The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

Wierda, M.I.

Chapter 3: Systemic Effect II: Internalization of the Rome Statute

[I]n the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system. Kofi Annan[567]

I. Introduction

The impact of the Rome Statute on domestic legal systems is better described as "internalization", rather than as complementarity. Internalization is the process by which states demonstrate compliance with international law. In this case, internalization is reflected in the fact that States take action to investigate or prosecute Rome Statute crimes. This action may consist of changes to laws; building new specialized capacities to try Rome Statute crimes; or conducting trials. These three indicators will be discussed below.

Traditionally, scholars argued about whether international law promotes compliance through coercion or persuasion.[568] Harold Koh distinguishes between social, political and legal internalization,[569] the latter occurring "when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three."[570] Ryan Goodman and Derek Jinks argue that states are influenced to adopt international human rights law not through persuasion or coercion but through a process of "acculturation",[571] i.e. "the general process by which actors adopt the beliefs and behavioral patterns of the wider culture."[572] Harold Koh argues that the evolution of a state's norm internalization from coercion to persuasion to internal acceptance is a dynamic process "whereby persuasion often occurs in the shadow of coercion, and acculturation often occurs in the shadow of persuasion."[573] The Rome Statute can be said to combine coercion with persuasion. In another article, Koh writes abut the transnational legal process, which he calls non-traditional; non-statist; dynamic and normative:

> Nations react to other states' reputations as law-abiding or not … Domestic decision-making becomes "enmeshed" with international legal norms, as institutional arrangements for the making and maintenance of an international commitment becomes entrenched in domestic legal and political processes. It is through this repeated process of interaction and

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[567] Secretary-General's Report. *The rule of law and transitional justice in conflict and post-conflict society*, S/2004/616, 23 August 2004 at para. 34.
[568] Koh, Harold Hongju. *Why Do Nations Obey International Law?* 106 Yale L. J. (1997). 2599.
[569] Ibid. p. 2656.
[570] Ibid. p. 2657.
[571] Ryan Goodman and Derek Jinks. *Incomplete Internalization and Compliance with Human Rights Law,* EJIL Vol. 19 no. 4 (2008) pp. 725-748.
[572] Ibid. p. 726.
[573] Koh, Harold Hongju. *Internalization through socialization*. 54 Duke Law Journal (2005) p. 981.

> internalization that international law requires its "stickiness", that nation-states acquire their identity, and that nations define promoting the rule of international law as part of their national self-interest.[574]

This Chapter argues that in fact, many countries are internalizing the Rome Statute's norms. Prohibitions on genocide, war crimes, and crimes against humanity, were incorporated into domestic law by states such as Afghanistan, even if they were not strictly required to do. Some states, such as Colombia, are holding extensive domestic proceedings, beyond what complementarity may require. While some of these systemic effects may constitute Drumbl's "legal mimicry",[575] the effects may still be positive, in terms of contributing to States' ability to investigate and prosecute Rome Statute crimes in the future. In the words of Kastner, "a commitment that is internalized – whether consciously or unconsciously- is based on a stronger sense of obligation and may actually be more effective than an imposed or supposedly enforceable obligation."[576]

Indicators of internalization discussed among country experiences include the adoption of implementing legislation, including the adoption of procedural rules that bolster international standards; the establishment of specialized courts or chambers to try Rome Statute crimes; and national trials proceedings. However, as the experiences below will demonstrate, internalization is seldom a straightforward matter or linear process. It can be difficult to discern genuineness, in the sense of good faith or "acculturation" as referred to earlier.

For instance, the establishment of specialized domestic capacities to investigate and try Rome Statute crimes, such as the International Crimes Divisions in Uganda and Kenya, is not necessarily an indicator of genuine political will to investigate and prosecute Rome Statute crimes. The establishment of these capacities can serve as a smokescreen, i.e. an attempt to obscure a lack of political will by emphasizing form over substance. At the same time, in such institutions may still play a role and represent a step forward in building local capacity to investigate and prosecute Rome Statute crimes in the future.

National trials can suffer from many flaws that are difficult to assess on a standard of genuineness. At the same time, national proceedings, in spite of their flaws, are perhaps the strongest indicator of systemic effect. For this reason, it is important to map out indicators of "genuineness". National trials may even result in an acquittal, as was the case with the Kwoyelo case. This however does not mean that the proceedings itself did not result in any "internalization."

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[574] Koh, Harold. *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996) p. 204.
[575] Drumbl, Mark. Atrocity, *Punishment and International Law*, Cambridge University Press (2007) Chapter 5.
[576] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490, p. 486.

II. Implementing Legislation

A. Incorporation of Rome Statute Crimes

A vast number of states have proved wiling to domesticate Rome Statute crimes, in spite of not being obliged to do so under the Rome Statute. This is evidence that states increasingly accept Rome Statute norms.[577] While the incorporation of Rome Statute crimes in domestic law is an important step in internalization, the process may face many of the same challenges faced by any law reform initiative. These challenges may include challenges of retro-activity or tensions with other Constitutional norms; questions of process or attempts to include legal transplants. In this respect, the domestication of international criminal law is comparable to other legal reform processes.

Uganda and Kenya both passed implementing legislation that incorporates Rome Statute crimes into domestic law and give jurisdiction to domestic courts (the High Court in both cases), but in both countries, the respective the International Criminal Court Act (2010) and the International Crimes Act No. 16 are prospective only, and cannot be applied retroactively.[578] In passing the 2010 ICC Act in Uganda, the Committee of Legal and Parliamentary Affairs reverted largely to the language an earlier draft ICC Bill of 2006, abandoning a more extensive draft International Crimes Bill drafted by international advisors with insufficient local ownership.[579] The quick passage of the Act, cutting out any more complicated constructions, reflected a desire to be ready for the Review Conference, held in Kampala in 2010.

The International Crimes Act in Kenya, which was passed in December 2008 but only came into force in January 2009, similarly may not apply to the Post-Election

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[577] Terracino, Julio Bacio. *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*. 5 JICL (2007) pp. 421-440.

[578] Article 28(7) of the Ugandan Constitution (1995) states: 'No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.' Uganda is a member of the ICCPR but it is not clear whether this provision could ever be used to overcome a Constitutional prohibition on retroactivity. Uganda had already ratified the Geneva Conventions and incorporated them into domestic law in 1964: however, it is not clear whether the LRA conflict is international in character, and it is not clear whether war crimes in internal armed conflict were criminalized under customary international law or Ugandan law at the time they were committed. Some experts argue that the 'underlying acts' of crimes against humanity and war crimes, such as murder, abduction or rape are criminalized in the Ugandan Penal Code, and that on that basis, it would not be unfair to convict people of war crimes and crimes against humanity that were committed before the Act was passed. See for instance Wrange, Pal. *The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army-a Legal and Pragmatic Commentary.* Uganda Living Law Journal 42-128 (2008). Uganda is also a State Party to the Genocide Convention but has not incorporated it into domestic law.

[579] Report of the Committee on Legal and Parliamentary Affairs on the International Criminal Court Bill 2006.

Violence, which took place in early 2008.[580] The Judicial Service Commission argued that these crimes could be prosecuted because of the 2010 Constitution,[581] which states in Art. 50 (2) that every person has the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or an offence under international law. However, the principle of legality may require specific and written law, so the matter remains unresolved.[582]

When Colombia ratified the Rome Statute, it passed a provision in Law 742(2002) making the Rome Statute applicable in domestic courts, but Art. 93 of the Constitution restricted the application of the Rome Statute purely to "the ambit of the subject matter regulated in the Statute."[583] This was intended to avoid any procedural difficulties that could have given rise to inconsistencies with the Colombian Constitution.[584] Certain Rome Statute crimes are also criminalized under the domestic law, but the fact that there is no single piece of legislation incorporating Rome Statute crimes created a complex legal picture. The Criminal Code Law 599/2000 contains certain international crimes, including genocide (including genocide against political groups). Certain crimes against humanity, such as torture, enforced disappearances or forced displacement are also included, [585] although they are not labeled as crimes against humanity.[586] Some war crimes were incorporated in the Criminal Code under a Chapter on "Crimes against Persons and Property protected by IHL", which identified up to 29 new IHL breaches.[587] But accountability for IHL was hampered by the denial of an existence of an armed conflict.[588] Colombian domestic law differs from international law in crucial ways, including on the issue of who constitutes a protected person, and the question of nexus to the armed conflict. The Colombian Congress did amend Colombia's Criminal Code to include various forms of conflict-related sexual violence, including forced nudity, abortion and pregnancy, specifying that certain types of evidence ordinarily required under domestic law are not required to prove these crimes.[589]

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[580] Chistine Alai and Njonjo Mue, *Complementarity in* Kenya, *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011), p. 1125.
[581] Report of the Judicial Services Commission on the Establishment of an International Crimes Division in the High Court of Kenya, 30 October 2012, pp. 88-95.
[582] Kenyans for Peace with Truth and Justice, *Securing Justice: Establishing a domestic mechanism for the 2007/8 post-election violence in Kenya*, May 2013.
[583] Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial,* DOMAC/17 Oct. 2011 at p. 19.
[584] Ibid. p. 17. Colombia also filed an exception to the Court's jurisdiction on war crimes, under Article 124 of the Rome Statute, which expired in 2009.
[585] Ibid. p. 16.
[586] Ibid. p.48. A number of Colombian jurists believe that Rome Statute crimes, particularly crimes against humanity, are so vague defined as to violate notions of the principle of legality, and would be difficult to apply by Colombian courts.
[587] Interview with Former Deputy Minister of Justice, Bogota, 14 May 2014.
[588] Also, the Colombian government was trying to avoid the scrutiny of the Security Council for child recruitment. The FARC, paramilitary and military in Colombia have all used children either as combatants or as informants.
[589] OTP Report on Preliminary Examinations, 2013 at para. 144.

The law refers to these crimes as crimes against humanity, but its application remains to be seen.

The Afghan Penal Code drafted in 1976 did not contain war crimes, crimes against humanity or genocide. The Rome Statute is not directly applicable in Afghanistan, as Article 7 of the Afghan Constitution states: "The state shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights."[590] While this article may imply the system is monist, Afghan lawyers in fact consider it dualist.[591]

In 2005, the Afghan Independent Human Rights Commission drafted a law to implement the Rome Statute into domestic law in Afghanistan. The draft law was forwarded to the Department for Legislative Drafting ("*Taqnin"*),[592] but it was not tabled at the Council of Ministers.[593] In an interview, the Ministry of Justice said that it could not endorse the draft, without specifying why.[594] However, since that the *Taqnin,* advised by the Criminal Law Reform Working Group, drafted comprehensive new penal code,[595] with a Chapter that incorporates the Rome Statute definitions for aggression, war crimes, crimes against humanity and genocide (Articles 6, 7, 8 and 8*bis* of the Rome Statute).[596] The crimes are mostly adopted verbatim, with some crucial omissions, such as the requirement of a plan or policy for war crimes; or the crime of recruitment of children under the age of 15 into armed forces.[597] Afghan law only recognizes recruitment of children as a crime for those under 18.

A draft of this new penal code was presented to the Afghan Cabinet on 1 Oct. 2016 and has been adopted.[598] However, it is unlikely that the Penal Code will be given any retroactive application, because of Article 27 of the Constitution: "no deed shall be considered a crime unless ruled by a law promulgated prior to commitment of

[590] A similar provision was found in the 1964 Constitution.
[591] Interview with Michael Hartmann, Kabul, March 2014. Obligations such as those contained in the ICCPR, ratified by Afghanistan in 1983, are not directly enforceable before Afghanistan's courts.
[592] For their website see http://moj.gov.af/en/page/1670.
[593] Interview with AIHRC Commissioner (now Attorney General), 20 Nov. 2013.
[594] Interview with Head of Criminal Law Department, Ministry of Justice, Kabul 15 March 2014.
[595] The Taqnin receives technical assistance from the Criminal Law Reform Working Group. Interview with Michael Hartmann, Head of UNAMA Rule of Law Division, 16 March 2014.
[596] Articles 315 to 322 of the Afghan Penal Code. Interview with Head of Criminal Law Department, Ministry of Justice, Kabul 15 March 2014. See also Interview with previous staff member at the Taqnin, Kabul, 15 March 2014. Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[597] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[598] Ibid.

the offence".[599] Afghan penal law does provide for the death penalty for crimes such as murder, terrorism, treason, but also adultery and apostasy.[600]

B. Victims' Rights Under Domestic Law

Victims' rights have in some cases also been incorporated into domestic legislation. In Colombia, the "internalization" of the Rome Statute can be seen in improved frameworks for victims, both through the Victims and Land Restitution Law (Law 1448), and through Constitutional Court judgments, for instance on *tutela* actions filed by displaced persons against their municipalities, in order to enforce respect for their rights including housing.[601] A number of legal reform initiatives were also proposed in Uganda,[602] including a new law on witness protection; revisions to the Evidence Act to allow for witnesses to appear via video-link; and certain revisions to the Penal Code.[603] As mentioned, victims are also allowed to participate in ICD trials.

Under Kenya's Criminal Procedure Act, victims can participate in a number of ways common to other common law jurisdiction, such as in the context of a plea agreement, or through "impact statements" at the sentencing stage, compensation or restitution of property.[604] In 2014, the Kenya legislature passed the Victims Protection Act, which gave further rights to victims. For instance, the Act requires national authorities to undertake a preliminary assessment of victims. It gives victims the right to be present at trial and to participate in ways that are similar to the ICC trials. The Act also created a Victim Protection Trust Fund, similar to the ICC Trust Fund. However, so far this legislation has not yet been used in the Kenyan Courts.[605]Additionally, in Kenya, the Witness Protection Act 2006 provided for a Victims Compensation Fund,[606] and established a new Witness Protection Agency. While the Act gives this agency a solid framework, witness protection remains a major challenge in the Kenyan context. The program does not apply to defence

[599] Article 27 of the Afghan Constitution states: Article 27 [Punishment]:
(1) No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed.
(2) No person can be pursued, arrested or detained but in accordance with provisions of law.
(3) No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of offense.
[600] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[601]See Constitutional Court Decision T-025, 2004.
[602] Interview with Joan Kagezi, 10 Feb. 2014.
[603] Interview with Joan Kagezi, 10 Feb. 2014.
[604] Kenya Criminal Procedure Code, Article 137 (d), Article 329 (C) (1), Article 175 (2) (b), Article 177. Hansen, Thomas Obel. *Prosecuting International Crimes in Kenyan Courts?* Paper presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges. " 21 November 2015.
[605]Ibid.
[606] See Witness Protection Act, 2006 Art. 3 (1) (1).

witnesses. The Agency lacks funding and is not sufficiently independent from other government agencies such as the police.[607]

Afghanistan incorporates a variety of witness protection measures into its Criminal Procedure Code, but these seem to originate mainly from US law, and are not inspired by the ICC. Victims have a right to participate in trials according to Art. 6 (3) and may also claim compensation (Art. 189-201).[608]

C. Modes of liability

In some cases, domestic systems have incorporated modes of liability found in the Rome Statute, although in particular superior responsibility remains a difficult issue in national law. Colombian courts do refer to international law and to the jurisprudence of the ICC.[609] On the other hand, the Supreme Court has generally rejected international law concepts such as command responsibility and perpetration-by-means,[610] until 2010, when it applied the latter notion to a paramilitary leader, Alvaro Alfonso Garcia Romero. It seemed however to be guided by regional jurisprudence such as the Fujimori decision in Peru.[611] The Supreme Court also designated "aggravated conspiracy to commit a crime" as a substantive offence rather than as a mode of liability, an approach that has been criticized by scholars.[612] In Kenya, modes of liability of the Rome Statute are applicable according to Art. 7(1) of the international Crimes Act, "with any necessary modifications."

D. Incorporation of ICC procedures

When states set up specialized capacities to try Rome Statute crimes, they have also at times sought to rely on ICC procedures, sometimes inordinately so. The

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[607] Hansen, Thomas Obel. *Prosecuting International Crimes in Kenyan Courts?* Paper presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges. " 21 November 2015.
[608] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/.
[609] The Judiciary in Colombia includes the Constitutional Court, the Supreme Court of Justice, the State Council, the Supreme Council for the Judiciary, the Prosecutor General (*Fiscalia*), the lower Tribunals and Judges and the Military Criminal Justice. In the criminal system, the top of the hierarchy is the Criminal Chamber of the Supreme Court of Justice, followed by district tribunals, and circuit and municipal courts. Some specialized circuit courts were also established. Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, DOMAC/17 Oct. 2011 pp. 14-15. The Justice and Peace magistrates are known to have cited ICC cases, including decision from Lubanga and Katanga.
[610] Perpetration-by-means is included in Art. 25(3)(a) of the Rome Statute but is foreign to Colombia now. Chetman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial,* DOMAC/17 Oct. 2011 at p. 46.
[611] Ibid. p. 48.
[612] While conspiracy is not a mode of liability recognized in the Rome Statute, common purpose is. Ibid. p. 49.

International Crimes Division in Uganda drafted Rules of Procedure and Evidence, which were approved by the Rules Committee, subject to the Judicature Act, and came into force in March 2016.[613] The Rules reflect a complex attempt to transplant specific procedural elements from the Rome Statute or Rules of Procedure and Evidence of the ICC. For instance, the Rules suggest the creation of Pre-Trial and Trial Divisions within the ICD.[614] [615] The Rules also provided for the creation of a Trust Fund for Victims analogous to that of the ICC. [616] In the words of Mégret: "the area of international criminal law that has been fraught with tensions, contradictions, and evolutions so that it should now be transposed as such to domestic systems strikes one as odd."[617]

An interesting impact of the ICC procedures could be seen in Libya. In November 2013, the Assembly of States Parties amended adopted Rules 134 *bis, ter* and *quarter* on the use of video-link technology, excusal from presence at trial and excusal from presence at trial due to extraordinary public duties. Before violence

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[613] The ICD received assistance from ASF and various international and local consultants in drafting the rules.

[614] Draft Rules of Procedure and Evidence of the International Crimes Division of the High Court of Uganda, 2013. The Rules included the establishment of a Victims And Witnesses Unit and the suggestion of a list of counsel similar to that of the ICC. Victims are therefore allowed to participate in ICD trials, a feature that is new to the Ugandan system. The Rules suggest crating a War Crimes Prosecution unit as a separate organ of the ICD, as well as an Investigation Unit within the Police force.

[615] The Draft Rules also follow international practices of allowing for the admission of various forms of evidence, including evidence via audio- or video-link; or conversely not allowing certain forms of evidence in cases of sexual violence or evidence which may self-incriminate a witness. Other areas where the Rules seek to follow international practices are in disclosure of evidence; practices dealing with the protection of victims and witnesses, including their participation and legal representation during proceedings; reparations to victims. The Rules incorporate ICC procedures on arrest and detention; Pre-Trial procedures including confirmation hearings; and various trial procedures, such as status conferences, the filing of various motions, and the possibility to join or separate trials.

[616]For instance, Afghanistan has a lengthy history of international efforts in law reform since the fall of the Taliban in 2001. In particular, many actors in Afghanistan sought to introduce "legal transplants", most often through introducing draft bills through the executive, without a consensus-based technical and political law reform process, which would engender the legitimacy needed for real internalization of new laws. A prime example of this was the Italian-drafted Interim Criminal Procedure Code introduced in Afghanistan. Some of these problems were remedied through the creation of a Criminal Law Reform Working Group, comprised of domestic and international actors, which could constitute an interesting law-making model for other countries. The Criminal Law Working Group was comprised of representatives of the Supreme Court; the Attorney-General's Office; the Ministry of Interior; the Afghan Independent Human Rights Commission; and occasional representation from the Ministry of Justice; and international experts from UNODC, the US State/ INL-funded Justice Sector Support Program; UNAMA; UNDP; the US ad UK Embassies; the Italian Cooperation Office; EUPOL; Canada, and where relevant, the participation of USIP; UNIFEM; US DOD and GIZ. Hartmann, Michael E. and Agnieszka Klonowiecka-Milart, *Lost in translation: Legal Transplants without consensus-based adaption,* in *The Rule of Law in Afghanistan: Missing in Inaction,* ed. Whit Mason, Cambridge University (2011).

[617] Mégret, Frederic, *Too much of a good thing? Implementation and the Use of Complementarity,* The *International Criminal Court and Complementarity: From Theory to Practice*, Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011), p.374.

broke out in Tripoli in July 2014, Saif al-Islam Qadhafi was participating in the trial via video-link according to Article 2 of Law No. 7 of 2014 amending Article 243 of the Code of Criminal Procedure to give the court discretion to use "advanced communication means" to link the accused to the trial session if there is fear for his security or his escape. This amendment was directly inspired by the amendment at the Assembly of States Parties. But after violence worsened, Saif al-Islam Qadhafi was been connected to the trial since the session of 22 June 2014.

II. Creation of Specialized Domestic Investigative Units or Chambers

Another important indicator of internalization is the dedication of specialized institutions to try Rome Statute crimes. Since the coming into force of the Rome Statute, several countries under the Court's jurisdiction established new capacities that specialized in investigating and prosecuting Rome Statute crimes. In all three examples given here (the Ugandan International Crimes Division, the Kenyan International and Organized Crimes Division, and the Context and Analysis Unit, to some extent their establishment was intended to allow national authorities to pose more effective admissibility challenges to the ICC. Their creation is therefore directly attributable to the ICC, even if it is an unintended effect. Establishing national capacities to try Rome Statute crimes has the potential of contributing directly to establishing a culture of accountability by ensuring that such crimes can be tried before a domestic court. However, rather than a reflection of "genuineness", the establishment of these new institutions was often intended to distract from an unwillingness to investigate or try crimes committed by anyone other than non-state actors.

A. Uganda International Crimes Division

1. Clarifying jurisdiction over international crimes

The creation of specialized capacities can have several advantages for domestic systems, as is demonstrated in Uganda. In July 2008 the Government of Uganda set up a War Crimes Division (later renamed International Crimes Division) of the High Court.[618] The establishment of the ICD has helped to clarify jurisdiction over international crimes, including but not limited to Rome Statute crimes. The ICD was given jurisdiction over a range of international crimes additional to Rome Statute crimes, including human trafficking, piracy and terrorism.[619] A disadvantage

[618] Annexure to the Juba Agreement, section 7. The Division was established pursuant to Art. 141 of the Ugandan Constitution. The High Court (International Crimes Division), Practice Directions ("ICD Practice Directions"), Legal Notice no. 10 of 2011, Legal Notice Supplement, Uganda Gazette, no. 38, vol. CIV, May 31, 2011.

[619] Legislation relevant to the subject-matter jurisdiction of the ICD includes the ICC Act 2010; the Geneva Conventions Act 1964; and the Ugandan Penal Code (charged in the alternative in the case of Thomas Kwoyelo). Cases from the ICD can be appealed to the Constitutional Court and the Supreme Court.

though it that it may not always be clear whether these international crimes can encompass the actions of state agents. While this is not formally excluded by the mandate of the ICD, there is a strong presumption that the ICD exists to try non-state actors.

2. Designating and developing specialized capacities

Another clear advantage is that countries may choose to designate and develop specialized capacities for investigating, prosecuting, and judging international crimes. Unfortunately this does not always include capacity for the defence. The Principal judge appointed four Ugandan judges to the ICD. A number of these judges had international experience in Rwanda, Sierra Leone and elsewhere. One of the judges serves as head of the division.[620] But in general, the ICD remains underfunded and understaffed.

In 2014, the department of Uganda's Directorate of Public Prosecutions (DPP) dealing with ICD cases was composed of six prosecutors. This included the late Joan Kagezi, the Head of the ICD who was murdered in April 2015, presumably in relation to a terrorism case she was involved in on a series of bombings in Kampala during the World Cup in 2010 that killed 79 people. In addition, the Criminal Investigations Department (CID) was composed of 6 police investigators and 45 district focal points.[621] Defendants before the ICD have the right to retain private counsel, or will be represented by state lawyers but only if they are charged with offenses punishable by life in prison or the death penalty.[622] Human Rights Watch has concluded that the ICD suffers from deficits in fairness and quality.[623]

3. Access to Funding and Technical Assistance

An obvious advantage of establishing a specialized capacity is that it may be attractive to donors and other actors, both in terms of funding and technical assistance. The ICD is funded through the Government and international donors, channeled through JLOS.[624] However, apart from the Kwoyelo case, the ICD was largely dormant. In fact, at the national level the International Crimes Division is viewed as donor-driven initiative aimed to please the international community,

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[620] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division* (2012) p. 6.
[621] Interview with Joan Kagezi, 10 Feb. 2014.
[622] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division* (2012) p. 8. Kwoyelo's defense were not court-appointed but privately paid. Court appointed lawyers can be chosen from a list maintained by the Uganda Law Society but it can be difficult to attract high quality lawyers because the fees are not considered profitable. Interview with ICD Registrar, 10 Feb. 2014.
[623] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division* (2012) p. 8.
[624] JLOS donors also provided additional support to the ICD, for instance by funding a study tour to Bosnia, Sierra Leone and The Hague in 2009.

rather than a response to local priorities. As one observer put it, the Ugandan government was "playing to the gallery" when it put in place the ICD. [625] Religious and traditional opposed, Kwoyelo's prosecution and continue to oppose prosecutions of the LRA in general.[626] It remains to be seen whether the ICD will try other LRA actors such as Ceasar Acellam, once a Brigadier in the LRA.[627] He is said to have been on a list of 10 originally provided by the UPDF Intelligence to the ICC, of which 5 were eventually selected for prosecution.[628]

B. The Context and Analysis Unit in Colombia

1. Ability to investigate and prosecute "system crimes"

One of the biggest advantages of establishing specialized capacities is the ability to investigate and prosecute "system crimes". The term "system crimes" was coined by the Dutch jurist B.V. A. Roling, and refers to complex international crimes such as war crimes, crimes against humanity and genocide. The challenges of successfully investigating and prosecuting these crimes are unique, as these crimes are generally characterized by a division of labour, between planners and executants Also, these crimes are crimes of scale that are logistically challenging to investigate.[629]

The Context and Analysis Unit (UNAC) was established in 2012, under the Office of the General Prosecutor (*Fiscalia)*. Its mandate is to investigate large criminal structures, using analytical methods.[630] The work of the unit allows Colombian prosecutors to "prioritize" and focus on cases of those bearing the greatest responsibility, according to the *Fiscalia's* Directive 00001 of October 2012. Its creation was intended to better capacitate the *Fiscalia* to investigate Rome Statute crimes.

2. Allowing for multi-disciplinary investigations and use of analysts

The UNAC combines the capacities of prosecutors, analysts and investigators, to investigate the "context" of the crimes, including those who bear the greatest responsibility for the crimes, and the criminal plan that was formed. The investigation explores the political, historical and economic factors of the context, through social science methodology, followed by a description of the criminal

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[625] Interview with Advocats Sans Frontiers, Kampala, 10 Feb. 2014.
[626] A prominent religious leader referred to Kwoyelo as an "innocent man." Interview with religious leader, Gulu, 9 Feb. 2014.
[627] Ledio Cakaj, *The Lord's Resistance Army of Today*, Enough, November 2010.
[628] Interview with Joan Kagezi, 10 Feb. 2014. At the moment, Acellam is in a safe house under the custody of UDPF 4th Division in Gulu. Rumors abound about whether he has already been granted amnesty. In December 2013, a number of LRA are said to have surrendered in Central African Republic, including a group of 19, including Lieutenant Colonel Obur Nyeko alias Okuti. The DPP may be interested in him and others.
[629]OHCHR Rule of Law Tools for Post-Conflict States, Prosecution Initiatives, 2006 at pp.11-12.
[630] Interview with Head of the UNAC, 12 Nov. 2013.

organization and a reconstruction of its actual function. Analysts are drawn from many different disciplines.[631] Its investigations are intended to show the nexus between the military structures, financiers (such as banana companies or cattle farmers), politicians and armed forces, particularly in areas such as Urawa and Monte Maria.[632] The UNAC said it is investigating crimes committed by different actors and in different phases of the conflict, including extrajudicial killings by the military (false positives); violence against trade unionists; and violence against the Patriotic Union.[633]

The UNAC achieved some important results in investigations. For instance, in an investigation on "false positives", it discovered that the military was documenting FARC kills in an area where FARC was not present.[634] UNAC also took steps to prepare for bringing charges against FARC, including new charges on narco-trafficking, international humanitarian law, attacks on indigenous communities, and displacement.[635] These could not proceed further because of the Havana Talks. UNAC staff said that the ICTY, rather than the ICC inspires the methods of the UNAC.[636]

Critics however level several criticisms at the UNAC approach. Firstly, they argue that the Context and Analysis Unit is "mimicking" international legal structures without being suitably adjusted to the context of the local legal system.[637] Its analytical reports are not necessarily admissible in Court, unless they are admitted as expert evidence.[638] If the reports become evidence, they can be challenged by the defense, which may contribute to the length and complexity of litigation.[639] Secondly, some civil society worry that prioritization through the work of the Unit will lead to impunity.[640] Thirdly, the structure of the unit may not be sufficiently equipped to deal with the complexity of different kinds of crimes in Colombia.[641] This may be a case of over-centralization between different types of investigations on which barriers of separation may be more appropriate.[642] A fourth criticism is that the UNAC's efforts to investigate state crimes are limited. The (former) General Prosecutor himself was the main author on the Military Justice reforms, which will make it more difficult to pursue military cases.[643] Finally, the UNAC is just one in a

[631] Ibid.
[632] Interview with Director ICTJ Colombia, 12 Nov. 2013
[633] Interview with Head of the UNAC, 12 Nov. 2013
[634] Interview with Head of the UNAC, 12 Nov. 2013.
[635] Ibid., 12 Nov. 2013.
[636] Ibid., 12 Nov. 2013.
[637] Interview with Michael Reed, OHCHR, 9 Nov. 2013.
[638] Either Law 600 or Law 906 could apply, depending on how old the case is. For crimes before 1 January 2005, the former applies, whereas Law 906 applies to crimes committed afterwards.
[639] Interview with Director ICTJ Colombia, 12 Nov. 2013
[640] Ibid., 12 Nov. 2013.
[641] Interview with Michael Reed, 9 Nov. 2013.
[642] Ibid., 9 Nov. 2013.
[643] Ibid., 9 Nov. 2013.

series of units created in the *Fiscalia* over the years, with a new post-Havana unit already underway.[644]

C. Kenyan Special Tribunal and International and Organized Crimes Division

Developments in Kenya however demonstrate that the establishment of specialized capacities at the domestic level will not always lead to effective investigation and prosecution. In Kenya, state actors were directly implicated in violence. An attempt to first hybridize national proceedings, via the Kenya Special Tribunal, and then to go to the ICC, both failed. The Waki report criticized state security institutions both for their failure to anticipate violence and their direct involvement.[645] It recommended the establishment of a Special Tribunal for Kenya, a court of mixed composition that would investigate and prosecute PEV, particularly crimes against humanity.[646] The Prosecutor was to be a non-Kenyan. [647] Proponents of the Tribunal hoped that the threat of an ICC intervention would be enough to prompt the Kenyan legislature to pass the Bill.[648] But the Bill failed to obtain the required two-thirds majority in Parliament and was abandoned in July 2009. After that, many lobbied for the slogan: "Don't be vague, go to The Hague."[649] The failure to establish a Special Tribunal was a clear indication of a lack of political will to prosecute PEV on behalf of the Kenyan government.

Unsurprisingly, attempts to establish an International and Organized Crimes Division on the back of those failures have been unsuccessful. Under section 8(2) of the International Crimes Act No. 16 of 2008, Kenya's High Court has jurisdiction to conduct trials over persons responsible for international crimes committed locally or abroad by a Kenyan, or committed in any place against a Kenyan as of January 2009.[650] In October 2012, the Judicial Service Commission published a Report suggesting the establishment of an International and Organized Crimes Division, for "international-scale crimes" including post-election violence but also for

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[644] First was the National Unit for Human Rights, then the Justice and Peace Law unit, then UNAC, and under the Havana Peace Talks, a Special Jurisdiction for Peace will be established. Interview with OHCHR representative, Bogota, 13 May 2014; Interview with Director Colombia ICTJ, 16 May 2014.
[645] Alai, Chistine and Njonjo Mue, *Complementarity in Kenya, The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press, (2011) p. 1224.
[646] Ibid. See also Institute for Security Studies, *The International Criminal Court's cases in Kenya: origin and impact*, No. 237 (August 2012) at p. 7.
[647] Open Society Institute, *Putting Complementarity into Practice: Domestic Justice for International crimes in DRC, Uganda, and Kenya*, 2011. I travelled to Kenya in 2008 to advise on the establishment of the Special Tribunal. Alai, Chistine and Njonjo Mue, *Complementarity in Kenya, The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011), p. 1225.
[648]Ibid.
[649] See Institute for Security Studies, *The International Criminal Court's cases in Kenya: origin and impact*, No. 237, (August 2012) p. 9.
[650] Hon. Rev. Dr. Samuel Kobia, Commissioner JSC/ Chair ICD Committee, *Complementarity in Practice: Examples from Kenya,* Paper presented at the German-Kenyan Side Event at the ASP, (23 Nov. 2013) p. 8.

transnational crimes, including terrorism, piracy, cyber-crime, human trafficking, money laundering, small arms smuggling and drug trafficking as well as the International Crimes Act No. 16 of 2008.[651] Reverend Samuel Cobia, head of the Judicial Service Commission subcommittee, said the IOCD would be established "modeled on standards of ICC, with necessary modifications to suit the Kenyan Judiciary", with 7 judges sitting in 3 panels with an extra judge, and with its seat in Nairobi.[652] In the words of Willy Mutunga, the Chief Justice of Kenya: " The IOCD is a Kenyan solution to a local problem … The IOCD promises to borrow smart and best practices from the world over to try these cases. In a real sense, this is implementing the Constitutional imperative: to domesticate international law in ways that are useful in terms of substantive law."" [653]

In the political climate in Kenya, particularly after the collapse of the ICC cases, civil society took the view that the this attempt to set up an IOCD does not constitute a "good faith attempt" to do justice for post-election violence.[654] Civil society described the IOCD as "motion without movement."[655] The Kenyan Director of Public Prosecutions, Keriako Tobiko said at Assembly of States Parties in November 2013, that he is pursuing hundreds of cases. But in February 2014, he said that up to 4000 PEV cases couldn't be prosecuted due to lack of evidence.[656] In March 2015, President Kenyatta said that PEV would see no further accountability but that a fund will be established to help victims.[657] After the election of Kenyatta and Ruto, government officials dubbed civil society the "evil society", and attempted to restrict their activities and funding base through new legislation.[658]

III. National Proceedings and "Genuineness"

Domestic proceedings are perhaps the most significant evidence of "systemic effects" of the Rome Statute. Domestic prosecutions can over time contribute to building a "culture of accountability" through strengthening domestic institutions;

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[651] The Judicial Service Commission, Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in The High Court of Kenya, Oct. 2012. Later, in 2015, the name was changed to the International and Organized Crimes Division.
[652] Hon. Rev. Dr. Samuel Kobia, Commissioner JSC/ Chair ICD Committee, *Complementarity in Practice: Examples from Kenya*, Paper presented at the German-Kenyan Side Event at the ASP, 23 Nov. 2013 p. 7.
[653] News Ghana, *IOCD is a local solution to a national problem*, Chief Justice Mutunga, (29 April 2015) at http://www.newsghana.com.gh/iocd-is-kenyan-solution-to-local-problem-cj-mutunga/.
[654] Kenyans for Peace with Truth and Justice, and the Kenyan Human Rights Commission, *Security Justice: Establishing a Domestic Mechanism for the2007/2008 post-election violence in Kenya*, May 2013. Interview with civil society activist, Nairobi, 5 Feb. 2014.
[655] Interview with civil society activists, Nairobi, 3 Feb. 2014.
[656] Koech, Bernard. *French Doubts About Mandate of Kenya's Special Court*, IWPR 21 Feb. 2014.
[657] Hansen, Thomas. *Prosecuting International Crimes in Kenyan Courts?* Paper Presented at the Nuremberg Principles 70 Years Later: Contemporary Challenges", 21 November 2015.
[658] Interview with civil society activists, Nairobi, 3 Feb. 2014.

resulting in legal changes; providing important precedents; and through stimulating national debate on accountability questions.

Impact studies from other international tribunals indicate that countries that held domestic trials following international trials contribute to "internalizing" and processing questions of guilt and acknowledgment. For instance, Germany adopted and internalized the Nuremberg Principles over time.[659] Similarly, Orentlicher argues that the Bosnian War Crimes Chamber in Serbia would not have existed but for the ICTY, and that the work of the ICTY created a climate in which domestic prosecutors could proceed, if only through an antagonistic desire to prove their professional competence and national pride.[660] In 2004, up to 71 percent of Serb respondents in an opinion poll believed it was better to institute war crimes cases in national courts than at the ICTY.[661] In spite of some very mixed results, the Serbian prosecutions were viewed as more legitimate and less controversial than the trials in The Hague, and that they contributed to "normalizing" the prosecution of war crimes.[662]

At the same time, as will be seen from the Colombian cases, domestic trials can be difficult to assess in terms of their contribution to building a culture of accountability. It is important to analyze the experiences in Colombia, in order to distill "indicia of genuineness" that could be used to evaluate future cases, including those held before the Special Jurisdiction for Peace.

A. Domestic Trials in Colombia: Paramilitaries, Politicians, and "False Positives"

Colombia is often mentioned as an example of "positive complementarity" with the ICC as its "ally in the fight against impunity."[663] Colombia ratified the ICC Statute on

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[659] Unlike Germany, Japan did not conduct any further domestic trials after the conclusion of the Tokyo trials and it can be argued that "internalization" was more limited in Japan. The "hybrid court" model may show higher degrees of internalization of values, as indicated by the high approval ratings of the Special Court for Sierra Leone. In Cambodia, respondents were quite explicit for instance that they do not trust the national justice system. Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, "*So We Will Never Forget": A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia",* Human Rights Center, University of California, Berkeley (January 2009): only 36% of respondents said they trusted it.

[660] Orentlicher, Diane. *Shrinking the Space for Denial: The Impact of the ICTY in Serbia.* OSJI, 2008 at p. 18. Orenticher also points to the role of the assassination of Zoran Djindjic in creating sufficient political will to proceed with domestic trials. The BWCC was further assisted by transfer of evidence from the ICTY, and the transfer of "know-how" particularly in relation to practical issues on how to conduct complex war crimes trials: p. 48.

[661] Ibid. p. 47.

[662] Ibid. p. 56.

[663] Remarks by Ruth Stella Correa Palacio, Minister of Justice and Law, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, Pintificia Universidad Javeriana, 20-21 June 2013.

5 August 2002.[664] Law 742 (2002) approved implementation of the Rome Statute.[665] Court officials too often refer to Colombia's national proceedings as an example of the ICC's impact.[666] The Colombian Government says it is making "all efforts to ensure that war crimes and crimes against humanity are not left in impunity."[667] In 2005, the Colombian parliament passed Law 975, the background of which is described at length in Chapter 4.[668] In spite of the existence of Law 975, the Colombian authorities decided for the extradition of up to 29 paramilitary leaders to the US on drug-related offences between September 2008 and March 2009. The ICC OTP was sent many communications and urged to intervene by those who considered this a clear indication of unwillingness, but did not act on it.[669]

Proponents of Law 975 say its successes include the acknowledgement of 40,000 crimes; the participation of nearly 77, 000 victims; and the recovery of 5000 bodies.[670] Experts continue to disagree on their assessment of Law 975 and whether it led to effective prosecution of Rome Statute crimes at the domestic level. Human rights organizations argued that Law 975 constituted an attempt to "shield" from responsibility and masked unwillingness, whereas others argue that the law probably amounted in more revealed truth and prosecutions than would otherwise have been the case. [671] Another criticism often leveled at Law 975 is that it did not result in non-repetition, as many paramilitaries continue their involvement in para-

[664] At the time of ratification, President Pastrana appended a declaration under Art. 124 of the Statute, under which ICC would lack jurisdiction over war crimes committed in Colombia for a period of 7 years, reflecting a protectiveness over its military institutions which continues to this date.
[665] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 19. An Article was added to the law to clarify that any inconsistencies between Colombian law and the Rome Statute would "have effect exclusively within the ambit of the subject-matter regulated in the Statute." Differences included the ability to give life sentences (in Colombia the highest sentences were restricted to 60 years), and the application of statutes of limitations, as well as modifications to the *res judicat*a and *non bis in idem* principles in cases of ICC intervention. This law in turn was reviewed by the Constitutional Court, in a detailed decision. Constitutional Court for Colombia Decision C-578 of 2002. Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*. Domac/17 (Oct. 2011) p. 18.
[666] James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court,* 13 May 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.
[667] Remarks by Ruth Stella Correa Palacio, Minister of Justice and Law, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, Pintificia Universidad Javeriana, 20-21 June 2013,.
[668] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 20. Law 975 (2005) was passed alongside Law 782/2002 and Regulatory Decree 128/03, which provided the framework for demobilization by providing economic packages to demobilizing paramilitaries.
[669]Interview with Member of Congress 2, Bogota, 14 May 2014. Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 30.
[670] International Crisis Group, *Transitional Justice and Colombia's peace Talks*, Latin America Report No. 49, 29 (August 2013) p. 5.
[671] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach*", Lawyers Without Borders Canada (2011) p. 18.

politics and para-economics.[672] In the words of a prominent Colombian parliamentarian the JPL resulted in "0.1 % reparations, 5% justice, 20% truth, but 0% in terms of non-repetition."[673]

On paper, Law 975 appeared to be a great innovation, but in practice, it is now considered a mostly failed experiment, due to the low number of overall convictions, which only came to 10 after 7 years and 110 in 2015.[674] Law 1592 (2012) refocused prosecutions on the "most responsible": sixteen macro-level trials were planned for senior leaders, and the judgments will be applied to all those in custody hopefully before their sentences run out in 2014.[675] However, many Colombians remain proud of the innovations of Law 975 and consider it a transitional justice model that could be exported.[676]

The Prosecutor of the ICC referred to Colombia in unusually positive terms at an early stage:

> No doubt that in Colombia these proceedings are genuine … Colombian judges are very good and the Justice and Peace Law has allowed them to uncover hundreds of thousands of killings. Colombia is a sophisticated country and this law is also a very sophisticated one, very complex and interesting. It is a unique process in the world.[677]

After the extradition of senior paramilitaries to the United States, increasingly paramilitaries used their *version libres* to expose their ties with Colombian politicians.[678] At least sixty members of Congress were exposed as having such links and were convicted. The OTP in its report notes that as of August 2012, over 50 former congressmen had been convicted for "*concierto para delinquir*". [679]
Most of the convictions dealt with election crimes, but four public officials were also convicted of murder, enforced disappearances, kidnapping and torture.[680]
The impact of the ICC on the trials of the para-politics was limited. This is in spite of the fact that the Prosecutor's second visit coincided with the para-politics scandal on which he had addressed a letter to the Colombians on 18 June 2008, referring to

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[672] Interview with Member of Congress, Bogota, 14 May 2014.
[673]Ibid.
[674] Hayner, Priscilla. *The PeaceMakers Paradox: Pursuing Justice in the Shadow of Conflict*, Routledge 2018 (Case Study on Colombia) p. 198.
[675] International Crisis Group, *Transitional Justice and Colombia's Peace Talks,* Latin America Report No. 49, (29 August 2013) p. 5.
[676] Interview with Carlos Holmes Trojillo, Bogota, 17 May 2014. In the words of Carlos Holmes Trojillo, Vice Presidential candidate, "the Peace and Justice Law was a good model."
[677] Velez, Sheila, Luis Moreno-Ocampo, Chief Prosectuor of the ICC: "I have the most important mission in the world", AEGIS trust website, 22 Feb. 2011.
[678] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecuto*r, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1004.
[679] OTP Interim Report, Situation in Colombia, Nov. 2012 at para. 175.
[680] Ibid. at para. 178.

it as a "key issue" for the ICC.[681] The OTP Interim report does not deal with the Administrative Department of Security, a department that is alleged by human rights organizations to serve criminal interests and was allegedly used for illegal acts including the murder of "declared enemies".[682]

Between 2004 and 2008, during the Alvaro Uribe presidency and his Democratic Security Policy, it is alleged that almost 5000 civilians including men, women and children were executed and that their bodies were presented in guerilla uniforms and counted as members of the FARC killed in combat.[683] The widespread nature of this phenomenon points to the existence a policy,[684] which the Colombian Government has denied.[685] Originally the Government took the position that the persons killed were criminals.[686] Various incentives were offered to increase the number of "combat kills", and in the words of a senior Colombian military official, the success of the military should be measured in "litres of blood".[687] Under the Santos administration the military "self-corrected" and abandoned this practice.[688]

The Colombian authorities started to investigate and prosecute some cases, although early efforts aimed at rank-and-file, whereas there are indications that this practice would have been condoned at higher levels.[689] Factors that influenced the Colombian state to conduct these investigations include pressure from various sources including the OHCHR, the Special Rapporteur on extrajudicial, summary or arbitrary executions,[690] the AIHRC, and the USAID conditionality conditions laid

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[681] Vieira, Constanza. *Colombia: International Criminal Court Scrutinises Paramilitary Crimes*, IPS News Agency, 27 Aug. 2008.
[682] Avocats sans Frontiers. *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach"*, Lawyers Without Borders Canada (2011) p. 21.
[683] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in The International Criminal Court and Complementarity: From Theory to Practice, Vol. II (eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1005.
[684] The Special Rapporteur said in 201 that it appeared that these killings were not carried out "as a matter of state policy" but the high numbers may indicate otherwise. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 31 March 2010 UN Doc. A/HRC/14/24/Add.2.
[685] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1005.
[686] Interview with OHCHR representative, Bogota, 13 May 2014.
[687] FIDH, *Colombia: The War is Measured in Litres of Blood: False positives, crimes against humanity: those most responsible enjoy impunity*, May 2012 p. 10.
[688] Interview with Head of OHCHR, Bogota, 13 May 2014. In 2013, the Center for Research and Popular Education alleged that there were still around 10 false positives cases. Acuna, Phillip, *Ten 'false positives" cases, 232 extrajudicial killings in 2013: human rights organization,* Colombia Reports, 15 May 2014.
[689] FIDH, Colombia: *The War is Measured in Litres of Blood: False positives, crimes against humanity: those most responsible enjoy impunity*, May 2012.
[690] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 31 March 2010 UN Doc. A/HRC/14/24/Add.2.

down by the Leahy law.[691] Pressure from the ICC has undoubtedly played this part.[692] For instance, the military responsible for the *San Jose Apartado* peace community massacre were eventually tried.[693]

The OTP Interim Report of 2012 found that the false positives cases could constitute crimes against humanity.[694] The report also notes that high officials were aware but did not act.[695] Trials of higher-level military could constitute an important step forward in prompting accountability for state actors in the Colombian conflict.[696] In 2017, the OTP further specified that it had identified five potential cases to date relating to "false positives," focusing on different divisions and brigades of the Colombian army, including 29 commanding officers that were reportedly in charge of these units between 2002 and 2009. Proceedings by the Colombian authorities have now been initiated against 17 of these 29, but the status of some of these cases remains uncertain.[697] The OTP has shared information on this with the Colombian authorities, presumably to incentivize them to take further action.

The 2012 OTP report on preliminary examinations is the lengthiest report on any preliminary examination anywhere in the world. Some have said it concentrates only on a quantitative analysis of the number of open proceeding and indicted persons, without delving into the subject-matter of the cases or evaluating their quantity."[698] However, it is clear that the existence of the ICC has had impact on domestic proceedings in Colombia and that its "shadow effect" achieved more than active investigations probably would have.

B. Indicators of Lack of Genuine Domestic Investigations or Prosecutions

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[691] The Leahy Law or Leahy amendment is a U.S. human rights law that prohibits the U.S. Department of State and Department of Defense from providing military assistance to foreign military units that violate human rights with impunity. Interview with Head of OHCHR, Bogota, 13 May 2014.
[692] Interview with Head of OHCHR, Bogota, 13 May 2014. For instance, the military responsible for the *San Jose Apartado* peace community massacre were eventually tried. Seven peace activists including four children were killed in the crime. Global Post, *A Massacre Explored: Murder in the Jungle*, 16 March 2010.
[693] Global Post, *A Massacre Explored: Murder in the Jungle*, 16 March 2010.
[694] OTP Interim Report, Situation in Colombia, Nov. 2012 at para. 95.
[695] Ibid. at para. 100.
[696] Ambos, Kai. *ICC OTP Report on the Situation in Colombia- A critical analysis*. www.ejiltalk.org (1 Feb. 2013).
[697] OTP Report on Preliminary Examinations, 2017.
[698] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach*", Lawyers Without Borders Canada, (2011) Executive Summary. Some commentators expressed frustration that the OTP's report only deals with the assessment of national proceedings "in a purely quantitative way and thus leaves out some qualitative aspects of a legal and judicial nature that are indispensible to adequately evaluate the results of the Colombian criminal justice system with regard to the prosecution of international crimes." Ambos, Kai. *ICC OTP Report on the Situation in Colombia- A critical analysis.* www.ejiltalk.org (1 Feb. 2013).

The Colombian cases provide many considerations on what may constitute genuineness because they fall on a spectrum in terms of political willingness. Genuineness is relevant to internalization.

1. Absence of Appropriate Punishment

Law 975 in its original form it did not anticipate imprisonment as a punishment.[699] This resulted in challenge by victims and the civil society, which yielded Constitutional Court Decision C-370 of 2006, which amended the Justice and Peace Law in significant ways. The Court therefore decided that the reduced sentences offered by the Justice and Peace law of 5-8 years should only be available under certain conditions, including (1) the offender does not repeat any criminal offense; (2) the offender declares "freely and voluntarily" the facts related to all crimes committed as a member of the illegal armed group, without any "omission or concealment of crimes;"[700] (3) the victims rights to participate in various stages of the investigation, prosecution and punishment is guaranteed; (4) the sentence is served in a regular prison, subsequent to sentencing by a judge, rather than in a "zone of concentration"; (5) the offender contributes to reparations for the victim through contributing their assets whether obtained legally or illegally.

The OTP in its 2012 report on Preliminary Examinations in Colombia considered the reduced sentences in the JPL "acceptable" at least to the point of rendering the domestic proceedings against paramilitaries inadmissible. [701] The OTP concluded that the fact that 43 out of 46 paramilitary leaders alive today have been investigated, prosecuted or sentenced for Rome Statute crimes "means that these specific cases would not be admissible before the ICC."[702] The issue of appropriate punishment is a complex one that is discussed much further in Chapter 4. What makes it complex is the fact that proportionality is not an adequate standard for meting out punishment for mass atrocities.

2. Casting the net too wide

Law 975 encompassed to many perpetrators, including minor ones. The list of targets for prosecutions was not the product of investigation but of an executive decision, which appended a list with roughly 4714 names on it of persons who already had criminal records.[703] The list represented an approach contrary to a prosecutorial strategy akin to that of the ICC, focusing on "those the greatest responsibility." The compilation of this list undermined the impartiality of the

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[699] Seils, Paul. *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, ICTJ 2016 p. 64: Does a National Court's Decision on Punishment After Conviction Have a Bearing on Determining of the Proceedings are Genuine?
[700] Constitucional Claim Decision C-370 de 2006, available on the Constitutional Court website.
[701] OTP Interim Report, Situation in Colombia, Nov. 2012 at para. 166.
[702] Ibid. at para. 173.
[703] Ibid.

Attorney General's Office.[704] Around 1200 estimated that the Attorney General did not have evidence against them and withdrew from the process without confessions.[705] Moreover, up to 20,000 paramilitaries did not participate, instead attempting to avail themselves of Law 782 (2002), which grants pardons for political crimes, or Law 1424 (2010), which grants a form of use immunity for their testimony.[706] Nonetheless, the number of persons who had to be processed during the law was so large as to be unmanageable.[707] It should be noted here that in many national jurisdictions, the principle of legality requires the prosecution of crimes where there is evidence: this is the same in Colombia. At the same time, it is now well-recognized that prioritization and a selection of cases of those bearing the most responsibility for Rome Statute crimes is acceptable at the national level.[708]

3. Selecting low-level targets for investigation and prosecution

A common indicator for genuineness is whether national authorities pursue "system crimes" up the chain of command. The OTP Interim Report of 2012 notes that the Colombian authorities reported that 207 members of the armed forces were convicted for murdering civilians within the ICC temporal jurisdiction, with sentences ranging from 9 to 51 years. Out of these, 52 convictions were rendered in relation to "false positives."[709] But the OTP acknowledges that in general these prosecutions have not focused on those bearing the greatest responsibility.[710]

In more recent statistics, up to 10,000 military actors may be implicated and around 600 have been convicted to date.[711] UNAC was reported to be analyzing allegations of up to 1360 false positives cases.[712] Up to 2900 cases are pending with the Human Rights Unit, but it is not clear whether these cases need to be referred to the Criminal Chamber of the Supreme Court if they involve military leaders. In 2015 Human Rights Watch said, "The apparently widespread and systematic extrajudicial killings by troops attached to virtually all brigades in every single division across Colombia point to the conclusion that the highest levels of the army command at least should have known about the killings, and may have ordered or otherwise actively furthered their commission." In 2016, the OTP said it had identified five

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[704] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada, (2011) p. 14. The same report says that there are suggestions that the lists of candidates were created by the paramilitaries themselves (p. 15).
[705] Ibid. p. 15.
[706] Ibid. p. 15.
[707] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1007.
[708] See the next Chapter.
[709] ICC Interim Report, Situation in Colombia, Nov. 2012 at para. 180-181.
[710] Remarks by OTP representative, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, 20-21 June 2013, Pintificia Universidad Javeriana.
[711] Interview with OHCHR representative, Bogota, 13 May 2014.
[712] See the next section for an explanation of the UNAC.

potential cases relating to the false positives.[713] It notes that a significant number of persons (961) had been convicted, but these were mid and lower level.[714] In addition, investigations were initiated against 14 commanding officers, but available information on these was limited.[715] The para-politics proceedings too did not sufficiently expose the responsibility of politicians who "acted as perpetrators-by-means, co-perpetrators, and instigators of many violent crimes in the different regions of Colombia.[716]

4. Failure to conduct independent investigations (for instance through overreliance on confessions)

ASF conducted an extensive analysis of the handling of false positives cases to demonstrate that the Colombian state has no willingness to investigate itself, pointing to numerous deficiencies in the pursuit of these cases. Using statistical data, it argued that a very large proportion of allegations of homicide against members of the armed forces are not pursued beyond the preliminary stage. Many of the cases were lodged under military jurisdiction, being classified as killings committed in the course of duty, rather than homicides. Homicides were not analyzed according to patterns in order to determine who may be at the top of the chain of command. Insider testimony was not used. All of these factors point to such an ineffective investigation and prosecution of "false positives" cases so as to constitute a lack of genuine willingness.[717]

A weakness of Law 975 for the paramilitaries was its over-reliance on confessions Constantly changing rules by the courts applying Law 975, in particular in relation to partial indictments, caused further delays.[718] In May 2007, the Constitutional Court ruled that the law should be amended to withdraw benefits from any applicants who did not make "full confessions", including for all the crimes committed by their subordinates (whether they knew about them or not).[719] This led to the bizarre situation of commanders confessing to long lists of crimes they themselves had put together but may not have known about. In the absence of an equivalent of superior responsibility in Colombian law, prosecutors then attempted to bring partial indictments to remedy this problem but the courts rejected this.

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[713] OTP Report on Preliminary Examination Activities, 2016 at para. 242.
[714] Ibid. at para. 243.
[715] Ibid. at para. 244.
[716] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada (2011) p. 20.
[717] *Avocats sans Frontiers, The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada, (2011) pp. 24-42: "Homicides to Win and Cover Up: The Institutional Lie Escaping Investigation."
[718] Ibid. p. 17.
[719] Seils, Paul. *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II Eds. Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p. 1008.

[720]This problem was compounded by the fact that the Justice and Peace Unit of the *Fiscalia* for many years lacked the capacity and the tools to conduct effective and independent investigations on the information gathered from the *version libres* and other sources. The cases resembled ordinary criminal processes, but for mass crimes.[721] As observed by one commentator: "The procedural advances do not respond to the gravity or patterns of crimes; there are paramilitaries indicted for isolated homicides with no connection to a broader context of violence or attack on the civilian population."[722] The *version libres* gave rise to a serious bottleneck in the streamlining of the process through to the "formulation and attribution of charges" or trial stages.[723] By 2013, it was already clear that many paramilitaries would serve their minimum sentences of 5-8 years, even before concluding their judicial proceedings.

5. Use of military jurisdiction to shield perpetrators (or lack of recognition of superior responsibility)

The military continue to enjoy a high degree of respect in the Colombian society. The Ministry of Defence in Colombia is a powerful institution that controls both the military and the police. Civilian oversight of the military has been described as perfunctory.[724] Many cases that ought to be transferred to civilian jurisdiction are not, but remain with military jurisdiction where victims do not have the same rights.[725] In 2012, the Colombian Government proposed constitutional amendments to articles 116, 152 and 221, seeking to transfer cases from civilian to military jurisdiction, based on notions of personal jurisdiction, known as the "Military Justice Reform". This would apply to all crimes committed by the military "related to acts of military service," except genocide and certain crimes against humanity, including enforced disappearances, extrajudicial executions, sexual violence, torture, and forced displacement. Other violations, such as certain war crimes and arbitrary detention, would only be investigated and tried by military courts. The reforms specify a definition of "direct participation in hostilities" which diverges from that of

[720] Ibid. p. 1008.
[721] See remarks of Mr. Juan Pablo Cadona in the Report of the expert conference, "*In the Shadow of the ICC: Colombia and International Criminal Justice*", Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London, 26-27 May 2011 p. 41.
[722] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada, (2011) p. 17. Steps were taken to remedy this through the establishment of a Context and Analysis Unit (UNAC) in the Prosecutor's office.
[723] Avocats sans Frontiers, *The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that Demands More than a "Positive" Approach",* Lawyers Without Borders Canada (2011) p.17.
[724] While the Senate appoints generals, this is considered rubber-stamping.
[725] Interview with Member of the High Judicial Council, Bogota, 14 May 2014.

the ICRC, and is much broader.[726] The Congress adopted the Amendment in a statutory law in June 2013.

The reforms were criticized by the United Nations and human rights group on the ground that military jurisdiction often equals lenience, and on the ground that the reform is at odds with international human rights standards and threatens to deny justice to victims.[727] The Constitutional Court struck down the law in October 2013 on a technical ground so that it never came into force.[728]

IV. The Tale of Kwoyelo: Internalization Without a Conviction?

Finally, it is worth noting that expressive value, and internalization can even take place in the absence of a conviction. This is where a trial may lead to a discussion and re-evaluation of legal standards and norms in accordance with the Rome Statute at a later stage. This is demonstrated by the trial in Uganda of LRA commander Col. Thomas Kwoyelo, a trial that has proved prolonged and complex.[729] Nevertheless, the Kwoyelo trial had significant impact on the national debate on accountability and whether amnesty is an appropriate tool in the reintegration of the LRA in Northern Uganda. While the crimes he is accused of are serious, Kwoyelo was not of senior rank in the LRA and fell well outside the purview of the ICC.[730] Kwoyelo was captured in Garamba in 2008 but the circumstances of his capture remain unclear. On 18 March 2010 the Commission forwarded the application to the DPP, stating that it believed Kwoyelo qualified for amnesty.

Instead, on 6 Sept. 2010, the DPP charged Kwoyelo with various offences of Grave Breaches under Article 147 of the Fourth Geneva Convention (criminalized through Uganda's Geneva Conventions Act). [731] He was also charged with various domestic offences under the Penal Code Act, including murder, kidnap with intent to murder, robbery with aggravation, and attempted murder. Kwoyelo entered a plea of not guilty to all charges. He then filed a petition to the Ugandan Constitutional Court,[732]

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[726] OTP Report on Preliminary Examinations, 2013 at para. 135.
[727] UN News Centre, UN Independent experts urge Colombia to reconsider proposed criminal law for the military, 22 Oct. 2012. UN News Centre, UN Human rights office concerned over Colombia's military justice reform bid, 27 Nov. 2012. Eding, Zach, Colombia's military justice reform could lead to ICC intervention, Colombia reports 19 Nov. 2012.
[728] Freeman, Daniel. *Colombia's Constitutional court knocks down controversial military justice reform law,* 24 Oct. 2013.
[729] Nouwen, Sarah. *Complementarity in the Line of Fire: the Catalysing effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press (2013) p. 231: "The Kwoyelo case is so far the only case indirectly catalyzed by the ICC's complementarity principle."
[730] See also interview with Ledio Cakaj in the International Justice tribune, 12 January 2017 by Stephanie van den Berg.
[731] *Uganda vs. Kwoyelo Thomas alias Latoni,* Amended Indictment, International Crimes Division of the High Court of Uganda at Kampala, 5 July 2011.
[732] Constitutional Petition No. 036/11 (Reference) arising out of HCT-00-ICD-Case No. 02/10 between Thomas Kwoyelo Alias Latoni (Applicant) and Uganda (Respondent), Constitutional Court of Uganda, 22 Sept. 2011.

arguing that the failure by the Director of Public Prosecutions and the Amnesty Commission was discriminatory according to Art. 121 of the Ugandan Constitution. Kwoyelo pointed to the fact that the DPP and the Amnesty Commission granted amnesty certificates to other LRA commanders, such as Kenneth Banya and Sam Kolo, captured under similar circumstances in 2004.

The Attorney General however argued that the Amnesty violated Uganda's legal obligations assumed under the Rome Statute.[733] She noted that Uganda's foreign policy supported the prosecution of international crimes as illustrated in its enactment of the Rome Statute and the establishment of the International Crimes Division. The Attorney General cited a variety of international law sources to argue that a blanket amnesty is in violation of Uganda's international law obligations. [734] In a decision rendered on 22 Sept. 2011, the Constitutional Court ruled in favor of Thomas Kwoyelo. [735] The Constitutional Court argued: "The Act was meant to be used as one of the many possible ways of bringing a rebellion to an end by granting amnesty to those who renounced their activities … The Act is also in line with national objectives and principles of State policy and our historical past which was characterized by political and constitutional instability.[736] It went on to hold that the indictment of senior LRA leaders "… [c]learly shows that Uganda is aware of its

[733] Art. 287 states that "Where (a) any treaty, agreement or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or (b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government as the case may be, shall continue to be a party to it." The Attorney General argued that the amnesty is unconstitutional because it granted amnesty for war crimes, including grave breaches of the Geneva Conventions to which Uganda is a party, and that Art. 287 recognized the validity of ratified treaties under Ugandan law such as the Geneva Conventions Act.

[734] International authorities cited by the Attorney General included the Inter-American Court of Human Rights, *Barrios Altos v. Peru*, Judgment 14 March 2001; *Prosecutor v. Morris Kallon and Brima Bazzy Kamara* (SCSL 2004-15/16-AR72); *Prosecutor v. Anton Furundzija,* Judgment, 10 Dec. 1998 (IT-95-17/1-T).

[735] Kwoyelo's counsel cited *Hamdard Dawakhana (Wakf) Lal Delhi and others v. Union of India and others*, 1960 AIR 554, 1960 SCR (2) 671 to argue that in examining the constitutionality of a law, the constitutional court can take into account factors such as the history and purpose of the legislation and the "mischief it intended to suppress." He also cited *Azanian Peoples Organization and 7 others v. President of South Africa and others* (CCT 17/96) [1996] ZACC 16, the well-known South African Constitutional Court decision upholding the constitutionality of certain provisions of the South African Truth and Reconciliation Act, including the amnesty provision.

[736] Constitutional Petition No. 036/11 (Reference) arising out of HCT-00-ICD-Case No. 02/10 between Thomas Kwoyelo Alias Latoni (Applicant) and Uganda (Respondent), Constitutional Court of Uganda, 22 Sept. 2011 at lines 500-510. The Constitutional Court noted that the UPDF, as state agents, are not eligible for amnesties and that this makes it different from the South African Truth and Reconciliation Act, which "granted amnesty to all wrong doers within the apartheid government and within the rebel ranks."

international obligations, while at the same time it can use the law of amnesty to solve domestic problems."[737]

However, this was not the end of the story. The case was referred to the Supreme Court, but there it faced extensive delay due to a lack of quorum. A final decision was only rendered on 8 April 2015. First, the Supreme Court decided that there is no uniform practice in respect of amnesties. Uganda had opted for a "dual conflict response model" of peace and accountability, but the Amnesty Act effectively covers crimes committed in the cause of war or armed rebellion. The Supreme Court found that crimes against innocent civilians or communities could not qualify as such and should not be amnestied.[738] The Court therefore referred the Kwoyelo case back to the High Court's ICD division for trial.

The Kwoyelo case prompted much interest in Uganda and abroad, and provoked a longer-term discussion on the compatibility of amnesty with international obligations.[739] Perhaps it will continue to do so, but this is not clear. The outreach function of the ICD is particularly important, but it has proved difficult to finance and staff this aspect of the proceedings, causing further delays.[740] The ICD already received permission to broadcast the proceedings through Government-owned radio stations.[741] By prompting this discussion, the trial has contributed to the internalization of Rome Statute norms on accountability even in the absence of a conviction.

V. Conclusion: Systemic Effect in Domestic Legal Systems.

Systemic effects to be found domestic legal systems can be viewed as a process of "internalization of Rome Statute norms. This is part of the indirect impact of the Court. Al-Naim suggests in the context of international human rights that "a more realistic and desirable approach … is to seek to diminish the negative consequence of the paradox of self-regulation by infusing the human rights ethos into the fabric of the state itself and the global context in which it operates."[742]

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[737] Constitutional Petition No. 036/11 (Reference) arising out of HCT-00-ICD-Case No. 02/10 between Thomas Kwoyelo Alias Latoni (Applicant) and Uganda (Respondent), Constitutional Court of Uganda, 22 Sept. 2011, lines 595-600.

[738] Nakandha, Sharon. *Supreme Court of Uganda Rules on the Application of the Amnesty Act,* International Justice Monitor, 16 April 2015. http://www.ijmonitor.org. The judges referred to the Juba agreement as indicating that the Ugandan Government wishes to pursue accountability, and they concluded that impunity couldn't bring about peace.

[739] Van Den Berg, Stephanie. *Interview with Ledio Cakaj,* International Justice Tribune, 12 January 2017.

[740] Nakanda, Sharon. *The Kwoyelo Case at the ICD: The Realities of Complementary in Practice*, International Justice Monitor, 5 May 2016.

[741] Ibid.

[742] An-Naim ,Abdullah Ahmed in The Blackwell Companion to Sociology (edited by Judith Blau) Blackwell publishers (2002) pp. 90- 91.

Likewise, ideally the Rome statute will be infused into the fabric of states themselves through legislation, specialized capacities and domestic trials. This process should allow for a "margin of appreciation", and does not require a "hard mirror" approach to the Rome Statute or ICC proceedings. In the words of Federic Mégret, "ICC implementation could thus be characterized as less about certain forms and more about certain goals, emphasizing a degree of political and social preparedness about the need to deal with the worst crimes."[743]

The process may be messy. As observed by Drumbl, a significant degree of "mimicry" accompanies internalization. At the same time, in the longer term such amendments to legal frameworks and institutions may still play represent a step forward in building local capacity to investigate and prosecute Rome Statute crimes in the future, therefore contributing to long-term prevention and a culture of accountability. Domestic proceedings for Rome Statute crimes are the most important indicator of internalization, but are particularly difficult to assess for whether they constitute genuine internalization. Nonetheless, domestic trials for Rome Statute norms in the shadow of the ICC remain the most significant "systemic effects" of the Rome Statute and may contribute to long-term prevention.

This is because domestic trials are likely to involve many more perpetrators and crimes than the ICC is able to process, as demonstrated in Colombia. Domestic trials have more potential to play an expressive function and to constitute meaningful justice for local audiences.[744] As the implementation of Law 975 in Colombia indicates, local proceedings generate national experience that can result in improvements to domestic justice. Domestic trials can also contribute to national debates on Rome Statute norms, which in itself may contribute to internalization over time, as societies grapple with how to confront impunity.

Colombia is often highlighted by the Court itself, and its supporters, as the ICC's most significant example of encouraging domestic trials through "positive complementarity." While the involvement of the ICC certainly is a factor, other factors also distinguish Colombia from other situation-countries before the ICC. In Colombia, the role of law in the society is far more prominent than it is in Afghanistan or Libya. Colombia has a functional legal system with relative independence from the executive, particularly at the levels of the Constitutional Court and Supreme Court. The regional human rights system, with the Inter-American Commission and Court, can also be credited for spurring domestic investigations and prosecutions.[745]

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[743] Mégret, Frederic, *Too much of a good thing? Implementation and the Use of Complementarity*, in *The International Criminal Court and Complementarity: From Theory to Practice,* Vol. I Ed. by Carsten Stahn and Mohamed M. El-Zeidy, Cambridge University Press (2011) p.390.
[744] Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: the Case for Tolerating Flawed Domestic Trials*, Journal of International Criminal Justice (2013), pp. 571-589.
[745] Interview with Michael Reed, 9 Nov. 2013.

The example of Colombia may just be an indication that the impact ICC in terms of incentivizing domestic proceedings is more likely in countries that already have functional legal institutions, as opposed to where the role of law in a particular society is weaker. According to Voeten, "both across and within countries, citizens who trust their domestic courts more also have more trust in international courts … [C]itizens see international courts not as substitutes for, but as extensions to the domestic rule of law."[746] This conclusion is troubling because it could mean that the Rome Statute and the Court are having the most impact where they are needed the least. This is another manifestation of parallelism. Where respect for the rule of law is stronger, the Court as an institution is more feared.

[746] Voeten, Erik. *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law (2013) p. 414.