis on criminal responsibility as a result of failure 'to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution'[39] offered a basis from which to challenge cultural and social attitudes that do not attribute command responsibility for sexual offences perpetrated by subordinate officers to their commanding officers. A similar concern exists in Guinea, where the presence of attitudes that only exceptional and 'delinquent' individuals commit

[36] PEX Policy, above n 19, 14 [57].
[37] The OTP's silence on impunity enjoyed by armed forces is another notable omission in contrast to the observation by the UN and by NGOs of the absence of guarantees of punishment in a 2010 'zero-tolerance' policy: UNHCHR, *Annual report of the United Nations High Commissioner for Human Rights, Addendum Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia* (7 January 2013); ABColombia, *Colombia: Women, Conflict-Related Sexual Violence and the Peace Process* (2013) 12 <http://www.abcolombia.org.uk>.
[38] El Tiempo, *El régimen de terror sexual que impuso el 'para' 'Juancho Prada'* (29 April 2013) <http://www.eltiempo.com/archivo/documento/CMS-12767893>.
[39] *Rome Statute*, art 28(a)(ii).

sexual violence impedes the likelihood that a commanding officer will be investigated as an indirect perpetrator for such crimes.[40]

These examples identify gaps in the OTP's norm-interpretive interactions to date that could have been remedied through a gender-sensitive application of the 2013 PEX Policy. While some deficiencies pre-date the policy, others occurred after its publication. In both time periods, the OTP possessed data enabling it to conclude significant incidence of and impunity for crimes of sexual violence, which were clearly not addressed by national criminal investigations. The OTP could have indicated the legal, policy and social changes required to demonstrate clearly the State's willingness and ability to comply properly with the sexual violence accountability norm.

These oversights may be partly attributable to the very limited resources of the Situation Analyst Section within the OTP responsible for activities under article 15 of the Rome Statute. Reviewing national legislation and proceedings according to the criteria in article 17 should ideally be done by a lawyer with knowledge of international criminal law and experience in several national criminal jurisdictions. This would facilitate more focused and efficient analysis of the incoming communications, the representations made by national criminal justice and other actors, and the inadequate aspects of national proceedings. More specifically, mapping the relevant legal, political and social content and context of national proceedings onto the criteria considered in preliminary examinations would be more precise.

2.3 Norm-interpretive dialogues increase broader awareness

Nevertheless, the OTP's engagement in both countries increased awareness about the impunity and the legal frameworks, policies and standards of behaviour required of criminal investigators and prosecutors to achieve genuine investigations for sexual violence. For instance, the OTP's insistence on the need to prioritise investigation of particular crimes led to the creation of DINAC in

[40] Chapter 6.3.4.

Colombia,[41] and the OTP's observations about the lack of equipment for investigating judges in Guinea prompted the government to provide that equipment.[42]

The OTP also functions as a *de facto* liaising agent between State and non-State actors, by providing information to civil society on the progress of investigations underlying the OTP's decision to keep the preliminary examination open. This is particularly useful in contexts such as Guinea, where the government's failure to communicate with or reach out to civil society caused women witnesses to distrust the integrity of the process and fear for their personal safety.[43] The OTP may also receive feedback from civil society about proceedings that contradict the OTP's position or the government's representations. Incorporating such information into its own norm interpretations strengthens the basis from which the OTP can challenge government representations of norm compliance. Indeed, this process of exchange eventually prompted the Guinean government to move the venue for the stadium case away from the gendarmerie headquarters.

Similarly, when leaders of the Guinean victim associations learned that the OTP considered the stadium case was progressing satisfactorily, they altered their strategy to itemise their concerns more explicitly to the OTP. Consequently, they better articulated the problematic procedures and the changes required to remedy them. These changes, such as providing adequate security and privacy for testifying witnesses, match standard procedures in ICC documents. That is, the norm interpretations of these victim association leaders/norm entrepreneurs in the national norm-interpretive dialogue around the stadium case became more refined, legally specific and connected to the sexual violence accountability norm.

The heightened visibility of sexual violence (specifically, rape) as a crime in Guinea due to the stadium case seems to have led to increased reporting. Several interviewees commented on the very low numbers of rape crimes reported to

[41] Interview I1.
[42] ICC-OTP, Report on Preliminary Examinations 2012 (2012) ('PEX 2102') 36 [161].
[43] Interviews G14, G15, G20 - witnesses.

authorities before the stadium massacre. A few human rights lawyers mentioned only one or two such cases, but noted that public knowledge about the incidence of rape and its criminal status had increased since 2009.[44] In 2016, the US government reported that 50 people had been arrested on rape charges (although none had been prosecuted during the year).[45] This is not insignificant in the context of a patriarchal predominantly Muslim society[46] that has historically stigmatised victims of sexual violence. Consequently, where internalisation is limited, or at the initial stages, heightened visibility of norm interpretations seems to instigate instances of, or accelerate, internalisation. Whether internalisation progresses as the scrutiny of Guinea continues will take another few years to determine.

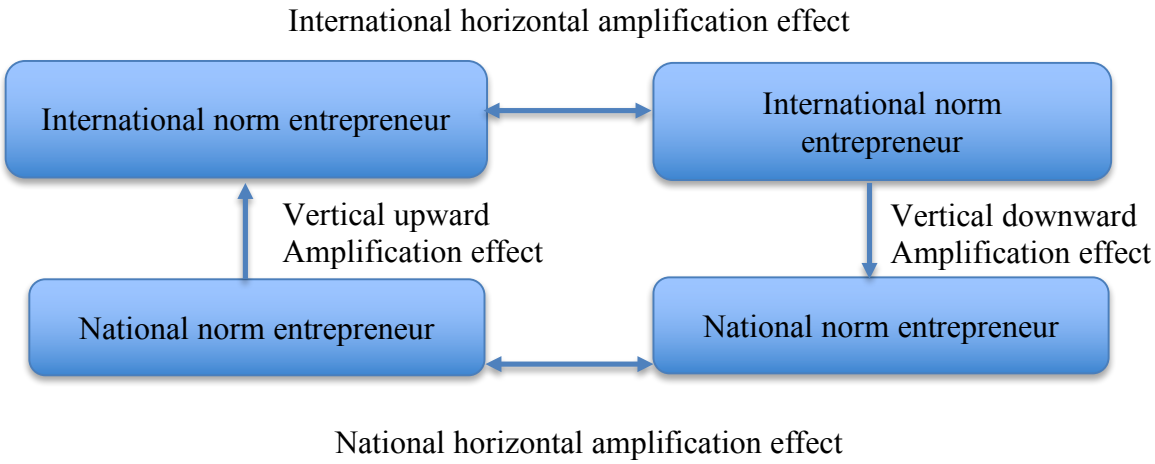
2.4 Awareness promotes a mutual amplification effect

Increased awareness of the content of the sexual violence accountability norm among national and international norm entrepreneurs, and among governmental norm sponsors, has what I term an important **mutual amplification (increased significance and impact) effect**.[47] This effect occurs **vertically** in both directions between international and national actors and **horizontally** between different international and national actors. For instance, the OTP focus on crimes of sexual violence from 2012 in Colombia provided additional leverage for advocacy in norm interpretations by national NGOs, namely, a **downward vertical amplification effect**. Reciprocally, the detailed knowledge by victims', human rights and women's organisations about the obstacles to genuine investigations can and did refine and **(vertically upward)** amplify the OTP's recommendations to Guinean State actors. This bi-directional effect is consistent with Koh's claim that the norms 'percolate up and down . . . from the domestic to the international level and back down again'.[48] The observed amplification effect (see Table 7.1) supplements Koh's TLP

[44] Interview G4, G8 - NGOs.
[45] https://www.state.gov/documents/organisation/160126.pdf
[46] Approximately 85% of the population is Muslim: US Department of State, *International Religious Freedom Report 2010 – Guinea* (13 September 2011) <https://www.state.gov/j/drl/rls/irf/2010_5/168411.htm>; see also the World Economic Forum Gender Gap Index Country Profile: Guinea (2016) <http://reports.weforum.org/feature-demonstration/files/2016/10/GIN.pdf>.
[47] This is consistent with Justine Tillier's suggestion that 'if local NGOs and civil society groups can be solicited and made more dynamic thanks to the public announcement of the opening of a preliminary examination, the impact of the policy of positive complementarity can be amplified': Tillier, 540.
[48] Harold Hongju Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181,184.

framework and suggests the internalisation process is more dynamic and nuanced than originally Koh proposed.

Table 7.1 Amplification effects across norm entrepreneurs



In Colombia, the OTP's scrutiny of the criminal justice system's neglect of sexual violence crimes **vertically amplified** national norm entrepreneurs' critique of the Fiscalía's frequent presumption that sexual violence was committed largely independently of armed conflict and in the context of personal relationships. This typically happened because the perpetrator was part of an armed group embedded or in control of a territory or because of power imbalances between civilians and armed actors, so that women and girls were coerced into relationships with, or offered by their families to, armed actors.[49] Regular scrutiny of inadequate national proceedings to assess progress in cases of sexual violence associated with the armed conflict improved the prosecutorial approach to such cases. One example was the decision to embed an international prosecutor in DINAC to boost prosecutorial competence in identifying the link between crimes of sexual violence and the armed conflict.

OTP scrutiny also led to increased State receptivity to technical training on ICL issues and procedures within the ICC framework. This change has in turn affected some interviewing practices and the process by which victims provide their testimonies to investigating judges. One NGO lawyer attributed increased recognition of the links between sexual violence and the armed conflict to OTP

[49] Interview C5, Ombudsman's office.

scrutiny of prosecutions for international crimes and a focus on sexual violence as a priority category.[50]

One example provided by the ICC Legal Advisor outside a PEX context, but demonstrative of how effective mutual amplification can be, relates to the increased mobilisation of armed actors preceding elections in the DRC in 2011. Fears of electoral violence prompted local actors and NGOs to ask the OTP to issue a statement to prevent the unrest from escalating. The widely-circulated OTP statement put politicians on notice that responsibility for electoral violence could be prosecuted at the ICC and it was credited by local actors for diffusing the violence.[51] In this instance, national norm entrepreneurs were able to leverage the visibility and influence of the OTP strategically to amplify norm interpretations that were tailored to a specific context and the heightened risk that crimes would be perpetrated there.

With respect to the phenomenon I term **international horizontal amplification**, Chapters 5 and 6 have already referred to the numerous reports by organisations spanning several years documenting the high incidence of and prevailing impunity in Colombia for crimes of sexual violence. The OTP has relied on this data only from 2012 onwards to highlight gaps in national criminal investigations. One example of horizontal amplification is the OTP's reference to a 2006 Inter-American Commission on Human Rights (IACHR) report that found armed groups such as FARC, ELN and paramilitaries used sexual violence as a means of warfare against their enemies, including for the purposes of obtaining information, terrorising, punishing, intimidating and coercing women and members of their families and communities.[52] The OTP also referenced the IACHR 2010 follow-up report that found this strategy continued.[53]

[50] Interview C5, Ombudsman's office.
[51] Interview I1.
[52] ICC-OTP, Situation in Colombia: Interim Report (2012) ('Colombia Interim Report') 27 [90].
[53] Ibid.

Thus, while credible evidence of the perpetration of sexual violence as war crimes and crimes against humanity existed for several years, it was only highlighted, or amplified, by the OTP's PEX report. Similarly, only from 2014 onwards did the OTP note progress, or lack of progress, in criminal cases of sexual violence in greater detail. For instance, its 2015 PEX report referred to the criticism by the *Auto 009* NGO Working Group of the lack of progress in the 183 cases referred to the Fiscalía by the Constitutional Court,[54] and its 2016 report highlighted gaps in data regarding sexual crimes by State armed forces.[55]

While this could be considered merely as cross-referencing, I suggest that incorporating this data into the OTP assessment of national proceedings amplifies its effect because of the OTP's discretion to realise the 'threat' of an ICC investigation. The IACHR's observation is no longer only a conclusion issued by an international organisation; it now also provides the basis for a potential finding of unwillingness by the OTP, which could render a case admissible before the ICC. The validity of this amplification effect would, of course, be undermined if Colombia continued to fail to improve compliance with the sexual violence accountability norm without any repercussions (i.e., an ICC investigation). As the longest-running preliminary examination, this situation in Colombia raises the question: should the duration of preliminary examinations be more consistent across contexts or should they continue to be determined by highly individualised factors?[56] As the length of a preliminary examination increases, does it diminish the likelihood of an ICC investigation? Particularly if some progress is initially made, does this mean that progressively smaller improvements in national proceedings will nevertheless be sufficient for the OTP to keep the preliminary examination open?

While this last conclusion seems reasonable, it does not appear to explain some of the data. The Colombian preliminary examination has been under way for 13 years, but the most significant progress towards compliance with the sexual violence

[54] ICC-OTP, Report on Preliminary Examination Activities (2015) ('PEX 2015'), 36 [154]-[155].
[55] ICC-OTP, Report on Preliminary Examination Activities (2016) ('PEX 2016'), 56 [251].
[56] The Colombian preliminary examination contrasts with the ICC investigation in Kenya following a *proprio motu* preliminary examination lasting under two years, but characterised by the government's failure on two occasions to pass a law to enable national criminal proceedings.

accountability norm has occurred since 2012. This correlates with both the OTP's explicit prioritisation of crimes of sexual violence crimes, and a more coherent and systematic gender-sensitive approach, as expressed in the OTP SGBC Policy. In TLP terms, this trend suggests continued catalytic effects of norm interpretations on norm internalisation. In other words, complete legal internalisation and partial political internalisation perpetuate, or continue to propel, the trend towards complete internalisation, even if the threat (i.e., an ICC investigation) becomes more remote. Thus, it may be that when internalisation is more advanced, the value of continued scrutiny and more specific norm-interpretive interactions becomes greater than the 'threat' of an ICC investigation.

A similar trend occurred in relation to international crimes generally in Guinea, where the earlier conspicuous failure to indict former President Captain Moussa Dadis Camara (named in the 2009 UN Commission of Inquiry report) was subsequently remedied. Although characterised by very limited internalisation prior to, and during the initial stages of, the stadium case, it may be that sustained scrutiny by the OTP and norm entrepreneurs created more opportunity for the investigating judges to indict those with political power. Consistent with this, by May 2010 more than 200 victims had been interviewed, but the first indictment of someone in a senior position, Commander Moussa Tiegboro Camara, commander of the security forces, occurred just under two years later, in February 2012. Importantly, the number of interviewees, and thus the volume of direct testimonial evidence, did not significantly increase in the intervening period; the 2012 OTP PEX report noted the same number (200) of interviewed victims.[57]

The comments by the Presiding judge of the stadium case and several lawyers suggested political pressures affected the case proceedings. In these circumstances, it is likely that issuing the indictment against Camara may have been delayed until the political environment was more conducive to (more) independent judicial proceedings. In other words, legal, political and social internalisation progressed between the opening of the case and May 2012 in relation to the obligation to

[57] PEX 2012, above n 42, 35 [157].

investigate and prosecute international crimes. This in turn facilitated further norm internalisation in the form of indicting the most senior individual implicated in the stadium massacre, the former President.

The **international horizontal amplification effect** is also clear in Guinea, as reflected in the OTP's explicit reference to the range of actors with whom it maintains a dialogue, including 'civil society organisations, victims' legal representatives, UN representatives, including with the UN Team of Experts on the Rule of Law and Sexual Violence in Conflict, the EU, and other relevant States'.[58] These norm entrepreneurs use the Rome Statute and RPE provisions and ICL principles in their own interactions with State actors, and with international and national non-State actors.[59]

However, the amplification effect also appears to flow in the other direction, from local NGOs **vertically** up to the OTP. For example, moving the stadium case venue away from the gendarmerie building was attributed to civil society, which had communicated its concerns to both the government and to the OTP.[60] The venue change occurred a year after victims started testifying, but the venue concerns were expressed to the government as soon as the first victims attending court to testify were intimidated by the gendarmerie. The OTP learned of the problem through its scheduled meetings with civil society (not the government) and then communicated the problem to the government. The year delay suggests that civil society complaints to the government were not sufficiently persuasive, and that the OTP amplified the norm interpretation, which then catalysed a venue change.

The **amplification (increased significance and impact) of international and national interpretations by norm entrepreneurs** occurs because OTP interpretations have the potential to trigger undesirable tangible consequences. The incentives to comply with those aspects of the norms that are amplified increase

[58] PEX 2016, above n 55, 63 [281].
[59] For instance, UN experts use these provisions in providing technical assistance to the Guinean judges: Interview G5, NGO.
[60] Interviews G3, G4, G5 – NGOs; Chapter 6.3.5.2.

because the cost-benefit-analysis changes; the two-level game comes into effect. The **amplification of OTP norm interpretations** occurs because national and international norm entrepreneurs, and interpretive communities such as national courts, repeat the OTP's norm interpretations across many norm-declaring fora and more frequently than the OTP.

One important qualification is that national and international norm entrepreneurs have diverse mandates that will include criminal accountability to varying degrees, and with varying expertise. Rather than perceiving a problem in 'relying on external actors [because] they lack the mandate to focus on criminal responsibility,'[61] I instead propose that enhancing the mutual amplification effect increases the consistency of norm interpretations across national and international norm entrepreneurs. However, the recommendations in Chapter 7.5 below respond to the criticism that the OTP has been 'more cheerleader than coach . . . without a plan to turn things around'.[62] In other words, more targeted and strategic OTP norm interpretations and engagements with norm entrepreneurs will necessarily provide guidance because of the unique role the OTP plays in producing the mutual amplification effect.

2.5 The ripple effect beyond international crimes of sexual violence

With respect to the broader indirect effect of the OTP's scrutiny of international crimes, the data demonstrates a **'ripple effect' beyond prosecutions of international crimes of sexual violence** to prosecutions as domestic crimes. For instance, Colombian women's rights lawyers noticed that improvements in police investigations into sexual violence under the Justice and Peace Law relating to the armed conflicts had 'rippled' or extended into other criminal investigations of sexual violence.[63] These improvements included procedural changes in the questions police and judges asked victim witnesses. In Guinea, the ripple effect was predictably more moderate, given the prior silence around sexual violence; the increased number of rapes reported to authorities is attributed to the stadium

[61] Will Colish, 'The International Criminal Court in Guinea: A Case Study of Complementarity' (2013) 26(2) *Revue québécoise de droit international* 23, 43.
[62] Ibid.
[63] Interview C11, NGO.

case.[64] This suggests that the political and social internalisation process of an international legal norm may have an impact beyond its specific legal context.

This is unsurprising given that certain laws and policies created to address sexual violence committed as international crimes inevitably affect the treatment of 'ordinary' sexual violence.[65] Protection and support for vulnerable witnesses will encompass victims of sexual violence, whether that violence was committed as a war crime, crime against humanity or in another context entirely. Similarly, investigators, judges and prosecutors specifically trained to prosecute sexual violence and in appropriate techniques for interviewing vulnerable women are likely to apply these skills irrespective of the legal characterisation of the crime and the context within which it occurred. Thus, internalisation of the sexual violence accountability norm may promote internalisation of other criminal justice and human rights norms and practices.

Other empirical research on the effects of ICC investigations and prosecutions (rather than preliminary examinations) has found a similar increase in domestic prosecutions and convictions of human rights violators.[66] This has three implications for projects seeking to identify and measure the ICC's catalytic effect. The first is that the OTP's impact goes beyond crimes as described in the Rome Statute and affects practice relating to other ('ordinary') crimes of sexual violence. Second, and notwithstanding my findings, the full extent of the catalysis may not manifest in the short or even medium-term. Third, these effects occur not just because of ICC investigations, but also as a result of preliminary examinations.[67] Iterative norm-interpretive interactions around ambiguously-defined terms such as 'unwilling' and 'unable' grant the OTP discretion to determine how broad the 'margin of appreciation' accorded to a State is. This is a more flexible model of engagement compared to ICC investigations in which the State has already lost

[64] Interview G4, NGO.
[65] Ní Aoláin, above n 2, 626.
[66] Geoff Dancy and Florencia Montal, Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions (2016) <http://www2.tulane.edu/liberal-arts/political-science/upload/Dancy-and-Montal-Unintended-Positive-Complementarity-AJIL.pdf>, 69.
[67] Chapter 2.2.2.4.

control over certain investigations, and where the outcome – that individuals are charged – is already certain.[68]

One other indirect effect is that of 'broadcasting' the types of standards considered sufficient to persuade the OTP to keep a preliminary examination open, rather than trigger an ICC investigation. It seems that there is a precedential value in such decisions that other countries may observe, notwithstanding that the OTP does not 'make sweeping judgments of structures'.[69] Determining whether other countries under preliminary examination conduct this type of assessment would require substantial further empirical research. Whether nascent or more robust, these observed phenomena confirm not only the complex process required for norm internalisation, but also that there are grounds to believe the OTP could enhance its catalytic impact.

3. Using the data to confirm and critique TLP's explanatory value

As the empirical data discussed above shows, part of the TLP's explanatory value as an international legal theoretical approach is that it captures non-legal factors that affect the extent to which an international legal norm is internalised. This helps us better understand the challenges to internalising the sexual violence accountability norm. In this context, neither Colombia nor Guinea contested the validity or applicability of the norm obliging investigation and prosecution of international crimes, nor its application to international crimes of sexual violence. Nonetheless, the earlier discussion has also shown that there are significant legal, political and social reasons for State reluctance to prosecute the 'most serious crimes' in general, and crimes of sexual violence in particular. Overcoming these barriers is a key precondition to achieving the 'voluntary obedience' envisaged by the Rome Statute (and Koh's TLP), rather than coerced or instrumental compliance[70] created by the threat of an ICC investigation.

[68] It is possible for the OTP to open an investigation but subsequently close it without charging any individuals, but this has not happened to date. It also seems an unlikely outcome given its likely very damaging effects on the OTP's reputation and credibility.
[69] Interview I4.
[70] Harold Hongju Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2645.

In both States, initially slow proceedings that could have been interpreted as an instrumental response by the State to avoid international intervention have nevertheless gradually produced some tangible results. In Colombia, almost total impunity for sexual violence was reflected in the poor follow-up to the 2008 *Auto 092* judgment. This has been somewhat countered by recent convictions, which are significant in terms of the number of crimes of sexual violence and the political profile of the defendants.[71] In Guinea, proceedings that were initially characterised by delays and interference by the government and viewed by civil society as unlikely to affect those most responsible, have since produced indictments against all the senior individuals named in the UN Commission of Inquiry report.

This shift is consistent with the four stages or types of relationships between norms and conduct along the spectrum of internalisation described by Koh. Specifically, Koh distinguished between compliance with a norm to gain rewards or avoid punishments, and internalisation (or obedience), where the norm is incorporated into an internal value system, thus reducing the need for reward or punishment to maintain norm-consistent behaviour.[72] In both Colombia and Guinea, the OTP's aim throughout has been and is to 'bind' each State to behave consistently with the norm obliging investigations and prosecutions for international crimes. The acceptance by both States of the binding nature of the obligation through repeated norm-interpretive interactions has brought about developments consistent with the norm. Koh's TLP does not explain how causality is proven in the internalisation process; this is, the TLP is a theory of 'how' internalisation occurs, not 'why' it does.[73]

Nevertheless, the TLP agents who promote internalisation by provoking norm-interpretive interactions are described in ways that intimate *why* internalisation occurs. Koh claims that transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks and interpretive communities *persuade*

[71] Chapter 6.2.3.
[72] Harold Hongju Koh, '1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Houston Law Review* 623, 628; see also Chapter 2.2.1.
[73] Chapter 2.2.1.

resisting States to internalise their interpretations into domestic law.[74] The actions of these actors have been referred to throughout the analysis in the previous chapters of interactions in Colombia and Guinea, so this analysis focuses on inferences emerging from the current research not captured by Chapters 5 and 6.

The principal transnational norm entrepreneur in preliminary examinations is the OTP. However, the ICC treaty regime is qualitatively different to other human rights-related regimes because the OTP is a specific 'monitoring and assessing' organ with discretionary powers under the relevant legally binding instrument. For instance, Koh applies the TLP to human rights regimes because they feature iterative norm-interpretive interactions between the monitoring body, the State and non-State norm entrepreneurs. However, the monitoring and assessing entities of international human rights treaties have no legal authority to intervene actively in national processes or to enforce remedies.[75] Decisions by UN complaint-recourse mechanisms are not binding on States,[76] and complaint-information procedures do not allow for targeted remedies or responses to be initiated by international actors without express State consent.[77] Thus, the OTP as an entity with treaty-delegated powers to determine when ICC jurisdiction will be triggered is qualitatively different from the NGOs and individuals Koh describes as norm entrepreneurs.[78]

These qualitative differences suggest that an entity like the OTP is not 'just' a norm entrepreneur comparable to an NGO, yet there is no other agent in Koh's description of the TLP that adequately captures the OTP's capacity to instigate legal proceedings regardless of State consent. Other international courts have been important 'law-declaring fora' but do not actively promote internalisation through norm-

[74] Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24(4) *Pennsylvania State International Law Review* 745, 747. He does not include the other two features, bureaucratic compliance procedures and issue linkages as these are not agents capable of performing the act of persuasion.

[75] For a list of these bodies, and links describing their powers see <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

[76] E.g. the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* GAOR, A/RES/54/4, 54th sess, Agenda Item 109, opened for signature 15 October 1999(entered into force 22 December 2000).

[77] For example, the Commission on the Status of Women.

[78] Chapter 2.2.2.

interpretive *interactions* with State and non-State actors, even if their judgments are subsequently invoked by norm entrepreneurs in such interactions.

NGO and individual norm entrepreneur activities include mobilising popular opinion and political support, and attempting to persuade elites that their regime should reflect a universal moral sense and application.[79] While the OTP may perform these activities, they are incidental to its role of assessing the 'genuineness' of national proceedings. I suggest the OTP is more an international **norm enforcer** than a norm entrepreneur, either passively through its scrutiny and assessments or actively, by opening an investigation and ensuring the norm requiring investigation and prosecutions is complied with by enforcing norm compliance itself. This is distinguishable from administrative or (quasi-)judicial bodies that issue decisions on disputes brought to them by State parties to a treaty.

The international norm-enforcer role relies on different avenues of persuasion (the 'shadow' authority of the ICC, in this case), cultivates different legal and political relationships (with key senior decision makers within the Executive and the Judiciary), and ultimately can trigger some tangible consequence if non-compliance with the norm continues (an ICC investigation). Further, the 'shadow' of an ICC investigation is consistent with Koh's understanding of how legal process theories can explain the conversion of a State's behaviour from norm non-compliant to norm-compliant.[80]

It should be noted that regional courts such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACtHR) have more robust enforcement and intervention procedures, and established compliance monitoring mechanisms, compared to international human rights treaty regimes. For instance, the European Committee of Ministers supervises the measures taken by States to execute the judgments of the ECHR.[81] Nevertheless, there is an important distinction

[79] Ethan A Nadelmann, Global Prohibition Regimes: The Evolution of Norms in International Society, (1990) 44 *International Organisation* 479, 482; Koh, above n 71, 2612.
[80] Koh, above n 70, 2639.
[81] Department for the Execution of Judgments of the European Court of Human Rights, < https://www.coe.int/en/web/execution>.

between this type of mandate, which occurs *after* the ECHR has issued its judgment and that by the OTP during preliminary examinations, which involves monitoring and engagement with States *before* there is even a case before the ICC.

The Inter-American system is a closer parallel, because subject to certain conditions the Inter-American Commission (the Commission) may receive petitions from non-state entities without specific State consent under the American Convention on Human Rights (article 44) and adopt enforceable precautionary measures to prevent irreparable harm.[82] This occurs *before* it files a complaint to the IACtHR, which may also adopt provisional measures at the request of the Commission in cases not yet submitted to it (subject to certain conditions).[83] A key pre-condition in both situations is the exhaustion of domestic remedies.[84] This operates as an admissibility screening process similar to the one the OTP conducts when determining whether to open an investigation following a preliminary examination. On this basis, the Commission and IACtHR could also be understood as norm-enforcer institutions.

On the other hand, the type, duration and intensity of engagement between the norm-enforcer and the relevant State is substantially different between the ACHR and ICC treaty regime. Adopting a positive complementarity approach, the OTP directly engages with national criminal justice actors during preliminary examinations with an explicit agenda of encouraging genuine national proceedings. Rather than determining admissibility upon receipt of a petition, the OTP discretionarily opens a preliminary examination and assesses the integrity of national proceedings on an ongoing basis, triggering an iterative process of norm-interpretative interactions. In this capacity, the OTP performs more like a norm entrepreneur compared to when it takes on a norm-enforcer role when opening an ICC investigation following a preliminary examination.

[82] Inter-American Commission on Human Rights Rules of Procedure, art 25(1).
[83] American Convention on Human Rights (ACHR), art 61(1) and art 62(2) respectively
[84] ACHR, art 46, art 47.

Finally, many OTP norm interpretations during preliminary examinations are transparent and public. Annual reports, open letters and communications with States, missions to States and participation in public fora allow for broader monitoring and offer guidance to States on the specific changes required to remedy non-compliance. These initial similarities and differences underscore why legal scholars have already examined the ACHR system through the lens of TLP and norm internalisation more broadly.[85] They also indicate why norm-interpretive interactions may play a more significant role in catalysing national proceedings during preliminary examinations compared to within the ACHR system, whereby enforcement is structurally guaranteed.

Testing the TLP within the preliminary examination phase confirms its value as a compliance theory that offers insights into how non-compliance can be transformed into compliance, a topic not well explained or explored by the existing theoretical literature.[86] In Guinea, this was exemplified by post-OTP briefings from the Minister of Justice communicating the OTP's concerns about the case to the panel of judges on the stadium case.[87] In Colombia, the Fiscalía noticeably increased attention on crimes of sexual violence after the OTP designated it a focus category in its preliminary examination. Including this different type of key agent more comprehensively explains how the TLP framework may capture the features of the ICC treaty regime.

The other key finding is that improved engagement by the OTP with norm entrepreneurs, including cultivating more developed transnational issue networks and interpretive communities, invites increased and more specific norm-interpretive interactions. While Koh describes how interactions among the agents promotes norm internalisations, this thesis goes further: if an international norm enforcer like the OTP can more strategically cultivate each of the TLP agents, then

[85] Harold Koh, 'The Value of Process' (2005) 11 *International Legal Theory* 27, 36-37; Marcelo Torelly, 'Transnational Legal Process and Fundamental Rights in Latin America: How Does the Inter-American Human Rights System Reshape Domestic Constitutional Rights?' in Pedro Rubim Borges Fortes et al (eds) *Law and Policy in Latin America: Transforming Courts, Institutions and Rights* (Palgrave Macmillan UK, 2017), 21-38;
[86] Ibid.
[87] Interview G1.

their norm-interpretive interactions will be more contextually specific and appropriate, as well as more persuasive. There is a **mutual amplification effect**[88] that an international norm enforcer can strategically cultivate to improve accuracy and responsiveness in its own norm interpretations, which in turn enhances its catalytic influence. The OTP norm interpretations also provide knowledge and leverage to other norm entrepreneurs to do similarly. This foreshadows the discussion below about the TLP's explanatory limitations with respect to the sexual violence accountability norm.

While Koh noted that the order in which legal, political and social internalisation occurs varies, he did not explain how the relationship, or the lack of a relationship, between each type of internalisation can affect State compliance.[89] Chapter 2 noted legal internalisation through the criminalisation of sexual violence or rape in national jurisdictions has generally not correlated with, or led to, complete political and social internalisation and, therefore, such crimes are typically not prosecuted or convicted. This appears true in Colombia and Guinea. Extending this logic to challenging ingrained socio-cultural practices and beliefs around a gender-based topic like sexual violence, legal and/or political internalisation could be predicted to occur before social internalisation. However, social internalisation cannot be presumed to occur just because the other two forms of socialisation have occurred.

This is the case in both countries; in Colombia, while the legal framework is now comprehensive and there is some political internalisation, there are only isolated instances of social internalisation. In Guinea, the rhetoric from the political elites about ability and willingness preceded the legislative reform that incorporated some, but not all, international legal standards vis-à-vis sexual violence. However, there is no evidence of widespread adherence to the sexual violence accountability norm nor of the adoption of policies to promote this result. Thus, the TLP's explanatory value could be increased by incorporating an understanding that where international legal norms challenge entrenched socio-cultural attitudes and behaviours, social internalisation will occur most slowly, if at all. Further, norm

[88] Chapter 7.2.4.
[89] Koh, above n 72, 642-643; Chapter 2.3.2.

entrepreneurs need to devote more attention and resources to social internalisation, rather than assuming norm-interpretive interactions combined with legal and political internalisation will inevitably lead to social internalisation.

Knowing that social internalisation will be the most difficult to achieve suggests that norm entrepreneurs should promote legal and political internalisation that encourages or creates circumstances for social internalisation to occur more quickly. For instance, in circumstances where sentences for serious crimes of sexual violence are typically disproportionately low (indicating the absence of social internalisation on the part of sentencing judges), legal internalisation in the form of sentencing laws that mandate minimum sentences for such offences would accelerate social internalisation with respect to sentencing. This strategy is typically used for other crimes to escalate community perception of their relative seriousness and increase sentencing consistency.[90]

To improve social internalisation, investigative procedures could incorporate enforcement measures and consequences for non-compliance. For instance, failures to interview victims of sexual violence in private or to investigate such crimes according to policy-prescribed timelines could trigger disciplinary measures that ensure and enhance compliance. As a norm enforcer with a limited mandate in preliminary examinations, it is not appropriate nor feasible for the OTP to interrogate investigative procedures in general. However, the OTP can proactively seek information from national norm entrepreneurs about the key barriers to investigating crimes of sexual violence and incorporate these elements into its norm-interpretive interactions with State actors. In fact, the OTP has already done this in Guinea, by communicating victim representatives' concerns to the State about the presence of gendarmes at the court venue, resulting in the relocation of proceedings.

[90] United States Sentencing Commission, *Fifteen years of guidelines sentencing* (November 2004*)* 38-78, 70-73; UK Sentencing Council, *Sexual Offences Definitive Guideline* (1 April 2014). For example, on sentencing guidelines for domestic abuse in the United Kingdom: <https://www.sentencingcouncil.org.uk/news/item/sentencing-council-publishes-new-guidelines-on-intimidatory-offences-and-domestic-abuse/>; on achieving consistency see <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2016/justice/7916.pdf>.

This finding highlights the key limitation in TLP's explanatory value with respect to the internalisation of a gender-based norm, such as the obligation to investigate and prosecute international crimes of sexual violence. TLP claims that the process of 'interaction-interpretation-internalisation' is sufficient to cause international norms to trickle down and become internalised into domestic legal systems.[91] This may work to some extent in general terms. However, the research demonstrates that to internalise international norms that conflict with pre-existing norms shaped by social and cultural attitudes and beliefs, norm entrepreneurs or norm-enforcers need to apply a more deliberate, nuanced and targeted strategy.

The criminal justice systems of Colombia and Guinea share a historical neglect of crimes of sexual violence. While the data is qualitatively different across the two contexts, it nevertheless supports a common conclusion that an explicit gender focus in norm-interpretive interactions is required to catalyse internalisation of gender-based norms. In other words, in Colombia's longer PEX, the OTP's gender-neutral norm interpretations may have contributed to improved national proceedings for international crimes in general. However, this approach failed to catalyse a significant effort to achieve such achievements with respect to crimes of sexual violence. An explicit focus on sexual violence coincided with increased government efforts from approximately 2012 to address this category of crime; these efforts were effective in several respects. Conversely, from the very start of Guinea's shorter PEX, the OTP explicitly incorporated sexual violence as a category of crime in its norm-interpretive interactions about the stadium case and, partly because of this specific focus, sexual violence has been investigated.[92]

In Guinea, the pre-existing impunity for sexual violence remains largely due to very low levels of reporting and the absence of gender-sensitive criminal justice procedures, while in Colombia impunity persists despite comprehensive laws and documented high incidence rates. For reasons explored in Chapter 6, and

[91] See Chapter 2.1.2; Koh, above, n 72.
[92] This does not mean legal, political and social internalisation has occurred but rather the typical Guinean silence around sexual violence does not apply to the stadium case.

notwithstanding pre-existing domestic advocacy of norm entrepreneurs around gender-based violence and women's rights, there are good reasons to expect this trend would have continued. While other crimes in Colombia were addressed under the Justice and Peace Law from 2005, accountability for sexual violence crimes remained overwhelmingly absent. The State adopted no new measures, nor did the OTP call on the State specifically to introduce measures, to remedy this oversight. As foreshadowed in Chapter 2, the research demonstrates the TLP's failure to account for domestic political factors that may undermine domestic implementation of an international norm.[93] More specifically, the OTP's initial gender-neutral norm-interpretive interactions, and the 'sexed identity of the players in the internalisation process'[94] in Colombia perpetuated the historical neglect of sexual violence (and other gender-based crimes) by the criminal justice system.

The empirical data in this thesis confirms the prediction made in Chapter 2 that the TLP, despite its focus on extra-legal aspects of internalisation, fails to recognise, consider and incorporate the impact of gender on the normative behaviour of individuals, institutions and States at either the national or international level. Although Koh applied the TLP to the CEDAW treaty regime and to the women's suffrage movement, as a gender-neutral theory, the TLP does not explore the dynamics and contestation of norms across the three types of internalisation when the international norm is inherently gender-based. Accordingly, the TLP cannot explain why gender-neutral norm-interpretive interactions will prompt internalisation of the norm generally, but fail to affect pre-existing impunity for gender-based crimes such as sexual violence. As Chapter 2 also noted, a feminist critique explains why this is the case, and why norm-interpretive interactions by an international norm enforcer like the OTP must refer explicitly to gender-specific aspects of the norm to prompt internalisation for those aspects.

[93] Chapter 2.3.2; Megan Louise Pearce, 'Gendering the Compliance Agenda: Feminism, Human Rights, and Violence against Women' (2015) 21 *Cardozo Journal on Law and Gender* 393, 424.
[94] Hilary Charlesworth, 'Feminist Ambivalence about International law' (2005) 11 *International Legal Theory,* 1, 8.

More than that, the empirical research suggests that a gender-sensitive approach to norm interpretations with the other key agents described by the TLP will also increase the OTP's influence on internalising the sexual violence accountability norm. For instance, based on the mutual amplification effect observed in the research, this thesis finds that the OTP can and could have elicited more specific information from women's organisations about the barriers to compliance with the sexual violence accountability norm. This information could increase the specificity, contextual relevance and factual accuracy of the OTP's norm interpretations, analysis and recommendations; national norm entrepreneurs can in turn leverage these in their advocacy or other internalisation efforts. This upward spiral effect of pressure, produced by multiple actors amplifying each other's norm interpretations, already occurs to a limited extent. However, the empirical research also suggests that a more nuanced OTP gender-sensitive approach to its PEX norm-interpretive interactions could accelerate the spiral towards more comprehensive and faster internalisation.

The TLP provides a valuable explanatory framework of the process and actors involved in promoting norm internalisation. However, this thesis demonstrates through empirical research that the TLP's gender neutrality renders it unable to account fully for the nature and extent of barriers to complete internalisation of international norms relating to sexual and gender-based violence. Without considering and responding to the gendered dimensions of existing State non-compliance with international norms, the TLP cannot explain continued non-compliance with international norms that challenge socio-cultural gendered practices, nor can it promote their internalisation effectively. The empirical research presented in this thesis demonstrates how adopting a gender-sensitive approach to norm-interpretive interactions enhances the TLP's explanatory value and its capacity to explain and improve the OTP's influence on internalisation of the international sexual violence accountability norm.

4. Maximising the impact of norm interpretations

4.1 The content of the OTP's norm interpretations

The OTP's reliance on factual inaccuracies and its misconceptions about the applicable laws, the proceedings under scrutiny and their results undermines its legitimacy and influence with national criminal institutions. Proposals to maximise the OTP's catalytic potential need to be anchored in a realistic assessment of what is both feasible and appropriate, given the OTP's role, resources and limitations under the Rome Statute. However, it is clear that 'the Court needs to engage in a more detailed rigorous qualitative assessment of all the ways in which the national characterisation and relevant legislation would impact on the contours of the case'.[95] While capacity building and judicial review of a national legal system are beyond the OTP's mandate, more comprehensive, current and corroborated data should be used strategically to highlight oversights.

As is clear from the indicators in the PEX Policy, the OTP can legitimately consider substantive definitions and legal frameworks, procedures that violate fundamental norms and outcomes that are manifestly disproportionate, particularly in light of Article 21(3) of the Rome Statute.[96] In fact, the OTP recognised that Colombia's failure to investigate and prosecute sexual violence crimes 'is a systemic problem and you simply can't prosecute without addressing the systemic problems, unlike the false positive situation'.[97] That is, the continuing impunity will not be challenged without this type of approach to internalising the sexual violence accountability norm.

Accordingly, Table 7.2 below incorporates gender-sensitive additions in italics to the factors identified in Table 5.2, taken from the OTP's PEX Policy. The gender-sensitive suggestions are neither a surprising nor unnatural extension of the OTP's mandate or conduct, particularly in light of the fact that the Women's Caucus proposed that some of them be included in the text of Article 17 at the Rome

[95] Interview I1.
[96] E.g. interview I1.
[97] Interview I4

Conference. The suggestions that were first proposed at the Rome Conference are underlined in the table.

Prima facie, there is nothing in the Rome Statute that precludes the OTP from interpreting its terms in this way, even though the Women's Caucus suggestions were not included in its final text. It may be that the OTP could, in its implementation of any of its policies, be found by the ICC judiciary to be acting *ultra vires* in its expanded interpretation of the criteria in Article 17. This has not been raised before the ICC so far. I would suggest that since the OTP grants a 'margin of appreciation' to States under preliminary examination,[98] the gender-sensitive interpretation below is not *ultra vires.* A State or individual accused can contest the OTP's interpretation of Article 17 when contesting admissibility of a situation or a case. Chapter 4.3 discussed several cases in which this has already occurred. By communicating the criteria it uses to open and close a preliminary examination, as well as how it will execute its positive complementarity approach, the OTP merely increases transparency. And, as the field research demonstrates, increased transparency and detail in norm interpretations promotes improved compliance with the norms contained in the Rome Statute.

[98] Chapters 3.1 and 5.2.

Table 7.2: Gender-sensitive interpretation of unwillingness and inability[99]

Test for inactivity	Indicators
No ongoing investigations or prosecutions	• the absence of an adequate legislative framework, *including inadequate or absent definitions of sexual violence crimes, inadequate procedural and evidence laws to protect sexual violence victim witnesses; absence of indirect responsibility provisions in the criminal law; procedural or evidentiary requirements particular to sexual violence that preclude or unreasonably obstruct a proper conviction* • the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation • the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible, or • other, more general issues related to the lack of political will or judicial capacity.
(b) unjustified delay in the proceedings (Article 17(2)(b))	• the pace of investigative steps and proceedings, *taking into consideration cases that should be prioritised, including because of victim witness vulnerability* • whether the delay in the proceedings can be objectively justified in the circumstances, *including whether delay applies to particular categories of crimes and not others*, and • whether there is evidence of a lack of intent to bring the person(s) concerned to justice.
(c) independence of proceedings (Article 17(2)(c))	• the alleged involvement of the State apparatus, including those departments responsible for law and order, in the commission of the alleged crimes • the constitutional role and powers vested in the different institutions of the criminal justice system • the extent to which the appointment and dismissal of investigators, prosecutors and judges affect due process in the case • the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to government institutions • political interference in the investigation, prosecution or trial

[99] Note that for clarity, the table does not include more general non-gender related elaborations for the criteria suggested by the empirical data.

	• recourse to extra-judicial bodies, and • corruption of investigators, prosecutors and judges.[100]
(c) impartiality of proceedings (Article 17(2)(c))	• connections between the suspected perpetrators and competent authorities responsible for investigation, prosecution or adjudication of the crimes, as well as public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.[101]
Test for inability	**Indicators**
*total or substantial collapse or unavailability of judicial system means the State is unable to collect the necessary evidence and testimony, unable to obtain the accused or is otherwise unable to carry out its proceedings (article17(3))	• the inability of the competent authorities to exercise their judicial powers in the territory concerned • the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems, *particularly the failure to have a policy and to allocate adequate resources to vulnerable witnesses* • the absence of the required legislative framework to prosecute the same conduct or forms of responsibility, *including inadequate or absent definitions of sexual violence crimes, inadequate procedural and evidence laws to protect sexual violence victim witnesses, absence of indirect responsibility provisions in the criminal law, procedural or evidentiary requirements particular to sexual violence that preclude or unreasonably obstruct a proper conviction* • the lack of adequate resources for effective investigations and prosecutions, *including a failure to allocate resources to train female interviewers*[102] *and provide protection and support to vulnerable witnesses* • violations of fundamental rights of the accused.[103]

[100] PEX Policy, above n 19, 14 [53].
[101] Ibid 14 [54].
[102] This derives from women's reports of feeling uncomfortable sharing their stories with the male judges in Guinea: interview G12, G13, G14, G15, G17, G18 - witnesses.
[103] PEX Policy, above n 19, 14 [57].

There is a preliminary issue worth noting regarding assessments of inactivity, which are made when there are no national proceedings targeting the 'same person and the same conduct' as would be investigated by the ICC.[104] Without a gender-sensitive analysis to investigations, the OTP may neither uncover nor choose to prosecute crimes of sexual violence, even if they belong to a category of crime under OTP scrutiny. This was the case in *Lubanga*, which precipitated substantial criticism of the OTP's investigative strategy.[105] The consequence of excluding these crimes is that inactivity *cannot* be the conclusion arrived at as the reason for not investigating them, because the conduct is not the subject of an ICC investigation.

Adopting a gender-sensitive approach to preliminary examinations from the outset, as required under the OTP SGBC Policy, avoids this outcome, because crimes of sexual violence will fall within the scope of prospective ICC investigations if and when it is appropriate. Thus, inactivity at the national level vis-à-vis crimes of sexual violence, but activity with respect to other crimes, would support an OTP assessment of admissibility of cases arising out of conduct related to crimes of sexual violence crimes. The improved OTP track record in charging and proving crimes of sexual violence, as reflected in increased confirmation and conviction rates, suggests this is more likely to be the case in future assessments made during preliminary examinations.

Strict application of these gender-sensitive criteria would lead the OTP to conclude unwillingness in a few scenarios. For instance, by 2015, only 0.24 percent of the 39,546 crimes confessed to in Colombia under the Justice and Peace Law included sexual violence, and there had been only one conviction for a sexual violence

[104] Chapter 4.3.1.1.

[105] Chapter 3.4.2; Women's Initiatives for Gender Justice, *Special Issue of the Legal Eye on the ICC* (May 2012) <http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2012-first-special-issue-on-lubanga-judgement/>; Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor Without Borders' (Spring 2009*) World Affairs* 30; K'shaani O Smith, 'Prosecutor v Lubanga: how the International Criminal Court failed the women and girls of the Congo' (2011) 54(2) *Howard Law Journal* 467, 474.

crime.[106] The disparity between this and the reported incidence of sexual violence suggests 'manifestly insufficient steps [had been taken] in the investigation' of the majority of crimes of sexual violence compared to other crimes.[107] In Guinea, if the conduct amounting to sexual slavery and sexual mutilation is charged merely as indecent assault or physical assault with kidnapping (in the case of sexual slavery), this may result in disproportionately low sentences for crimes of sexual violence compared to other crimes. This discrepancy could be considered an intent to shield the person concerned from criminal responsibility for these crimes.[108] State denials of such an 'intent to shield' in such cases, and in cases not involving crimes of sexual violence, would be unsurprising; this is the value of the objective indicators from which the OTP can reasonably infer intent, notwithstanding assertions to the contrary.

It could be expected that as the OTP's strategic approach to preliminary examinations becomes more gender-sensitive, its engagement with norm entrepreneurs and norm interpretations will become more nuanced. This in turn should guide national actors to provide information that is more relevant to the Article 17 criteria as interpreted by the OTP, which will allow the OTP to identify and articulate more gender-sensitive aspects of each criterion in its norm interpretations with State actors. The consequent upward spiral should contribute to more genuine and better investigations and prosecutions of international crimes of sexual violence, however entrenched pre-existing legal, political and socially tolerance of impunity may be. The absence of State responses promoting these outcomes would alert the OTP to a possible need to 'forecast' or 'signal' to the State that an ICC investigation could be opened based on impunity for sexual crimes, even if national proceedings for other crimes exist. However, I would suggest this is an unlikely scenario; the Guinean situation represents an extreme example of a jurisdiction with almost no history of prosecuting crimes of sexual violence, yet the State is attempting to ensure that these are included in the stadium massacre case.

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[106] ABColombia, above n 37, 2. Note that Amnesty International cites the figure 96 of 57,000 (rather than 95, which is 0.24% of 39,546): Amnesty International, *Colombia: Hidden from Justice - Impunity for Conflict-Related Sexual Violence, a Follow-up Report* (2012), 26.
[107] PEX Policy, above n 19, 13 [51].
[108] *Rome Statute*, art17(2)(a); PEX Policy, above n 19, 13 [51].

4.2 The role of norm entrepreneurs

The OTP has a unique role and catalytic potential as a norm enforcer. However, my research has suggested that norm entrepreneurs could also have greater impact on State compliance with the sexual violence accountability norm.

First, national norm entrepreneurs are better informed about the specific aspects of the conduct of national proceedings. The data from Guinea suggests that linking State conduct to, or framing it in terms of, the Rome Statute obligations may be more persuasive than merely identifying concerns with national proceedings. Highlighting how the particular conduct is non-compliant with the international norm facilitates incorporation into OTP norm interpretations, which increases the visibility of continued non-compliance. Relatedly, norm entrepreneurs could also use the OTP PEX, SGBC and other policies to inform their own data collection and analysis of national proceedings under OTP scrutiny. This strategy reduces the risk that in their dialogue with the OTP they will omit information relevant to admissibility; it is also likely to increase the volume of relevant information shared with the OTP.

For instance, civil society in Guinea could suggest that the failure to ensure that the investigating judges were appropriately trained to interview women victims of sexual violence constitutes 'intimidation of victims' according to the PEX Policy, which could suggest unwillingness under Article 17(2)(a) of the Rome Statute. In contrast, Colombian women's rights organisations have consistently incorporated international standards into their advocacy, but with very limited acknowledgement by the government until recently. The Colombian government's 2014 invitation to an NGO to draft the protocol for investigating crimes of sexual violence suggests greater State receptivity to NGO norm interpretations.[109]

Second, the vertical and horizontal mutual amplification effects suggest that beyond publishing and sharing their own data generally, norm entrepreneurs could amplify their norm interpretations more strategically and increase their influence over the

[109] Chapter 6.2.3.

attitudes of national criminal justice actors. In spoken and written advocacy, using OTP norm interpretations bolstered by their own data could enhance the impact of norm interpretations by national norm entrepreneurs. Similarly, norm entrepreneurs could share these interpretations with other bodies, such as international norm entrepreneurs working on related issues. These include, for example, CEDAW, the UN Special Rapporteurs and other human rights treaty monitoring bodies that include access to justice for sexual violence in their surveys of national contexts. This may promote greater specificity and consistency in norm interpretations across international organisations engaging with States on a range of rights-related issues.

Third, national norm entrepreneurs can use the 'ripple effect' to enhance the impact of their advocacy on other, related human rights issues. Improved norm interpretations and compliance by a State with respect to the sexual violence accountability norm both increases visibility of discrepancies across related human rights issues and provides a normative basis to improve practices generally. This effect was demonstrated in Chapter 6.3.3.4, which described how a protest march against sexual violence in Guinea, as part of a broader advocacy campaign, preceded the first government campaign to end 'violence against women'.[110] Such a heightened public profile of the issue is consistent with human rights lawyers' observations that the stadium massacre raised the visibility of violence against women in Guinea.

These recommendations both reflect and complement the recommendations targeted at the OTP above. National norm entrepreneurs already perform such a critical role in norm internalisation. The recommendations here may be particularly useful for norm entrepreneurs with limited influence, engagement with, or access to the State and/or those operating in a context where the State has historically been less receptive to NGO suggestions.

[110] *Guinea: Sixteen days devoted to the fight against violence against women* (22 November 2016) <https://www.guinee360.com/22/11/2016/seize-jours-lutte-contre-violences-aux-femmes/>.

5. Extending the analysis

Chapters 1.2 and 2.2 explained that the TLP framework was selected to apply to the ICC treaty regime for several reasons. While the OTP has a unique role as an international norm enforcer, particularly in preliminary examinations, there are reasons to expect that the findings here could apply beyond this specific context. Certainly, some themes from Chapter 7.2 may be relevant to human rights and women's rights treaty regimes, particularly since the TLP has already been applied to these contexts. Further, while TLP answers 'how' international norms are internalised, explaining 'why' this may happen in the context of the ICC treaty regime has not yet been explored. Both issues are discussed briefly in this section.

The more strategic and gender-sensitive model of engagement discussed in this thesis need not be limited to the preliminary examination phase within the Rome Statute regime, although the OTP's powers as an international norm enforcer in this paradigm are unique. The empirical findings suggest that the ICC can have catalytic effects beyond the immediate cases under the OTP's scrutiny. This is consistent with other empirical research that human rights trials have ripple effects beyond international crimes,[111] and suggests a logical direction for future research, namely, to empirically research the *processes* by which these ripple effects are created and can be enhanced.

This thesis confirms previous human rights research that improvements in compliance with human rights norms can be explained by a transnational legal process characterised by norm-interpretive interactions. Accordingly, it is possible that the phenomena or principles identified in Chapter 7.2 above would also be present with respect to other rights-related norms under different treaty regimes. However, the degree and salience of norm-interpretive effects are likely be weaker in other regimes compared to the preliminary examination context, for three reasons.

[111] Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939.

The first reason is that human rights-related treaty regimes operate on a 'soft law' basis, without an international norm enforcer with discretion to intervene to achieve norm compliance.[112] Without this, there is no tangible (undesirable) consequence to increase the incentive to at least partially internalise the norm sufficiently to avoid international intervention. The second reason is that without a specific context within which compliance can be publicly scrutinised and assessed on a relatively frequent and detailed basis (such as through PEX reports and multiple country visits a year), the norm-interpretive interactions will necessarily be less detailed, and therefore less able to catalyse the specific forms of internalisation required to achieve compliance. The third reason is that the relatively narrow scope of the OTP's scrutiny compared to other treaty regimes – limited to the 'most serious' cases of international crimes that the OTP would investigate and prosecute itself if the State did not – allows for more targeted norm interpretations compared to more expansive regimes.[113]

For these three reasons, the recommendations in Chapter 7.5 may not catalyse or accelerate norm internalisation in other contexts to the same extent as they could in preliminary examinations. On the other hand, as the ripple effect demonstrates, the ongoing effects of norm-interpretive interactions may extend to related norms. Once legal, political and social internalisation is achieved with respect to one norm, its 'contagion effect' may be more likely, because some of the pre-existing challenges to internalisation have been overcome.[114] Understanding the processes by which norm compliance is enhanced is an important precondition to achieving the ideal, 'voluntary State obedience' to the norm.

The research demonstrated that TLP explains *how,* not *why,* nations that do not obey international law may, over time, come to obey it. That is, TLP does not identify the reasons or influences that render the interaction-interpretation-internalisation process effective. These are explained by other compliance theories, which may also

[112] Chapter 7.3.
[113] Typically, treaty monitoring bodies scrutinise the entire range of rights contained in the treaty, necessarily reducing the depth of scrutiny on each right.
[114] Francisco O Ramirez, 'The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990' (1997) 62 *American Society Review* 735, 740.

provide useful insights on improving the OTP's catalytic impact on national proceedings for international crimes. For instance, in contexts of incomplete internalisation such as Colombia and Guinea, Ryan Goodman and Derek Jink's Socialisation Model mirrors TLP's claim that the persuasive power of norm-interpretive interactions works because it occurs in the shadow of coercion, in the form of threatened international intervention.[115] However, the Socialisation Model also invokes acculturation as a mechanism[116] to explain why 'under certain conditions, "soft law" mechanisms will be more effective in establishing durable norms'.[117] Specifically, monitoring and reporting, as occurs through PEX reports and norm interpretations by the OTP in law-declaring fora, can be used to expose wrongdoing and to tie exposure to external praise and criticism.[118] Essentially, when State actors are aware that they are being scrutinised (when a preliminary examination is opened) and they are obliged to report on the scrutinised behaviour (by engaging with the OTP), they are more likely to comply with norms.[119]

Relatedly, shallow commitments made by States under scrutiny are expected to evolve into deeper commitments through the 'civilising force of hypocrisy' before an external audience.[120] This effect is a particularly important aspect of the preliminary examination dynamic of continuous OTP scrutiny of national prosecutions of international crimes. While beyond the scope of this thesis, testing the limits of the Socialisation Model's explanatory force in promoting State internalisation of the sexual violence accountability norm would be a valuable complement to this research. Identifying the extent to which the micro-processes of acculturation explain why internalisation occurs would enhance the capacity of

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[115] Koh identified the Socialisation Model as a case study in norm-internalisation through socialisation: Harold Hongju Koh, 'Internalization through Socialization' (2005) 1(54) *Duke Law Journal* 975, 977.

[116] Acculturation involves the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press, 2013) 138-9.

[117] Ibid 123.

[118] Ibid 130; Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders* (Cornell University Press, 1998) 23.

[119] Goodman and Jinks draw on Foucault's landmark work demonstrating the power of conscious and permanent visibility to regulate social behaviour in this regard: Goodman and Jinks, above n 117, 130.

[120] Ibid 150.

norm entrepreneurs and norm-enforcers to leverage these processes to promote internalisation.

6. Conclusion

This chapter has explored how the contrasting data from the preliminary examinations in Colombia and Guinea mutually reinforce several inferences about internalisation and the OTP's catalytic potential on national proceedings for international crimes. The conduct of the OTP during preliminary examinations described in Chapter 5 and the findings from interviews in Chapter 6 reveal several dynamics that could enhance the OTP's capacity to promote compliance with the sexual violence accountability norm.

Common themes and requirements for internalisation emerged from the data, even though the two case-study contexts contrasted with each other in various ways. These themes and requirements range from the comprehensiveness of the legal framework and documentation of sexual violence through the range of policies, programs and procedures that exist regarding sexual violence, to the functionality of the legal system vis-à-vis international crimes more generally. This suggests that despite qualitative research undertaken in only two contexts, the emergent common themes may be generalisable to other preliminary examinations, and potentially beyond. The next and final chapter explores further applications, after drawing together some key conclusions emerging from the thesis.

CHAPTER 8. CONCLUSION

1. Introduction

This thesis has examined the ability of the ICC's Office of the Prosecutor (OTP) to catalyse genuine national prosecutions of international crimes of sexual violence through its policy of positive complementarity in preliminary examinations. At the preliminary examination stage, the OTP retains discretion to determine what type, number and nature of national criminal investigations and prosecutions are sufficiently genuine to not require an ICC investigation.[1] Accordingly, States have the benefit of a margin of appreciation[2] in preliminary examinations[3] to avoid an ICC investigation altogether. Using the TLP framework, analysis of the norm-interpretive interactions between the OTP and stakeholders in Colombia and Guinea during preliminary examinations revealed whether and how international norms are internalised. The empirical data also suggested how the OTP and norm entrepreneurs may better promote genuine national proceedings for international crimes of sexual violence.

Chapter 2 identified how as a compliance theory, TLP is a useful framework within which to conceptualise the OTP's influence during preliminary examinations but that its gender neutrality limits its explanatory value vis-à-vis the sexual violence accountability norm. Chapter 3 identified the limitations of and progress made by national and international criminal institutions, including the ICC, in investigating, prosecuting, convicting and sentencing crimes of sexual violence. This historical context shapes our expectations of national criminal justice processes and the standards the OTP can and will include in its norm interpretations.

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[1] Ultimately subject to Pre-Trial authorisation in the case of opening an investigation, this assessment necessarily applies the same person/same conduct test in the ICC jurisprudence used to determine case admissibility: Chapter 4.4.1.

[2] On how this phrase has been understood or discussed by the ICC and in human rights law, see Chapters 3.1 and 5.2.

[3] See Chapter 5.2; William Burke-White, 'Proactive Complementarity : The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal*, 53, 75; Jenia I Turner, 'Nationalizing International Criminal Law' (2004) 41 *Stanford Journal of International Law* 1, 32; Jan K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 98.

Chapter 4 described the legal, practical and positive dimensions of complementarity, which provide the content of the norm interpretations described in Chapter 2. The chapter concluded by discussing the intersection of complementarity and sexual violence, explaining how positive complementarity can foster genuine national proceedings to prosecute crimes of sexual violence. Chapter 5 narrowed the discussion from positive complementarity to OTP policies and conduct during preliminary examinations. It then described the evolution of the OTP's preliminary examinations in Colombia and Guinea, with a specific focus on the extent to which crimes of sexual violence have been recognised and incorporated into OTP norm-interpretive interactions.

Chapter 6 used the material and insights obtained from interviews in Colombia and Guinea to critically analyse the OTP's conduct described in Chapter 5, within the TLP framework described in Chapter 2. It found a modest contribution by the OTP to partial legal, political and social internalisation in both Colombia and Guinea. The data from which the OTP's influence can be inferred was significantly different in each of the countries but yielded themes explored in Chapter 7 that were complementary and mutually reinforcing. Chapter 7 also identified avenues for the OTP to reconceptualise its approach to and the content of its norm interpretations to better promote compliance with the sexual violence accountability norm.

This final chapter draws together the analysis and findings of the thesis. By applying Koh's TLP theory to preliminary examinations, the thesis contributes to compliance theory literature by exploring how the content, range and effect of norm-interpretive interactions during preliminary examinations promotes internalisation of an international norm. By empirically testing the TLP's capacity to explain internalisation of a gender-based norm, the thesis contributes to empirical research on the OTP's catalytic impact on national investigations and prosecutions of international crimes of sexual violence. Consistent with feminist critiques, the empirical research confirmed that a gender-sensitive approach to engagement in preliminary examinations will enhance the OTP's catalytic impact on national proceedings for sexual violence crimes. It also reinforced that as a gender-neutral

theory, the TLP is less able to explain the limited internalisation of gender-based international norms. Drawing on these contributions, the thesis makes a number of recommendations to practitioners seeking to enhance the OTP's catalytic impact, to improve compliance with the sexual violence accountability norm, and ultimately to more effectively challenge the long-standing impunity associated with crimes of sexual violence.

2. Testing the TLP as a compliance theory

Complementarity's intended goal is that States fulfil their obligation to exercise national criminal jurisdiction over international crimes[4] without the need for external enforcement mechanisms, such as the threat of an ICC investigation. This epitomises the TLP's normative ambition of 'internalised obedience' or 'internalisation'. The TLP assumes norm-interpretative interactions are responsible for internalisation; this assumption, and the role of OTP in this process, was tested by empirical data from Colombia and Guinea.

The empirical research confirms that the OTP, State actors and norm entrepreneurs engage in exactly the type of iterative norm-interpretative interactions described by the TLP with respect to what State conduct constitutes compliance with the sexual violence accountability norm. It also illustrates more generally how the transnational legal processes at both the international and national levels may promote voluntary compliance with the norms articulated in the Rome Statute. The results from Guinea confirm Koh's prediction that, unlike liberal and rational approaches, the TLP can explain how norm-interpretive interactions may convert non-compliance into compliance,[5] not only in a liberal democracy like Colombia, but also in an illiberal regime like Guinea.[6] Prevailing impunity for international crimes due to State unwillingness or inability to investigate and prosecute them is precisely the challenge the ICC was created to overcome; the TLP provides a useful general guide of the processes that may help achieve this. Applying the TLP's explanation of

[4] *Rome Statute*, Preamble [6].
[5] Chapter 2.1.2.
[6] The Economist, *Democracy Index 2016* https://www.eiu.com/topic/democracy-index; Economist Intelligence Unit, *Democracy Report 2016: Revenge of the Deplorables* (25 January 2017) <http://pages.eiu.com/rs/783-XMC-194/images/Democracy_Index_2016.pdf> (requires login).

how internalisation occurs to preliminary examinations yields insights into what actors should do (or do more of) to achieve this goal.

The research also demonstrated that the 'shadow' of some form of sanction or perceived negative outcome, such as an ICC investigation, was a salient consideration. Further, the research suggested that the role and impact of a norm enforcer with discretion to initiate significant consequences for failure to achieve norm compliance (such as the OTP) is qualitatively different to that of norm entrepreneurs. This is a development of the TLP theory.

As predicted by the reference to the norm prohibiting and criminalising domestic violence in Chapter 2.3.3.2,[7] the TLP's silence on the relationship between different types of internalisation is a weakness. For instance, in Colombia laws and policies failed to produce social internalisation of the sexual violence accountability norm.[8] This reinforces the recommendation in Chapter 7 that norm-enforcers and norm entrepreneurs will need to focus explicitly on social internalisation to fully internalise an international norm related to gender-based violence. As an example of this, in the face of a lack of social internalisation, domestic violence norm entrepreneurs have re-directed resources and attention to changing social attitudes to domestic violence. This includes publicity campaigns, recruiting famous male role models as spokespeople and widespread dissemination of the norm.[9]

However, the fact that social internalisation of the prohibition against domestic violence remains incomplete should temper our expectations of gender-based norm internalisation. Achieving general social adherence to a gender-based norm requires more time and resources than legal and political internalisation. Social internalisation of a norm is especially challenging if it conflicts with pre-existing

[7] That is, why the criminalisation of domestic violence (legal internalisation) together with policies and services to support those who suffer domestic violence (political internalisation) may not translate into lower incidence or more effective prosecutions and convictions (social internalisation).
[8] Chapter 7.2.
[9] See e.g. <http://preventdomesticviolence.ca/research/engaging-men-and-boys-domestic-violence-prevention-opportunities-and-promising-approaches>; <http://www.nomore.org.au/about-cause>; <https://www.whiteribbon.org.au/stop-violence-against-women/what-white-ribbon-does/ambassadors/ambassador-qas/>.

culturally entrenched behaviours. Accordingly, even if the OTP and norm entrepreneurs were to focus more on social internalisation, we could expect that achieving adherence by criminal justice actors to the sexual violence accountability norm would still take several years. This is reinforced by the erratic examples of social internalisation of the norm in Colombia. Internalising the norm of *non-commission* of sexual violence crimes (whether as international or national crimes) will likely take many more years. The next section examines why, based on the empirical data, it is still reasonable to expect that internalisation of sexual violence accountability norm will occur, albeit over a period of years.

3. Contribution to compliance and empirical literature

This thesis also contributes to the body of empirical research on compliance with international norms, including the spiral model proposed in relation to enforcement of human rights norms more generally.[10] Chapter 7 noted that human rights research has generated similar concepts of actors and phenomena as the TLP but that these explain *why*, not *how*, States are compliant with international human rights norms.[11] The norm-interpretive interactions in Colombia and Guinea explain how States may transition from the norm acceptance to norm-consistent behaviour (spiral process).[12] The TLP provides additional explanatory value by differentiating compliance (norm-consistent behaviour for instrumental reasons) from internalisation (norm-consistent behaviour due to legal, political and social internalisation).

The data from both Colombia and Guinea are consistent with the spiral process documented in human rights empirical scholarship referred to in Chapter 2, which proposed five stages: repression by norm-violating States, denial of violations,

[10] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 902-904.These tend to be trials for serious human rights violations, which are often also international crimes: see Chapter 2.2.4 and Beth A Simmons, *Mobilising for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009), 16-17; Beth A Simmons, 'From Ratification to Compliance : Quantitative Evidence on the Spiral Model' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2016) ('*Persistent Power* ') 43–60, 53-55.

[11] Chapter 7.4, Finnemore and Sikkink, above n 10, 887.

[12] Chapters 2.5 and 7.4.

tactical concessions, claims of norm acceptance and, finally, norm-consistent behaviour.[13] The last three stages resemble the TLP phases of compliance (tactical concessions and claim of norm acceptance) and internalisation (norm-consistent behaviour). For instance, in Colombia, systemic institutional neglect of sexual violence violations allows one to draw an inference of denial or trivialisation of their commission.[14] Increased scrutiny of sexual crimes in the Colombian preliminary examination heightened the visibility of the continuing absence of investigations; that is, non-compliance with the sexual violence accountability norm. State non-compliance was followed by tactical concessions, such as introducing gender-based policies, but without any guarantees of or resources for implementation. Examples of Colombia's claims of norm acceptance include the Fiscalía's public statements and adoption of an investigative protocol. Subsequent norm-consistent behaviour is evidenced to a limited extent by the recent convictions of senior paramilitary leaders for crimes of sexual violence. However, it seems that the greater degree of internalisation in Colombia is contributing to continuing norm internalisation, even when the threat of an ICC investigation may have diminished over time.[15]

Guinea's spiral process began from a more extreme level of repression,[16] demonstrated by the deliberate State attempts to destroy evidence of crimes related to the stadium case, followed by a denial of violations. Tactical concessions, accompanied by claims of norm acceptance, were made in response to the OTP opening a preliminary examination; these included appointing the panel of judges and public affirmations of the State's commitment to justice. The indictment of key senior government representatives can be regarded as norm-consistent behaviour, although their arrest would be a more persuasive example of this. Nevertheless, these individuals will stand trial for international crimes against civilians, an historical first for Guinea. In terms of the spiral model, Guinea's sensitivity to OTP influence suggests it is socially vulnerable (more sensitive to pressure) and/or

[13] Risse, Ropp and Sikkink, above n 10, 17-33.
[14] Modifying this stage to include trivialisation permits gender-based considerations that may not amount to denial but have the same result.
[15] Chapter 7.2.4.
[16] Chapter 2.2.2.4.

sensitive to material benefits or sanctions (economically vulnerable).[17] It is difficult to make general conclusions from the present two-country qualitative study, but it is equally difficult to suggest from the research that Guinea was *more* resistant to OTP pressure than Colombia. However, consistent with the TLP, Guinea's susceptibility to OTP pressure may be attributable not to the ICC regime, but to the nature, intensity and frequency of OTP norm-interpretive interactions and missions to the country. This suggests that even for illiberal non-compliant States, if the OTP can engage in frequent, detailed and informed norm-interpretive interactions, the likelihood of converting non-compliance to compliance is greater. Qualitative research on the effect of OTP norm-interpretive interactions in preliminary examination of other illiberal States is required to determine whether the finding from Guinea applies more generally

On the other hand, the evidence does not go so far as to suggest that 'norms initially adopted for instrumental reasons, are [now] maintained for reasons of belief and identity'.[18] This would be the case if legal, social and political internalisation had all been completed. Since this has not occurred, a favourable inclination to domestic prosecutions on its own may not be sufficient to catalyse investigations and prosecutions of crimes of sexual violence.[19] Adherence to the sexual violence accountability norm may only occur for reasons of belief and identity and this is possible only after social internalisation has been achieved.

Beyond the empirical human rights literature[20] and interviewees' beliefs[21] that prosecutions and convictions in general have a deterrent effect on future abuses, these findings are similar to those of a 2016 study that found tangible links between

[17] For a discussion on how material and social vulnerability can be related or counter each other (as in the case of China) see Thomas Risse and Kathryn Sikkink, 'Conclusions' in *Persistent Power,* 275-295, 289-290. This is despite its status as an illiberal regime, which the spiral model suggests makes it less sensitive to socialisation of human rights norms.
[18] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' *The Power of Human Rights: International Norms and Domestic Change* in *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 5.
[19] Kathryn Sikkink, *The Justice Cascade* (W.W. Norton & Company Ltd, 2011), 242.
[20] Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939.
[21] See e.g. Interview G16, G17, G18, G19, G20- witnesses; interview C5, Ombudsman's office.

ICC involvement and increased 'domestic prosecutions and convictions of human rights violators'.[22] The link was attributed to reform coalitions that used opportunities created by international involvement to demand legal reforms and build local capacity. The vertical mutual amplification effect in Colombia and Guinea is similar, although only with respect to OTP engagement in preliminary examinations, rather than ICC investigations. Both the Colombian and Guinean governments made commitments to legal justice that they may not have been willing to keep. However, activists monitored and critiqued this discrepancy between rhetoric and actions, which prompted limited improvements, described as a 'two-level game'.[23]

These results contradict Dancy and Montal's claim that it is the onset of an *ICC investigation*, not a preliminary examination, that is politically catalytic.[24] This is not surprising, since Dancy and Montal examined short preliminary examinations triggered by a State auto-referral that were a precursor to an inevitable ICC investigation. This thesis demonstrated that preliminary examinations are not purely characterised by a 'feigned willingness game involving strategic interactions with domestic reformers in front of an international audience'.[25] Rather, norm-interpretive interactions in preliminary examinations also 'generate unintended interactions between local actors',[26] including amplification effects. These can precipitate increasingly genuine investigations and prosecutions if preliminary

[22] Geoff Dancy and Florencia Montal, Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions (2016) <http://www2.tulane.edu/liberal-arts/political-science/upload/Dancy-and-Montal-Unintended-Positive-Complementarity-AJIL.pdf>, 69.
[23] Ibid 70.
[24] Dancy and Montal claim if States were motivated to cooperate with the Court 'the ICC should have more influence in the earlier preliminary examination stages of its involvement, when the threat of future investigation should inspire leaders into action to avoid penalty. This paper argues, however, that the onset of an ICC investigation is politically catalytic: it sets in motion strategic interactions among members of ruling groups, domestic courts, and local civil society organisations'.[emphasis added] Ibid 6: see Chapter 2.2.4.
[25] Ibid 24.
[26] The three countries they studied were Uganda, DRC and the Republic of Congo (Brazzaville): Ibid 7. In fact, the OTP is now issuing statements signaling the possibility of opening a preliminary examination to achieve the same result: genuine national proceedings. Whether these statements are capable of sufficient catalysis to either prevent a preliminary examination or an ICC investigation will become apparent in the coming months. See e.g. <https://www.icc-cpi.int/legalAidConsultations?name=161013-otp-stat-php>.

examinations last long enough to catalyse internalisation and there is a real prospect for the State to avoid ICC investigations (and they wish to do so).

Colombia and Guinea are both modifying their national criminal investigations of international crimes in response to OTP norm interpretations to avoid an ICC investigation – an instrumental approach to compliance. However, the OTP's scrutiny has a more ambitious objective: to encourage incorporation of norm-consistent investigations and prosecutions into the internal value system of the State (reflecting the TLP's goal of internalisation). Thus, although the TLP is not an empirically-based framework, it addresses the challenge of converting non-compliance into compliance better than the empirically-based spiral model from human rights scholarship.

This thesis has illustrated that States strategically frame their norm interpretations as narratives of norm compliance, but that this may not accurately represent the status of national proceedings. By collecting more specific information from a broader range of sources, the OTP's norm interpretations can contest such State norm interpretations more effectively, and indicate what action may constitute norm compliance.[27] This in turn promotes further internalisation. The data from Colombia indicates that internalisation may continue despite the diminishing threat of an ICC investigation. This may be a preliminary indicator that beyond a certain point, internalisation generates its own self-perpetuating momentum.

4. Increasing the OTP's catalytic impact

The suggestion above that internalisation could generate its own self-perpetuating momentum raises questions about whether and how preliminary examinations should be subject to time restrictions. The mutual amplification effect across national and international norm entrepreneurs observed in preliminary examinations is likely to increase over time as these actors have more opportunities to draw on other sources to amplify their own norm interpretations.[28] The data demonstrates that crimes of sexual violence are likely to be excluded or significantly

[27] Chapter 7.2.1 and 7.2.2.
[28] Chapter 7.2.4.

under-represented in national proceedings. Even with explicit OTP scrutiny, the lack of trained personnel and necessary support and protection measures impedes the initiation, effectiveness and speed of investigations and prosecutions of crimes of sexual violence. Guinea's experience exemplifies this, both in the all-male composition of the interviewing panel of judges and lack of any protection measures for vulnerable victims.[29] Thus, a time-limited preliminary examination may serve to perpetuate or exacerbate the discrepancy between proceedings for international crimes of sexual violence and other international crimes. This is because it is likely to take longer to charge and adequately investigate crimes of sexual violence to sustain convictions, thus exacerbating their under-representation in the criminal justice process.

Further, under Article 17 of the Rome Statute, it is impossible to be certain of the willingness of the State, or the genuineness of national proceedings, until convictions are recorded and sentences implemented.[30] While some investigations may not result in convictions, it is necessary to assess the sentences and other outcomes of completed trial(s). If no convictions result from a range of investigations for international crimes, that would suggest unwillingness, or inability, if there are significant systemic failures in the investigation (e.g., failure to collect evidence).

Conversely, while it is important to separate a finding of guilt (determination of criminal responsibility) from punishment, I would disagree with Paul Seils' claim that it is inappropriate that 'an inadequate sentence could be understood as a proceeding designed to shield the accused from criminal responsibility'.[31] Very clearly, a finding of guilt for international crimes and the imposition of a trivial punishment shields an accused from *responsibility* in a genuine sense; such an outcome undermines the safety, expressivist and specific deterrent goals of punishment in criminal justice.[32] To conclude otherwise is adopt an overly legalistic

[29] Chapter 6.3.4.2.
[30] *Rome Statute*, art 17(2)(b); interview I1.
[31] Paul Seils, 'Putting Complementarity in Its Place' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 305, 324.
[32] Chapter 1.1.

and technical approach that defeats the purposes of the Rome Statute. Indeed, the ICC Legal Advisor noted that although sentences were excluded from the Rome Statute because consensus could not be reached, 'there is nothing in the Rome Statute that says that a clearly disproportionate sentence would not be a relevant factor'.[33] In fact, although the OTP accepts sentence variability, discrepancies in sentences for crimes of sexual violence crimes and other categories of crime would be considered in a PEX.[34] It seems logical that it should be possible to interpret the proceedings as conducted without the intent to bring the accused to justice if they result in an insignificant punishment.

This is particularly important for crimes of sexual violence in jurisdictions where conviction rates and sentence ranges are disproportionately low compared to other serious crimes. Accordingly, I would suggest that rather than instituting time limitations, developing clear criteria upon which the decision to close a preliminary examination without opening an ICC investigation is made[35] may be more appropriate and more likely to result in convictions and sentences for international crimes of sexual violence. In developing these criteria, it will be important to consider how responsive the State in question has been to OTP norm interpretations, to what extent legal, political and social internalisation is occurring beyond the scope of the norm-interpretive interactions, and whether there are trial outcomes that suggest an intent to shield the person concerned from criminal responsibility.

For instance, Colombia's responsiveness to OTP norm interpretations[36] has contributed its continuing 'upward spiral' of internalisation despite the length of the preliminary examination. These include the imposition of significant sentences for crimes of sexual violence, including on the basis of command responsibility, and initiatives to promote a coherent and comprehensive prosecutorial approach to

[33] Interview I1.
[34] Interview I1.
[35] Stahn also calls for 'internal benchmarks' in this regard: Carsten Stahn, 'Damned If You Do, Damned If You Don't' (2017) *Journal of International Criminal Justice* 1, 17.
[36] One example is the creation of the DINAC at the suggestion of the OTP, to more systematically and comprehensively investigate crimes committed in the context of the armed conflict: Chapter 6.3.5.

sexual and gender-based violence. Although political and social internalisation of the sexual violence accountability norm is incomplete, the rate and extent of progress towards norm compliance suggest it would be difficult to conclude inability or unwillingness to investigate or prosecute crimes of sexual violence. This thesis has not examined progress in Colombia for other crimes under OTP scrutiny, nor developed a comprehensive list of criteria for preliminary examination closure, but if comparable progress has been made across the 'potential cases'[37] of interest to the OTP, there are reasonable grounds to consider closing this preliminary examination.

The circumstances in Guinea suggest the opposite. These include continuing delays in the Guinean stadium massacre case, the failure to set a trial date, the coincidence between OTP missions and progress in the investigation, limited legal, political and social internalisation, and the continuing liberty of indicted senior government officials. Taken together, these factors present a strong case for continued OTP scrutiny until a trial judgment and sentence are delivered, which in turn will reveal whether the proceedings were conducted 'for the purpose of shielding the person[s] concerned from criminal responsibility'.[38] If a trial date is not set by the end of 2017, as represented by the Guinean government, the OTP may consider whether there has been 'unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice'.[39] These examples would suggest that, for consistency and transparency, the OTP should develop gender-sensitive criteria to underpin the decision to open (in addition to criteria to close) a preliminary examination. While these considerations are not included in the PEX Policy, the OTP SGBC Policy could be interpreted to encompass them.[40]

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[37] Situation in the Republic of Kenya, Request for authorization of an investigation pursuant to Article 15, II-01/09-3, 26 November 2009, [51], [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 Pre-Trial Chamber I) ICC-01/09-19-Corr, 31 March 2010, [40]-[54], [182], [188].

[38] *Rome Statute*, art 17(2)(a).

[39] *Rome Statute*, art 17(2)(b).

[40] ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes* (2014) 3 <https://www.icc-cpi.int/iccdocs/otp> ('*SGBC Policy*'), 10 [6], 18-20 [39-47].

This section has explored how insights from the previous chapters may have implications for the OTP's catalytic impact beyond the very specific context of this thesis. The research analysed how States that respond to norm interpretations for an instrumental reason (to avoid an ICC investigation) can be persuaded to improve their compliance in an upward spiral through iterative norm-interpretive interactions. More encouragingly, the research suggests that the TLP may over time result in sufficient legal, political and social internalisation to suggest 'obedience' or internalisation of the international norm. Further, it shows how the insights in this thesis may be useful for issues of compliance by illiberal States, both during preliminary examinations and in relation to human rights norms more broadly. The next section highlights the importance of gender to each of these insights.

5. The importance of gender

As predicted in Chapter 1, the results in Chapter 7 reflected the inability of a gender-neutral compliance theory to explain *how* to achieve internalisation of a gender-based norm. Achieving internalisation of a gender-based norm, such as the sexual violence accountability norm, requires a distinct gender-sensitive strategy; it cannot be assumed that it will occur through gender-neutral norm-interpretive interactions. This is the first research project to empirically test not only whether the interactions promote some internalisation, but also to examine how the content of norm-interpretive interactions affects State behaviour. Gender-sensitive OTP norm-interpretive interactions in preliminary examinations are necessary to promote compliance with the sexual violence accountability norm. Gender-neutral OTP norm-interpretive interactions were shown not to improve criminal justice approaches to crimes of sexual violence compared to other categories of crimes. This result is consistent with Pearce's claim that 'individual perpetrators and society as a whole must be persuaded' to achieve internalisation.[41] Based on the empirical data, Chapter 7 also recommended that the OTP incorporate a gender-sensitive perspective into all its norm-interpretive interactions. This reflects Pearce's

[41] Megan Louise Pearce, 'Gendering the Compliance Agenda: Feminism, Human Rights, and Violence against Women' (2015) 21 *Cardozo Journal on Law and Gender* 393, 424.

proposal that legal process theories should explicitly identify how gender and power influence norm content and influence.[42]

This thesis 'theorise[d] the process of domestic norm "translation" in order to properly describe how norms prohibiting violence against women are implemented—or not'.[43] Testing the theory revealed a discrepancy between legal and political internalisation compared to social internalisation, particularly in Colombia.[44] This evidences the 'considerable push back from States' domestic polities, which undermines the domestic implementation of a norm'.[45] That is, if OTP norm interpretations fail to consider how entrenched gender-based norms shape laws, policies and behaviour, they cannot anticipate and challenge their influence over impunity for sexual violence crimes.

Other insights from the research also contribute to our understanding of how to achieve complete 'translation' or internalisation. For instance, horizontal and vertical mutual amplification effects among norm entrepreneurs mean that norm interpretations and their underlying facts used by one norm entrepreneur can contribute to the influence of multiple norm entrepreneurs. If the OTP is amplifying the norm interpretation of others, this occurs because the OTP is a norm enforcer, with discretion to trigger ICC investigations. When other norm entrepreneurs incorporate the OTP's norm interpretations into their own interactions, amplification occurs due to the multiplier effect; the norm interpretation is articulated by many more actors (across many more law-declaring fora) than just the OTP.[46]

As the first qualitative empirical study to test a compliance theory from a gender perspective, these results are also significant for the explanatory power of other

[42] Ibid 425-426; Chapter 7.5.2.
[43] Sally Engle Merry, *Human Rights and Gendered Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006), 2; Benjamin Stachursky, The Promise and Perils of Transnationalisation: NGO Activism and the Socialisation of Women's Rights in Egypt and Iran (Routledge, 2013).
[44] Chapter 7.3.
[45] Susanne Zwingel, 'How Do Norms Travel? Theorising International Women's Rights in Transnational Perspective' (2012) 56(1) *International Studies Quarterly* 115–129, 115.
[46] Chapter 7.2.4.

compliance theories. The results highlight the importance of the TLP being gender-sensitive to adequately explain when, and under what conditions, a gender-based international norm will be internalised by States. This suggests that compliance theories more generally must be gender-sensitive if they are to contribute to our understanding of, and capacity to, induce State compliance to gender-based international norms effectively. Further empirical testing of other compliance theories would strengthen this claim. Finally, the empirical data thesis went further than demonstrating TLP can produce norm internalisation; it demonstrated that gender-neutral norm interpretations will fail to promote internalisation of the sexual violence accountability norm.

Adopting a gender analysis[47] mandated an acknowledgment that the gendered dimensions of criminal prosecutions around the world, including for international crimes, is problematically and typically limited to sexual violence.[48] However, the empirical data confirms that changes resulting from norm-interpretive interactions between the OTP, States and other stakeholders can extend beyond prosecution of international crimes of sexual violence. For example, introducing victim protection laws to facilitate prosecuting sexual violence as a war crime, a crime against humanity or genocide can benefit all sexual violence victims. This is a gendered outcome, since women and girls are typically overrepresented as victims of this crime category.

Isolating all other variables to 'prove' that OTP norm interpretations in preliminary examinations are *the cause* of these improvements remains unrealistic. However, an inference of causality may be reasonable in a few years if the OTP conducts a gender analysis in each preliminary examination and compliance with the sexual violence accountability norm improves in each of the situations in which sexual violence is under OTP scrutiny. This requires the OTP to understand the underlying differences, inequalities and power relationships that shape criminal justice behaviour and to incorporate a gender perspective into its assessment of national proceedings and its

[47] Chapter 1.3.
[48] Fionnuala Ní Aoláin, Dina Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425, 427; Chapter 1.3.

norm-interpretive interactions.[49] As most national jurisdictions continue to address crimes of sexual violence crimes inadequately, changes beyond legislation and policies that include general adherence (social internalisation) to the sexual violence accountability norm during preliminary examinations would confirm the OTP's catalytic influence. To this extent, the OTP's engagement with victims' organisations and civil society is critical; the OTP does not have the resources to gather data on general adherence by national criminal justice actors across all preliminary examinations, nor is it necessarily best-placed to identify the reforms required for social internalisation. Nevertheless, advising how ICC standards can be realistically 'translated' to varying national practices to overcome barriers to compliance will also amplify the norm interpretations of national norm entrepreneurs.

As Chapter 5 notes, the OTP SGBC Policy provides no guidance on what specific factors may constitute unwillingness or inability to carry out genuine proceedings.[50] However, the analysis and Table 7.2 in Chapter 7 suggests that using gender-sensitive indicators in the PEX Policy may ensure it is implemented consistently with the SGBC Policy. For example, an intent to shield the perpetrator from criminal responsibility under Article 17(2) can be indicated by irreconcilability between the findings and the evidence produced. A gender-sensitive reading would interpret this to include disproportionately mild or manifestly inadequate punishment for crimes of sexual violence. This would reinforce the OTP SGBC Policy's recognition that 'sexual and gender-based crimes are among the gravest under the Statute'.[51]

Chapter 7 also identified the following trends that could inform the OTP's strategic approach to norm interpretations and assessments of national proceedings pertaining to crimes of sexual violence crimes during preliminary examinations. First, relevant facts and interpretations of facts by States must be carefully examined because States will present their activities as norm-compliant, even when they are

[49] Performing these two gender-based functions is part of the OTP's commitment under the SGBC Policy.
[50] SGBC Policy, above n 40, 23 [42]; Chapter 5. 3.
[51] ICC-OTP, *Policy Paper on Preliminary Examinations* (2013) 10 <http://www.icc-cpi.int> ('*PEX Policy*') 23 [45].

not. Second, the OTP missed opportunities to identify (1) instances where legislation manifestly failed to address crimes of sexual violence, (2) the absence of essential protection measures and (3) highly problematic investigative or prosecutorial practices. Third, norm-interpretive dialogues increased broader awareness of the international norm, which improved the comprehensiveness, precision and quality of norm interpretations by both the OTP as a norm enforcer and by norm entrepreneurs. Fourth, as described above, this awareness promoted the mutual amplification effect, both horizontal and vertical, among norm entrepreneurs. Fifth, internalisation of the sexual violence accountability norm could have a ripple effect beyond international crimes of sexual violence and help reduce ordinary crimes of sexual violence. Thus, empirically testing the TLP and examining the content and nature of the OTP's norm-interpretive interactions within two quite different preliminary examination contexts has yielded both theoretical and practical insights.

6. Recommendations

Empirical reinforcement of the feminist critique of gender-neutral compliance theories suggests both how to improve TLP's explanatory capacity with respect to gender-based international norms and how norm-interpretive interactions can better achieve compliance with such norms. The qualitative research offers practical recommendations for the OTP (as the norm enforcer in the ICC treaty regime), for norm entrepreneurs and for governmental norm sponsors about how to promote genuine national proceedings for international crimes of sexual violence. The findings also suggest directions for future research, including how other norm compliance theories can improve State behaviour regarding gender-based international standards and how (and whether) sustained gender-sensitive norm-interpretive interactions by the OTP can contribute to ending impunity for international crimes of sexual violence in other contexts.

As empirical research from Colombia and Guinea demonstrates, the more specifically the OTP articulates its expectations or interpretations of what State compliance entails, the more likely States are to act in accordance with such expectations and interpretations to avoid an ICC investigation. The analysis in

Chapter 6 and Chapter 7.2 identified several methods by which the OTP can enhance its catalytic impact on compliance with sexual violence accountability norm during a preliminary examination.

The empirical research suggests that the OTP can improve its *approach* to preliminary examinations if it:[52]

1) ensures the OTP team is familiar with the gendered and intersectional dimensions of the context, including legislative changes, procedural developments and failures to respond to previous report concerns
2) ensures that statistics reported across years are internally consistent, and where they are not, query the discrepancy[53]
3) highlights issues that are not documented or addressed domestically, including:
    a. requesting data to be gathered covers sexual violence or refers to the unavailability of such data[54]
    b. requesting statistics on progress of sexual violence cases from the previous year
4) identifies legislation and policies that need to be reformed to ensure that the norm requiring genuine investigations and prosecutions can be fully internalised
5) understands that each context is different so that justice will look different in each country, so that:
    a. the OTP learns from domestic actors the relevant details of the national context, including non-State reports and analysis
    b. the OTP understands how ICC norms are already understood and utilised by domestic norm entrepreneurs
    c. OTP recommendations are tailored so it is feasible to implement them

[52] These incorporate and build upon suggestions made in interview C13.
[53] This would overcome the discrepant reporting of the *Auto 092* cases from 2012 to the 2016 PEX report; and ensure the discrepancy in reported numbers, such as the number of sexual violence victims who have testified in Guinea's stadium proceedings, is explained.
[54] As discussed in Chapter 5.3.2, the OTP's Interim PEX Report on Colombia included statistics on national proceedings against paramilitaries, except with respect to sexual violence crimes.

6) the OTP highlights the elements of unwillingness and capacity required to address the issues not documented or addressed, as identified under (b) above[55]
7) when referencing the admissibility tests in assessments during a preliminary examination, the OTP addresses each aspect of the test[56]

This may require a re-assessment of the human, technical and other resources required in the SAS team conducting preliminary examination activities to achieve the maximum catalytic effect possible across the varied PEX situations. As noted in Chapter 7.2 a trained lawyer with international and national criminal experience will likely map developments in national proceedings, and the legal, political and social context onto the criteria in article 17 more efficiently. If this analysis and information is regularly communicated to norm entrepreneurs in-country this will likely over time result in increasing relevance and specificity in the information shared by norm entrepreneurs with the ICC.

Such changes may also enhance the OTP's capacity to make the following recommended changes in its preparation of *PEX reports*:

1) identify key legal barriers impeding these investigations, including but not limited, to inadequate or restrictive definitions of sexual violence, inadequate minimum sentences and problematic definitions of key terms, such as consent and coercion
2) identify key procedural obstacles to investigating and prosecuting international crimes of sexual violence, including but not limited to, the absence of trained female interviewers, the lack of protection programs and adequate resources to ensure they are effective
3) identify responses and lack of responses to the data in previous reports and assessment of proceedings, including key developments and obstacles.

[55] Interview C13, Fiscalía.
[56] For example, the OTP should explicitly assess and make a conclusion regarding inactivity before assessing inability and unwillingness. This would remedy the oversight in its 2012 PEX report: Chapter 6.3.5.3.

Beyond its PEX reports, the OTP could also respond more rapidly to legal and political developments as they arise in other norm-interpretive and law-declaring fora, including by:

1) using meetings with civil society and State actors to understand the factors impacting women victims' participation in criminal processes, reasons for delays or problems in the investigation and prosecution of sexual violence crimes, whether these occur in the case of other crimes as well, and likely remedies for these issues
2) encouraging and facilitating the attendance and participation of women's and victims' organisations at meetings; strengthening relationships and consulting with them to better identify the barriers experienced by women victims of sexual violence that relate to norms articulated in ICC legal instruments
3) drawing on this local expertise to identify aspects of cases that demonstrate continued non-compliance with the norm vis-à-vis crimes of sexual violence crimes[57]
4) sharing information provided by the State about progress and reasons for delay in cases of sexual violence, and offering women's and victims' groups the chance validate and/or critique such information
5) using private meetings with State actors to identify the specific legal, political and social barriers derived from consultations with civil society; communicate recommended methods to overcome such barriers, and how the OTP intends to represent this in its PEX public documentation.

These suggestions are predicated on the empirical data findings in this thesis, including the mutual amplification effect that occurs both vertically and horizontally. They also assume the need to cultivate relationships specifically with victims' and women's organisations to both amplify domestic norm interpretations and draw on context-specific expert knowledge of local justice deficiencies. The OTP

[57] One example is the Justice and Peace case of Juan Francisco Prada Marquez, in which failure to confess sexual violence crimes committed by subordinates has not affected enjoyment of the reduced sentence received: El Tiempo, *El régimen de terror sexual que impuso el 'para' 'Juancho Prada'* (29 April 2013) <http://www.eltiempo.com/archivo/documento/CMS-12767893>.

appears to have had a mixed, but somewhat positive, catalytic impact during preliminary examinations on national investigations and prosecutions for international crimes of sexual violence so far. However, there are both evidentiary and theoretical reasons to expect that if the OTP adopts the above recommendations, its influence and promotion of internalisation of the sexual violence accountability norm will increase.

While these recommendations target the OTP as a norm enforcer, norm entrepreneurs including international and national civil society organisations and academics may find them useful to identify the information that will best assist the OTP to highlight factors indicating norm compliance and to further understand how to improve the ICC's influence on national proceedings. Further, the research suggests that explicitly linking concerns based on factual knowledge of national proceedings in OTP norm interpretations around admissibility, including in its PEX Policy, may enhance the impact of norm entrepreneurs' norm interpretations. Finally, sharing such norm interpretations strategically with other norm entrepreneurs, including international organisations working in other PEX situations and on related rights issues, may improve the consistency and specificity of norm interpretations across the norm-interpretive community. This, in turn, will likely enhance the ripple effect on norm internalisation for other human rights.

7. Conclusion

Given the limited capacity of the ICC as an international criminal institution, successfully challenging impunity for international crimes of sexual violence requires legal, political and social internalisation of the sexual violence accountability norm at the national level. This thesis' evidence suggests ways to enhance the catalytic influence of OTP's norm-interpretative interactions in preliminary examinations, particularly on national proceedings for international crimes of sexual violence.

Measuring and maximising the influence of international law on purely national legal processes is an ambitious and difficult project, particularly when the personal interests of those in power are affected. For the ICC, increasing State compliance

with the primary norm it embodies—investigating and prosecuting international crimes—is critical to both its institutional legitimacy and its mission to end impunity for international crimes. Acknowledging the ICC's institutional, resource, legal and political limitations, this thesis has investigated (a) whether the OTP has or could have a catalytic influence on national investigations of international crimes of sexual violence in the Colombia and Guinean preliminary examinations, (b) how this influence manifests itself and (c) whether there is evidence to suggest this influence can be enhanced.

The TLP framework helped to identify how the OTP's engagements with various actors may induce or affect State investigations for crimes under OTP scrutiny. However, the discrepant lack in competence, frequency and adequacy of different State responses to crimes of sexual violence compared to other crimes was not well explained by the TLP. As anticipated by feminist critiques, explicitly incorporating gender-sensitive elements into norm interpretations is required to encourage compliance with the sexual violence accountability norms. States with pre-existing impunity for sexual violence crimes attributable to negative socio-cultural gendered practices seem to respond, and improve their responses, to this neglected category of crime only when it is explicitly included in OTP norm interpretations. It may be that this finding is generalisable to other international norms that challenge entrenched socio-cultural attitudes and practices so that the TLP, and norm interpretations, need to be tailored more specifically to contexts to promote comprehensive internalisation.

The empirical research has demonstrated the OTP's influence in preliminary examinations of national investigations and prosecutions of international crimes, including of sexual violence. Although the OTP's approach to its norm-interpretive interactions in preliminary examinations has improved, there is evidence to suggest that a more nuanced gender-sensitive strategy will yield more—and better quality—investigations and prosecutions for international crimes of sexual violence. The data is contextually specific, but it was also consistent across two very different preliminary examinations. This increases the likelihood that the findings are of broader relevance.

The empirical findings highlight the importance in understanding the value and limits of gender-neutral compliance theories to promote State compliance for gender-based norms. The data from Colombia and Guinea, together with the recommendations emerging from them, offer useful practical insights to assist norm entrepreneurs and international norm-enforcers, such as the OTP, in enhancing compliance with the sexual violence accountability norm. Thus, the research offers a theoretical contribution to compliance literature in its gender analysis and application of TLP to the ICC treaty regime, and contributes to human rights and ICC empirical literature with respect to the OTP's catalytic influence on national proceedings for sexual violence.

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Annexure 1: Questions for semi-structured interviews with women

Q No.	Question
1	How and when did you come to know about NGO X?
2	When you first told NGO X about the crime against you what was their initial advice to you?
2a	*Do you remember what the NGO said the challenges to prosecution are?*
3	What did you do about your case after you spoke to NGO X?
4	Have you spoken to the police about your case?
4a	*If yes, who did you speak to? Were you comfortable telling this person about your case? Why or why not?*
4b	*When you told them what happened what did they say and do?*
4c	*In the times that you have spoken to the police, are there any positive or negative experiences that you remember in particular?*
5	Have you spoken to the prosecutors about your case?
5a	*If yes, when did you first speak to them? Who did you speak to? Were you comfortable speaking to this person about your case? Why or why not?*
5b	*What did they tell you about prosecuting crimes of sexual violence?*
5c	*In the times that you have spoken to the prosecution, are there any positive or negative experiences that you remember in particular?*
6	Have you spoken to anyone else about your case?
6a	*If yes, who? What did he/she say?*
7	Has your case gone to court?
8	If yes, what happened in court?
8a	*Is there anything especially negative or positive about your court experience you remember?*
9	Who advised you about what the court result was? When was this?
10	Why do you think prosecuting these crimes important?
11	What do you think are the biggest problems with prosecuting these crimes?
12	Has there been any change in the way your case has been dealt with in [*1. The last 6 months? 2. The last year? 3. The last 3 years]?*

Annexure 2: Questions for semi-structured interviews with NGO staff

Q #	Question
1	How long have you been working for X?
2	What is your role?
3	How do you come into contact with women victims of sexual violence?
4	How many cases involving sexual violence in the last year have you worked on?
5	What does this work involve?
6	How many women victims of sexual violence does X work with?
7	In your experience, are there problems with the legal definitions of these types of crimes?
7a	*If yes, what are these problems?*
8	In your experience, are there problems with the way police deal with these victims?
8a	*If yes, what are these problems?*
9	Are there problems with police practices, for example, in interviewing, evidence collection, or other procedures?
9a	*If yes, what are these problems?*
10	In your experience, are there problems with the way prosecutors deal with these crimes?
10a	*If yes, what are these problems?*
11	In your experience, are there problems with the way these cases are dealt with in court?
11a	*If yes, what are these problems?*
12	Are there any problems with the conviction rates or sentences?
12a	*If yes, what are these problems?*
13	In your opinion, do you think the way these cases are dealt with has changed in the last 1, 3, or 5 years?
13a	*If yes, in what ways?*
14	Do you think the International Criminal Court has had any impact on the prosecution of sexual violence crimes here?
14a	*If yes, why? And if no, why not?*

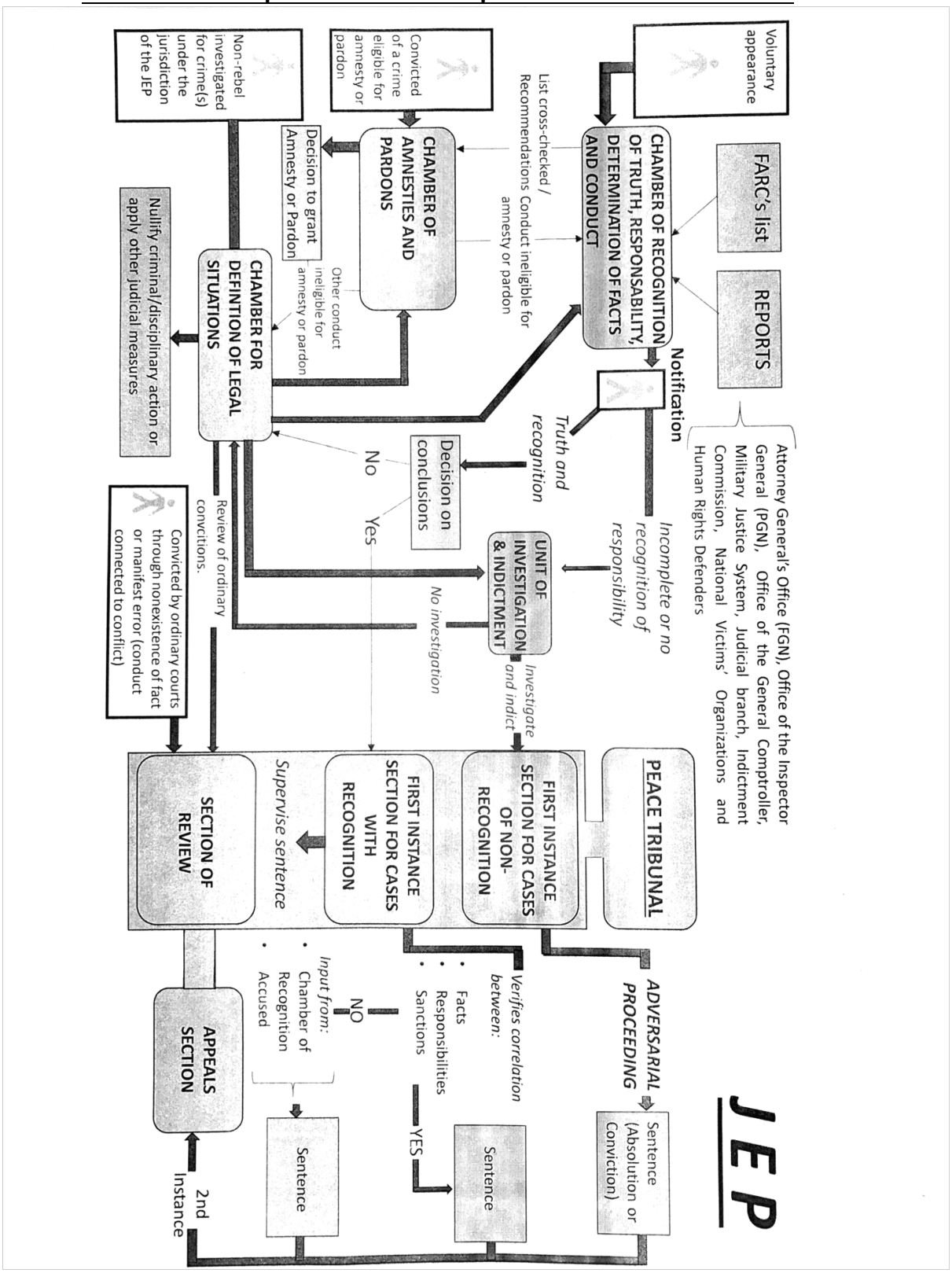
Annexure 3: Questions for semi-structured interviews with prosecutors

Q #	Question
1	How long have you worked as a prosecutor?
2	What are the provisions and laws that make sexual violence a crime?
3	What are the difficulties in prosecuting sexual violence?
4	What do you think is needed to overcome these difficulties?
5	Do you think prosecuting for sexual violence has become easier, or harder or is the same as 2/3/5 years ago (depending on experience)? Why?
6	Have you met women victims of sexual violence in the course of your work?
7	*(Assuming yes)* How have you met these women?
8	How many of these women have you met this way in the last year?
9	*(If relevant)* How many women have you met this way in the last 2/3/5 years?
9a	*What normally happens to cases of sexual violence, in your experience? Why? Does this happen?*
10	What do you say and do at the time these women first report sexual violence? Why?
11	What advice/information do you give to these women?
12	What is the process after a crime of sexual violence is reported? How long does this normally take?
13	Have you ever been involved in prosecuting sexual violence as a crime of genocide, as a war crime or as a crime against humanity?
13a	*If yes, what do you remember about this process?*
13b	*What is different about prosecuting sexual violence as an international crime?*
13c	*Do you think prosecuting sexual violence as an international crime is important or not important? Why?*
14	How many times have you been in court for prosecutions of sexual violence crimes?
15	What do you think is particularly positive or negative about the way these cases are treated in court?
16	Has anything changed in the process for prosecuting sexual violence in the last 2/3/5 years? If so, what?
17	What do you know about the International Criminal Court?
18	Do you think the International Criminal Court has had any impact in this country? If yes, what? If not, why not?

Annexure 4: Questions for semi-structured interviews with government representatives

Q #	Question
1	What is your current role and how long have you been in this role?
2	What experience have you had in relation to crimes of sexual violence?
3	What are the difficulties in prosecuting sexual violence in Colombia/Guinea?
4	What do you think is needed to overcome these difficulties?
5	Do you think prosecuting for sexual violence has become easier, or harder or is the same as 2/3/5 years ago? Why?
6	How have the laws changed recently to prosecute crimes in Colombia/Guinea?
7	What impact have they had?
8	What benefits are there in prosecuting sexual violence as international crimes?
9	What do you think is particularly positive or negative about the way these cases are treated?
10	What role has the International Criminal Court played in promoting more justice?
11	Do you think the International Criminal Court has had any impact in this country? If yes, what? If not, why not?
12	What could improve its impact on national justice? For sexual violence crimes?
14	How have proceedings for prosecuting sexual violence crimes improved?
15	(Colombia) What are the positive and negative aspects of the military justice reforms of 2012?

Annexure 5: Proposed Colombian Special Jurisdiction for Peace



Annexure 6: UNSW Ethics Protocol

GUIDELINE FOR MANAGING SAFETY RISK TO RESEARCHERS

In assessing applications for ethics approval, the HREC requires due consideration to be given to the risks to researchers. Accordingly, the supervisor or Chief Investigator must assess the risks to the safety of the researcher(s). This should include consideration of risks associated with research location; geographic, social and political context; participants; research topic and research methodology. Any risks must be identified in the application for ethics approval, and the proposed measures to manage the risks must be presented for HREC review.

Where risks to a student researcher are identified, a safety protocol must be developed and submitted to the HREC for review with the application for ethics approval. The HREC may also require a safety protocol to be submitted in situations where there is significant risk to a staff (or other non-student) researcher. If in doubt, a conservative approach is recommended and a safety protocol should be submitted.

Responsibilities of the Supervisor[1]

The safety protocol should be agreed between the student (where applicable) and the supervisor, and written agreement from the supervisor to the terms of the safety protocol must be included in the application to the HREC. The supervisor is responsible for implementing the safety protocol as approved, and should maintain documentation during the research project to demonstrate how the terms of the safety protocol are met. The supervisor must notify the HREC in writing as soon as practically possible of any material breach of the safety protocol and advise on actions to remedy the breach.

General Guide for Safety Protocols

The following are points for consideration, to assist in the development of a safety protocol for student researchers. Where the researcher is not a student, the points should be adapted accordingly.

This guide is by no means prescriptive, and not all points are likely to apply to all research projects. It should be used as a starting point only, and the safety protocol tailored to the individual circumstances of the research, the project and the researchers. Examples of safety protocols for different types of research are provided at the end of this document.

[1]This guideline refers to the supervisor, as most instances where safety protocols are required involve a student researcher. However, the person responsible for the safety protocol may be the Chief Investigator in instances where the researcher is not a student.

1. *For research taking place off-campus and within Australia, consider the following points:*

   - Awareness of the supervisor as to when and where students will be conducting the research.
   - Agreed schedule for students to contact their supervisors during conduct of the research, including emergency contact. Students to carry a mobile phone.
   - Dress appropriate to the research context and culture.
   - Safety during interviewing (where applicable). Consider whether safety would be

     improved by one or all of the following, if appropriate to the research project and practical to implement within the context of the research:
     - Conducting interviews during daylight hours
     - Conducting interviews in a public area
     - Operating in groups
     - Practising interview techniques before commencing research, including how to respond to rejections and unpleasant reactions
     - Initially conducting 'pilot' interviews with a staff member present
     - Wearing a University name tag, if appropriate

2. *For research taking place outside Australia, the following should be considered in addition to the points listed above:*

   - Relevant travel advisories from the Department of Foreign Affairs and Trade (http://www.smarttraveller.gov.au/zw-cgi/view/Advice/).
   - Any necessary visas for travelling or conducting research in the particular location.
   - Any required ethics approval to conduct research in the location.
   - Appropriate travel/health insurance.
   - University of Sydney guidelines: *"Fieldwork Outside Australia – A Supplement to Fieldwork Safety Guidelines"* (http://www.usyd.edu.au/ohs/policies/ohs/fieldwork/FieldworkOS.shtml#4)
   - Emergency contacts in the country where research will be conducted.
   - Clearly planned 'exit strategy' including the availability of emergency funding transport, knowledge of local emergency services and support centres.

3. *The researcher may wish to provide details to the HREC of any of the following points that may help to mitigate the identified safety risks:*

   - Previous experience in travelling, working or researching in the area to be visited.
   - Familiarity with, or expertise in, the local language(s).
   - Knowledge of the culture and society in which fieldwork is to take place, including familiarity with local customs, laws and norms of behaviour appropriate to the gender, ethnicity and age of the person conducting the research.
   - Understanding of the potential impact of carrying out research, including the cultural or political sensitivity of the research questions.

The safety protocol must be signed by the student researcher and the supervisor to indicate they have agreed and accepted the provisions of the safety protocol. Where no students are involved, the safety protocol should be signed by the researcher and any other staff member or member of the research team with responsibilities outlined in the safety protocol.

Example Safety Protocols

The following are examples of well-constructed safety protocols for particular types of research. These should be used as a guide only, and the safety protocol must be developed based on the individual circumstances of the research.

Example 1:
Research involving one-on-one interviews to be conducted by a student researcher overseas in a developing country.

- The researcher will be conducting interviews alone or, if required, with a local interpreter, however her supervisor considers that the safeguards provided in this safety protocol are sufficient to manage the safety risks.
- The researcher will discuss interview safety and perform practice interviews with her supervisor prior to travelling overseas.
- The researcher will take advice from the following local institutions regarding the safety of the planned research process: *[details provided.]*
- The researcher's local contact person is: *[details provided.]*
- The researcher has confirmed there is mobile phone coverage in the areas where the research will take place, has access to global roaming and will take her mobile phone to every interview.
- The researcher will provide a schedule to her supervisor of the date, time and place of all interviews. She will confirm the safe completion of each interview by mobile telephone with her local contact person. She will maintain contact with her supervisor at least twice a week by phone, SMS or (where available) email.
- The researcher will conduct the majority of interviews in safe, public places. There may be situations where it is preferable to conduct interviews in a private home (e.g. old or incapacitated interviewees). In these cases the researcher will call her local contact person before the interview to confirm the address, and after the interview to confirm safe completion. She will provide her local contact with a protocol to be followed if she fails to call within a specified time.
- The researcher has confirmed that there are currently no travel warnings from the Department of Foreign Affairs and Trade for *[name of country/region]*. She has subscribed to the travel advice to receive email updates each time the travel warning is reissued. She will also register with the Australian Consulate in *[name of city]* upon arrival.
- The researcher has obtained a visa *[details provided]*, as required to conduct research in *[name of country]*. Through correspondence with *[details provided]* she has determined that no local ethics approval is required for conducting research in this location.
- The researcher undertakes to follow the University of Sydney guidelines on *"Fieldwork Outside Australia – A Supplement to Fieldwork Safety Guidelines"*.
- The researcher has previously visited *[name of country/region]* and is confident in travelling in the area. Through her University studies and previous visits she has gained knowledge of the local language, culture and customs. She has confirmed that an interpreter is available if required.
- This safety protocol has been agreed and accepted by the researcher and the supervisor. *[Signature of student researcher and supervisor provided.]*

Example 2:
Research involving one-on-one interviews to be conducted by a student researcher in private homes in a rural setting in Australia.

- The research involves interviews with disabled people and will therefore need to be conducted in private homes, and the researcher will be conducting interviews alone. However his supervisor considers that the safeguards provided in this safety protocol are sufficient to manage the safety risks.
- Risk management strategies have been discussed between the researcher and his supervisor, and both parties are clear as to procedure. The researcher will discuss interview safety and perform practice interviews with his supervisor.
- The time and location of the interviews will be communicated to a third party *[details provided]*. The researcher will communicate with this third party prior to commencing the interview and after the interview is completed.
- As the interviews will take place in a private home, the researcher will take steps to ensure that he is able to leave at any time. This includes only entering 'public' areas of the house where possible (such as kitchens and living rooms), ensuring that the exit route is clearly known, and watching to ensure that the door is not locked after entering.
- Should anything untoward happen, or the researcher becomes uneasy for any reason, the interview will be terminated immediately and the interviewer will leave. The supervisor will be contacted as soon as practically possible.
- Where possible, interviews will be conducted in daylight hours or in the early evening.
- Transport to and from the interview will be by bus and, where necessary, taxi. Where a taxi is needed, both the outward and return journeys will be booked in advance.
- This safety protocol has been agreed and accepted by the researcher and the

  supervisor. *[Signature of student researcher and supervisor provided.]*

Example 3:
Research involving ethnographic fieldwork to be conducted by a staff researcher in remote villages in a developing country.

- The researcher understands that this form of research carries with it a set of unique challenges and issues. The following undertakings have been devised to minimise the risks involved while not placing undue constraints on the conduct of the research.
- The researcher has been conducting research in *[name of region & country]* for the past 5 years and has acquired a sound knowledge of the local customs *[publication references provided]*. She has developed a good relationship with the elders in a number of villages in the area.
- Although not fluent in the local language, the researcher has sufficient language to conduct routine conversations, and has hired a local interpreter who is respected in the community.
- The researcher has a high level of knowledge of the geographic, social, political, cultural, ethnic and religious contexts of the region. This includes familiarity with accepted gender norms within the research context, and an understanding of the limitations these may place on the research.

- The researcher will provide a travel itinerary and approximate schedule of fieldwork to *[name provided]*, who is a co-researcher on the study and will be in Australia. Any changes to this schedule will be notified when possible, according to the access to landlines and/or mobile coverage. The researcher will contact *[name provided]* at least once a week while in the field.
- There is a current travel warning from the Department of Foreign Affairs and Trade for *[name of country/region]*, as follows: *[details or copy provided]*. The researcher has considered this warning and determined that it is acceptable to travel, and undertakes to follow the recommendations of DFAT in the travel advice document. She has subscribed to the travel advice to receive email updates each time the travel warning is reissued. She will also register with the Australian Consulate in *[name of city]* upon arrival.
- The researcher has ascertained that no visa is required to travel and conduct research in *[name of country]*, and that no local ethics approval is required for conducting research in this location *[attach correspondence]*.
- The researcher undertakes to follow the University of Sydney guidelines on *"Fieldwork Outside Australia – A Supplement to Fieldwork Safety Guidelines"*.
- This safety protocol has been agreed and accepted by the researcher and the co-researcher named in the protocol. *[Signature of researcher and co-researcher provided.]*