



Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication

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Gendered Harms and their Interface with International Criminal Law

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NORMS, CHALLENGES AND DOMESTICATION[†]

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Abstract

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Many feminists have questioned the extent to which the law can ever effectively deter violence against women given the ways in which the law and criminal justice systems often act to reinforce deeply sexist assumptions about women, their sexual and social identities and their relation to the social (male) world. While acknowledging law's ineffectiveness in fundamentally reordering social relations, a number of scholars and policy makers believe that it is an institution that can be used to make substantive gains for women. The agreement by states on the establishment of an International Criminal Court (ICC), combined with a Statute that augments international legal prohibitions on violence against women, has given traction to optimistic views on international criminal law's capacity to proactively address female specific harms. Moreover, there is confidence that transformative international legal norms will, in turn, enable and support domestic law's capacity to advance accountability for violence against women. In that context, this article considers the potential for proactive and gender-centered complementarity under the ICC system. Based on a systematic review of a wide range of domestic legislation enacted by States Parties following signature and ratification of the ICC Statute, the analysis considers the significance and ramifications of domestic legal changes for the operation of the ICC complementarity system. Detailed consideration is given to ways in which the ICC complementarity regime might be operationalized to ensure a gendered understanding of the "unwilling and unable" standard contained in Article 17 of the ICC

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[†]Parts of this article have been previously presented at the Institute of Advanced Studies International Criminal Law Conference in Jerusalem, Israel on 22 December 2011, and at the Robina Conference on Rethinking Sexual Offences, Minneapolis, Minnesota, 5–6 April 2013. Thanks to Griffin Ferry for research assistance.

Statute. I further address the extent to which optimism around domestic legal enforcement is warranted, and what pitfalls may follow from a reliance on international criminal law to spearhead normative developments addressing gender violence.

Keywords

50 international criminal law, gender-based harms, sexual violence, complementarity

Many feminists question the extent to which the law can ever effectively deter violence against women given the ways in which the law and criminal justice systems reinforce deeply sexist assumptions about women, their sexual and social identities and women's relation to the social (male) world (Freeman 1980). For some, "the law," as a fundamentally patriarchal institution, corrupts feminist engagement to its purposes. For this reason, Snider (1998, 11) has suggested that "[c]riminal justice systems are probably the least effective institutions to look to for transformative change." While acknowledging that law is often ineffective in reordering social relations, some scholars still maintain that it is an institution that can be used to make substantive gains for women. Expansion of the normative definitions of international crimes added to enlarged sexual violence jurisprudence has produced buoyant optimism on international criminal law's (ICL) capacity to challenge gendered assumptions, address gender-specific harms and encourage the normative advancements realized internationally to be "brought home" and domesticated by states that have ratified the Rome Statute. As ICL becomes absorbed by and/or influences domestic legal systems, it is reasonable to ask whether its normative content has the capacity to help tackle socially-entrenched violence against women. Can ICL unblock a perceived lack of success in reforming "home-grown" domestic legal norms, and if so, how would we measure that move? This article considers in a preliminary way the relationship between the domestic and the international following the establishment of the International Criminal Court (ICC). My focus is on domestic legislation addressing a wide range of gender-based harms, probing in particular what domestic-level changes mean for the ICC complementarity regime. The analysis is situated in an acknowledgment of some triumphs for feminist ICL advocacy, but argues that a more partial success story should be told both for ICL's advances and for the domestic effects of feminist ICL advocacy.

The article specifically contemplates an apparent windfall in domestic norm creation for gendered harms in the legal systems of state signatories to the ICC Statute. For this purpose I have systematically tracked a range of legislative enactments broadly addressing violence against women arising post-ratification in 122 states that are signatories to the ICC.¹ My approach is to address the slew of domestic enactments as a way to consider how complementarity might be conceptualized and operationalized for gender-based harms under the ICC system. The first part of the article surveys the development of ICL and considers its "capture" capacity for gender-based harms. The analysis briefly addresses what pitfalls may follow from a reliance on ICL to

spearhead normative developments addressing gendered violence. These pitfalls are a cautionary backdrop to overenthusiasm about the likelihood of domestic transformation. The second part contemplates, in a preliminary way, the relationship between broadly-constructed domestic legislation that may go toward ending impunity for gender-based harms as it relates to the ICC Statute complementarity system. To assess an emerging synergy between state ratification of the ICC Statute and domestic legislation addressing sex-based harms against women, I rely on my survey of states' legislative initiatives that follow subsequent to ICC ratification (Appendix I). This preliminary survey of 122 States Parties to the ICC Statute demonstrates apparently significant domestic legislative movement on gender-based violence in the aftermath of treaty signature. The article explores what such practices signify, and in particular the extent to which the operation of domestic legislation addressing a wide variety of gender-based harms will be relevant to assessing the adequacy of a state's discharge of its responsibilities under the ICC complementarity regime. This section teases out the likely dimensions of the "unwilling and unable" standard under the ICC complementarity system. I address how enlarged domestic regulation influences the complementarity regime, and ponder how such domestic developments enable states to "get their house in order" to meet their Rome Statute obligations. The third part of the article addresses what theoretical and policy implications can be read from the survey of state practice, with particular reference to both the positive and negative dimensions of reliance on criminal law to dismantle the sustained realities of gender-based harm.

INTERNATIONAL CRIMINAL LAW: A BRIEF GENDERED TELLING

Much can be said about the development of ICL and its recent attention to sexual violence. In broad terms, while the development of a comprehensive legal sanction for sexual violence during warfare has taken decades (Boister and Cryer 2008), there is a positive progress narrative that can be relayed from the end of the Cold War onward (Cahn, Haynes, and Ni Aolain 2011). Until the passage of the ICC Statute, specific international legal prohibition of the crime of rape in situations of armed conflict was found in the Fourth Geneva Convention,² and within Articles 76(1) and 85 of the First Protocol Additional to the Geneva Conventions.³ The prohibitions contained in the Geneva Conventions defined rape primarily as an offense against honor. Many have understood the historical narrative as illustrating that all-encompassing sexual crimes against women were historically excluded from legal prohibition under the laws of war, and when included were only as facets of male status violation. As the attention of states turned to the creation of the ad hoc Criminal Tribunals in Rwanda (ICTR) and the Former Yugoslavia (ICTY), feminist observers were concerned that the low status of existing prohibitions for sexual violation within the hierarchy of humanitarian law

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140 offenses would infiltrate the mandate of the Tribunals (Pratt and Fletcher 1994). The ad hoc Tribunals partially forced legal and policy conversations concerning sexual violence and its regulation by the Law of Armed Conflict (Meron 1993). Feminist advocates argued that, as the inheritors to an incomplete Nuremberg and Tokyo legacy, the Tribunals should acknowledge and incorporate the gravity of sexual offences into their substantive law. An extraordinary advocacy effort was directed at addressing women's experiences of war and conflict and inserting them into the material scope of application engaged by the post-Cold War International Tribunals.

145 The Statutes of the ad hoc Tribunals (ICTY and ICTR) ultimately recognized specific forms of sexual harms as violations of the laws of war. The push for accountability was followed through in a number of site-specific contexts (e.g. Cambodia and Sierra Leone) as hybrid Tribunals confirmed the cantering pace of ICL enforcement. These Courts have produced a substantive jurisprudence addressing sexual violence experienced by men and women in war. 150 The ICTY in *Tadić*,⁴ *Celebici*,⁵ *Furundzija*,⁶ *Kunarac and Krstic* held,^{7,8} *inter alia*, that crimes against men constitute sexual harm in international law; that the act of rape can constitute torture under international law; that consent must be assessed in the context of surrounding circumstances; and that a single act of rape in the context of a widespread attack can constitute a crime against humanity. The ICTR in such cases as *Akayesu*,⁹ *Kayishema and Ruzindana*,¹⁰ *Barayagwiza, Ngeze and Nahimana*, and *Gacumbitsi* has found that rape can be a constitutive act of genocide under international law and articulated the ways and means whereby the sexualization of Tutsi women was part of the genocidal campaign against all Tutsi. 160 ^{11,12} The Sierra Leone Tribunal in *Brima, Kamara and Kanu* decided that forced marriage was an inhumane act constituting a crime against humanity.¹³ This advocacy effort has been critically described by Nesiah as the arrival of "international conflict feminism" as a player in global power politics (Nesiah 2013, 217). 165 While there is much to be lauded about norm augmentation, contemporary feminist concern is not generally directed at the pace and doctrinal content of ICL and international humanitarian law (IHL) prohibitions. Rather, feminist concern emerges around the "lost in translation effect," as the under- or inadequate enforcement of new norms raises old specters of unseen hierarchies operating to the detriment of addressing harms experienced by women. 170

The complexity of international conflict feminism's political and legal activism has leaked from criminal accountability to the peace and security agenda of the United Nations Security Council (UNSC), ultimately resulting in the production of a number of UNSC Resolutions on gender, peace and security. All resolutions bear the motif of acknowledging sexual harms, promoting criminal accountability and creating incentives for states to include women in accountability conversations. The core regulatory preoccupation has been with sexual violence and, in particular, the harm of rape (Engle 2012). In particular, the rape prohibition has reaped the most international legal and policy "action." 175 It cannot be denied that the emphasis on criminal accountability for sexual 180

185 harms has borne extraordinary fruit for feminist advocates. There are, however, costs to such a strategy, including the elevation of sexual violence as the primary harm against women, and the collapse of a collective international conscience to that end. Moreover, early jurisprudential success in a
190 small number of cases has not transformed the landscape of accountability for sexual harms in conflict. Critiques of the failure to fully and adequately prosecute sexual crimes have an obvious fault line, with the reasons commonly identified for the miserable success in state-level prosecutions of gendered violence.¹⁴ Thus, knowledge sharing from domestic legal systems
195 concerning the challenges of adequately prosecuting crimes of sexual violence is highly relevant to the potential of indictment, prosecution and conviction at the international level. Under-enforcement of the prohibitions on harms against women has emerged in multiple guises. A key point underscored by Chappell, Grey, and Waller (2013) is that the relationship between informal and formal rules in institutional settings can often serve to undermine theoretically-positive moves to undo gender hierarchies and exclusions. There is an underlying concern for many scholars that sometimes making rape visible is deceptively easy in the context of atrocity, and that there are real dangers to this strategy (Enloe 2004).

200 There is substantial imagination capture by wartime rape. This results in the splintering of impunity discourses on sexual violence – lodging conflict rape in the “extra-ordinary” violence of wartime atrocity – divorcing conflict rape conceptually from the lived experience of routine sexual violence and facilitating the easy dislocation of one kind of harm from the other. Increasingly,
205 scholars pause and reflect on the pluralism articulated by international courts and wonder if the naming has overtaken enforcement, and whether the former becomes the means to deflect attention from the latter; namely the ongoing, systematic violence against women (whether in wartime or peacetime). This is connected to “growing feminist unease about the gap between the ostensible feminist gains in international law and the actual impact of international law on women’s daily lives” (O’Rourke 2013a, 4). The limits of enforcement are evident when we examine the patchwork and ad hoc nature of domestic enforcement for criminal sexual harm in most domestic legal systems.

215 THE INTERATIONAL CRIMINAL COURT INHERITS THE MANTLE

220 The agreement by states on a Statute for the ICC,¹⁵ the requisite number of ratifying states and the appointment of a Prosecutor issuing indictments confirm a trend of criminalizing sexual harms that continues domestically and internationally. The broad subject matter jurisdiction (jurisdiction *ratione materiae*) of the ICC applies with respect to crimes that belong to one of the categories of crimes included in the ICC Statute: namely, the
225 crime of genocide, crimes against humanity, war crimes and the crime of

aggression. The Statute expands the definition of crimes against humanity and war crimes to explicitly recognize rape, and includes sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and trafficking in times of peace as well as war,¹⁶ when such violence is widespread or systematic and the product of state or organizational policy (Copelon 2003).

230 One consequence of ICC ratification is the incentives that follow to prosecute the Statute-defined crimes domestically and support the mandate of the Court. Significant ink has been spilt on the broader compliance consequences of the ICC, but much less attention has been paid to the gendered implications of ICC signature and ratification for states, and specifically how it may affect the domestic regulation of sex crimes and sexual harms. I highlight two particular 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. This domestication may (or may not) implicate gender-sensitive normative alterations to the existing law of signatory states. At the very least it encourages the articulation of gendered harms contained in the Statute into the domestic law of States Parties.¹⁷

245 The degree of influence of this domestic absorption will vary and much will ultimately depend on the interpretation of domestic legislation by domestic courts. This may turn in part on the willingness and the capacity of national courts to use the jurisprudence of the ad hoc Tribunals and the ICC as relevant and guiding interpretation for national legislation. For example, it remains to be seen whether the importation of crimes of genocide and crimes against humanity necessarily introduces notions of “genocidal rape” or other similarly judicially-developed doctrines into the domestic legal systems of signatory states. Obviously the translation of abstract international legal norms to domestic configuration may not be entirely straightforward. While some states may practice a form of constitutional fidelity to the language of the Rome Statute, others may produce a loss in translation effect as international norms journey to domestic legal forms. This process mirrors the translation of international human rights law norms to domestic form, where the challenges involved in translating gender equality into local vernaculars have been well documented (Merry 2006).

260 A second consequence of ratification 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. Evidently, not all of these legislative enactments follow directly from the provisions of the ICC Statute; stalking and trafficking being the obvious examples. They are nonetheless included in my legislative tracking to explore the idea that the effects of international legal norms on compliance are inherently complex and may interact with domestic processes of norm change already in place or assisted by external prompts. International law “[m]ay shape or affect the terms of bargains or transactions between non-state actors, who are not even directly bound by the rules in question”

(Howse and Teitel 2010, 132). Domestic legislative enforcement can evidently operate in the “shadows” of international law, shaped by and responsive to it in direct as well as subtle ways. Thus, the flurry of legislative activity involving gender harms in general and sexual harm in particular following ICC ratification may indicate some broader leverage on sexual harm regulation from the impetus and context generated by ICC obligations. Specifically, greater domestic regulation may influence the ICC complementarity regime, and I suggest that such domestic developments enable states to “get their house in order” to meet their Rome Statute obligations.

Complementarity: Gender Norms and Diffusion Theory as Applied to ICL and Domestic Legal Norms on Violence against Women

Central to broad-based accountability for gender crimes under the ICC system will be the capacity to engage active and functional complementarity. Complementarity emerged relatively early in the negotiating process of the ICC Statute. Moreover, the details of the complementarity regime proved particularly contentious throughout the course of the negotiations (Kleffner 2008). States argued that the unique characteristics of the ICC as a permanent institution with prospective jurisdiction that extended to crimes committed in the territory or by nationals of States Parties had to be balanced against state sovereignty and state interest. This meant creating an internal constraint on the power of the court, as well as giving states the opportunity to address breaches first. Complementarity advocacy was framed by pragmatic assessments of efficiency and effectiveness, given that states generally have the best access to evidence and witnesses, as well as the resources necessary to cope with a large number of cases (Informal Expert Paper 2013).

Inherent in the mandate of complementarity is the capacity for “proactive” complementarity (Burke-White 2008). For gender-based violence, this could minimally translate into the ICC’s assistance and encouragement to states undertaking domestic criminal prosecutions. Such support could have an overall and positive influence on the successful prosecution of sex crimes at the domestic level (Burke-White 2008). However, basing proactive complementarity solely on technical ICC capacity building would be an impoverished program for addressing gender-based violence. Clearly, how and if complementarity will be read through a gender-sensitive lens remains entirely unclear. The core of complementarity lies in the concept of “unwilling or unable to prosecute” standard (Article 17(1)). The Women’s Caucus for Gender Justice has maintained that a state should be deemed “unable” when it has failed to genuinely investigate and prosecute sexual and gender-based violence (Women’s Initiatives for Gender Justice 2010). In assessing this criterion, the Court has some guidance from the Statute, including: whether the purpose of the national proceedings was to shield the person from liability; whether there has been an unjustified delay in proceedings; or the actions of the state are otherwise inconsistent with bringing a person to justice (El Zeidy 2002).

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In two recent admissibility decisions from the ICC, guidance emerges on these standards.¹⁸ The Court highlights two questions that follow from an admissibility challenge; namely whether there is an ongoing investigation or prosecution, and if the state is “genuinely” unwilling or unable to carry out such investigation or prosecution. In the Gaddafi case the Court stressed the significance of “concrete and progressive” steps to ascertain individual responsibility, as well as the identification of “concrete and tangible evidence of a sufficient degree of specificity and probative value” by the local legal system.¹⁹ The inability standard emerging from the highly fraught post-conflict Libyan site is concentrated on matters of territorial control, capacity to obtain testimony and availability of legal representation to the accused. Applying a gendered lens, it seems reasonable to inquire whether a standard of “genuineness” is gender neutral; namely whether the Court would compare the progress and expectation of gender-based crimes with standard operating procedures in other crimes. Here the uniformity of domestic approaches would seem critical to advancing gender parity under the “unwilling or unable” standard.

A realistic assessment of complementarity in domestic legal systems requires a sober recognition of the lacunae in processing gender crimes. This realistic assessment is imperative given the relative lack of attention to the implications of complementarity for broadly-based gender justice. These accountability gaps are particularly evident in the pursuit of formal post-conflict justice accountability. It remains an open question whether the absence or limited inclusion of gender violence in domestic investigations and/or indictments will be seen as activating the “unwilling or unable” standard of the ICC Statute. It has been argued that where gender-based “[c]rimes are 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,” the unavailability of the national judicial system has been implicated (Women’s Caucus for Gender Justice and the ICC 2010, 25). More broadly, will structural exclusion and marginality for gendered violence in state criminal justice systems trigger the “unable and unwilling” standard? Structural exclusion may be prompted by the absence of specific legislation criminalizing crimes contained in the ICC Statute. Notably, the ICC Gaddafi case admissibility decision found that lack of legislation criminalizing crimes against humanity did not per se render the case at hand admissible. But, given the historic lacunae in regulating gender-based violence, feminist activists may still seek to insist that the failure to implement the Rome Statute crimes into domestic law (including the failure to incorporate gender crimes or inadequately incorporating them) should constitute an identified breakdown in terms of proactive and functional complementarity in the context of gendered crimes. Arguably, a broader web of domestic tolerance for sexual harms and the absence of sustained regulation for a variety of gender-based harms could be viewed as implicating the “unwilling or unable” standard.

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365 Thus, a central question is what will count toward actually establishing the
“unwilling or unable” standard? Should this evaluation include the barriers
created by substantive and procedural rules that discriminate along gender
lines (e.g. the status of female testimony and access to gender-sensitive
court procedures such as in-camera evidence giving; Kapur 2012)? Moreover,
370 whether the *unavailability of national legal process* will include the gendered
effects of an insecure environment and its consequences for accountability
remains an open question. Paying attention to normative factors, such as
amnesty or immunity laws, requires asking whether the immunities should
be assessed from a gender-centered perspective rather than assuming that
all amnesties function equally for all.

375 DOMESTIC ENGAGEMENT WITH GENDERED HARMS

As the tracking of state ratification of the ICC Statute and subsequent legis-
lation shows, of the 122 States Parties studied for this analysis only 27 have
not introduced any subsequent domestic legislation that generally addresses
380 violence against women. The vast majority of states reviewed for this prelimi-
nary study have produced multiple pieces of national legislation addressing a
range of harms, including violence against women, domestic violence, marital
rape, sexual harassment, trafficking, stalking, female genital mutilation and
early marriage. Many states have produced multiple and sequential changes
385 to national legislation addressing violence against women in what seems to
be a progressively expanding practice of regulatory enthusiasm. These
include such diverse countries as Georgia, Guyana, Kenya, Ireland, Mexico
and Zambia. Only distinct country-specific and comparative analysis will
yield data on the faithfulness of the translation from ICL norms, or indeed pro-
390 gressive/expansive development beyond the state-agreed content of the ICC
Statute. However, the central point of this analysis is not that domestic
norm development is necessarily an outworking of the ICC – only further
country-level research will reveal those links – but rather that these norms
will be central to the exercise of effective complementarity in the signatory
states. As states put in place broader institutional and normative mechanisms
395 to address gender-based violence, I argue that such augmentations will be
intertwined with the practice and assessment of effective complementarity.
National legal capacity to name, regulate and process gender-based violence
builds domestic capacity in ways that support complementarity (or may
400 limit for better or worse the reach of the ICC to national sites). As
a consequence, feminist critical-reflective perspectives are emerging, reveal-
ing how ICL could usefully redirect analysis to the question of positive norm
transfer between ICL and domestic cases of transitional justice (O’Rourke
2013b).

405 In assessing domestic legislative enactments, evidently domestic legal
changes may well have been long in the making and it may be merely coinci-

dental that ratification and domestic reform overlap. To wit, a number of the cases illustrated in Appendix 1 demonstrate time lags between local legislative enactments and ICC ratification. This confirms that parallel domestic advocacy and legal transformation initiatives may be the drivers in producing domestic norm proliferation. However, it is plausible that ratification of the ICC creates an opportunity (and arguably some push toward conformity in terms of treaty compliance) to remedy contradictory domestic norms. Moreover, remedying these gaps may be the means whereby states will deliver on their complementarity obligations. Remedial domestic action allows for the gaps in domestic accountability to be addressed and make it more likely that states will have available a substantive normative basis to address gender-based violence.

A separate matter is to what degree domestic norm production produces wholly positive outcomes for women. Some feminists have raised meaningful concerns about the extent to which an unrelenting emphasis on penetrative sexual violence has operated to exclude attention to the conditions conducive to the production of systematic violence (de Londras 2011). An important question is whether there is “healthy norm transfer” occurring between the domestic and international: to what extent are feminist lessons learned domestically transferred to the international sphere, and what kinds of lessons about prosecuting sexual violence will be transferred from the international proceedings to the reconstituted justice systems in post-conflict jurisdictions? As O’Rourke notes:

The very process of formulating a campaign for legal change means translating social and political problems, which require dramatic social and political responses, into legal deficiencies that require incremental technical change. In the process, initially radical feminist analysis tends to become flattened into reformist demands for more or ‘better’ law. (O’Rourke 2013a, 6)

Sexual violence against women remains a prevalent reality in most societies, notwithstanding the perceived strength or functionality of their legal systems. A vast literature exists attending to sexual violence, rape and enforcement of criminal sanctions (or lack thereof) at the domestic level (Smart 1995). A much smaller body of literature addresses a feminist perspective on utilizing criminal law to address harms experienced by women (Smart 1986; Naffine 1996; Lacey 1998). Before feminist scholars enthusiastically embrace ICL, some awareness of and reflection on the cogent critiques by feminist criminal law critics in domestic contexts might usefully be brought into play. As Buss warns:

The criminal law has always been a contradictory site for feminist activism. While the police and courts can be essential in protecting vulnerable populations living with violence, criminal law is by definition a coercive and blunt tool. It too is violent. Feminists working to address sexual violence against women in Anglo-American jurisdictions have highlighted the many limits of criminal prosecutions in rape cases. (Buss 2011, 409)

455 In addressing the potential connections, if any, between developments in
ICL with sexual offence law reform in domestic legal systems, some
caveats are necessary (O'Rourke 2013b). What we know is that even "in
countries with developed sexual offences legislation and strong women's
movements, impunity for rape continues" (Westmarland and Gangoli
2011, 8). Reforms on paper in these states have resulted from focused
460 organizational interventions by national women's organizations, increas-
ingly globalized discourses on the unacceptability of violence against
women and the pressure of international oversight via human rights
treaty obligations. Despite advances, impunity for sexual violence and
rape persists, as is evidenced by low victim reporting, a significant drop
off in pursuit of proceedings by police from reporting to investigation,
465 low conviction rates and desultory sentencing practices (Tang 1998). The
legislative expansions tracked by this article point to norm augmentation
but say little about effectiveness or enforcement, indicating that optimism
may be premature for the work that will be done by these norms in a comple-
mentarity context.

470 Despite decades of domestic lobbying in many highly-sophisticated legal
systems, efforts to address violence against women through statutory regu-
lation and modification has yielded, relative to other criminal law rule aug-
mentation, modest results (Thornton 1991; Tempkin and Krahe 2008). The
range of offences against women as articulated by domestic criminal law
statutes remains rather static, and undergirding doctrines and myths (fresh
475 complaint, mistake of fact, passivity/fighting) continue to exercise influence
on the outcomes of any criminal proceeding. At the national level, in con-
trast to the expansive normative developments contained in the ICC Statute,
substantial efforts have been required to bring about minimal changes in
existing statutory standards (Westmarland and Gangoli, 2011). The com-
parative picture of rape law reform across many states reveals substantial
480 efforts to reform the "rape" piece of the sexual assault legal framework.
However, the translation of legal change to practical outcomes has been
extremely limited.

485 The tracking of significant legislative efforts across all ICC States Parties
shows developing prohibitions on a range of sexual offences including traf-
ficking, female genital mutilation, forced marriage, early marriage, domestic
violence, stalking, violence against women and penetrative sexual harm.
There is little available evidence that lobbying and norm articulation at the
international level has intersected with domestic criminal law reform efforts.
490 No obvious organic (or any) relationship exists between the two, indicating
processes of legal change that are multidirectional and currently entirely
divorced from one another, working to different kinds of compliance incen-
tives. Yet, there is fruitful room for further exploration of the momentum
that may be generated from the engagement of states with ICL and potential
495 downstream consequences for more fulsome domestic regulation of gender-
based harms.

AQ5

CONCLUSION

500 Women experience violence in multiple forms in many societies (Brownmiller 1993). Much feminist theory has rightly concentrated on bringing intimate violence into the public domain and ensuring in policy terms that its private categorization does not mean that it is unregulated by the state (Estrich 1988). Despite such attempts to capture the range and depth of violent harms experienced by women, coverage remains patchy and incomplete in all domestic legal systems (Dolkart 1994), notwithstanding
505 decades of advocacy and legal reform efforts. Attending to the violent experiences of women through law has evident pitfalls, not least that the translation of harms to criminal sanction frequently produces multiple unintended consequences, including the re-inscribing of dependency, victimhood and marginalization texts. All of these pitfalls shape the ways in
510 which we can and should expect complementarily to work for women, and limit the ways domestic legal systems will effectively respond to gendered harms.

While the analysis advanced here requires further site-specific exploration to understand the causality of domestic lawmaking, observers should be wary
515 of assuming that “more” equals “better.” Proliferation may simply be the functional outworking of treaty ratification, but says little about domestic efficiency or buy-in. It may continue to perpetrate the cold distinction between norms that are viewed as “international” and parachuted into domestic legal systems, and those viewed as integral and necessary to the completion of domestic criminal law integrity. That stated, we should not
520 merely dismiss this rapid accumulation of legal norms as unimportant. Norm accumulation confirms the ongoing centrality and expansion of criminal law models for addressing multiple forms of violence against women. Legislative developments are indicative of ongoing contestation and naming of gendered harms, a process that remains in constant motion.
525 From a pragmatic ICC perspective, the proliferation of domestic norms addressing a range of gender-based harms may offer the means to embed a more nuanced (and ultimately effective) form of complementarity at the national frontline. For this reason, paying close attention to domestic developments provides insight into the nuances of domestic and international
530 interactions as well as giving us a granular understanding of the complementarity terrain.

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Notes

- 545 1 The data contained in Appendix I track domestic legislation addressing a wide range of gender-based harms enacted after states signed the ICC Statute. I acknowledge that given linguistic and translation challenges, there may be further legislation in some of the states listed that were not identified by the desk-based research. The cut-off date for both state signature and domestic legislation included in this analysis is April 2012. Not all the legislation identified involves criminal sanctions, although the predominant motif of the legislative measures across jurisdictions is criminal accountability.
- 550 2 Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 Article 27, ¶ 2 (1950).
- 555 3 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts, Annex I, U.N. Doc. A/32/144 (8 June 1977), in 16 I.L.M. 1391 (1977).
- 4 Case No IT-94-1-T judgment of 7 May 1997.
- 5 Case No IT-96-21 judgment of 16 November 1998.
- 6 Case No IT-95-17/1-T judgment of 10 December 1998.
- 560 7 Kunarac: Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic, IT-96-23-T and IT-96-23/1-T (30 March 2000).
- 8 Krstic: Case No. IT-98-33-T, judgment of 2 August 2001.
- 9 Prosecutor v. Akayesu, ICTR-96-4-T Judgment of 1 June 2001; Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶596, (2 September 1998).
- 565 10 ICTR-99-52-T, Trial Chamber, 3 December 2003.
- 11 Barayagwiza, Ngeze and Nahimana: ICTR-99-52-T, Trial Chamber, 3 December 2003.
- 12 Gacumbitsi: ICTR-99-52-T, Trial Chamber, 3 December 2003: paras 114 and 1079.
- 570 13 Judgment, Prosecutor v. Brima, Karama and Kanu, SCSL, Appeals Chamber, 22 February 2008. Judgment, Prosecutor v Sesay, Kallon and Gbao, SCSL, Trial Chamber, 2 March 2009.
- 14 Noting the national statistics for sexual assault in Australia, found at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/8612E58B8BCDC9DCA2578B700119690/\\$File/45100_2010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/8612E58B8BCDC9DCA2578B700119690/$File/45100_2010.pdf); for Canada (to 2009), <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11416-eng.pdf>; and for England and Wales (2010-2011), <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb1011/hosb1011?view=Binary>
- 575 15 Rome Statute for the International Criminal Court, 17 July 1998, 2187 UNTS 90, entered into force 1 July 2002 (“ICC Statute”).
- 580 16 *Ibid.*, art. 7(1)(g).
- 585 17 For example, in Australia those statutes were the International Criminal Court (Consequential Amendments) Act 2002 and inserted new divisions in the Commonwealth Criminal Code (Cth) and the International Criminal Court Act 2002 (Cth), which made provisions for the surrender of suspects and the provision of other forms of support to the ICC.

- 18 Summary of the Decision on the Admissibility of the case against Mr. Abdullah Al-Senussi 11 October 2013, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr953/Summary%20AL-Senussi%20English.pdf, and Summary of the Decision on Admissibility of the case against Mr. Gaddafi 21 May 2014, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Documents/Summary-of-the-Decision-on-the-admissibility-of-the-case-against-Mr-Gaddafi.pdf
- 19 ICC-01/11-01/11, Pre-Trial Chamber I, 5 June 2012.

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730 APPENDIX I

	ICC		
735 Country	ICC signature	ratification	Legislation and year
Senegal	18 July 1998	2 February 1999	Domestic Violence & FGM 1999, Trafficking 2005
Trinidad & Tobago	23 March 1999	6 April 1999	Domestic Violence 1999, Sexual Offence 2000
740 San Marino	18 July 1998	13 May 1999	Domestic Violence 2008, Sexual Harassment 2008, Sexual Violence 2008, Stalking 2008, Trafficking 2008, Violence Against Women 2008
745 Italy	18 July 1998	26 July 1999	Violence Against Women 2000, Domestic Violence 2001, Trafficking 2003, Sexual Harassment 2003, Domestic Violence 2003, Sexual Harassment 2005, Female Genital Mutilation 2006, Sexual Violence and Stalking 2009
750 Fiji	29 November 1999	29 November 1999	Domestic Violence 2003, Forced Pregnancy 2009, Sexual Violence 2009, Trafficking 2009
755 Ghana	18 July 1998	20 December 1999	Trafficking 2005, Domestic Violence 2007, Sexual Harassment 2007
Norway	28 August 1998	16 February 2000	Domestic Violence 2002, 2006 & 2010, Early Marriage & Forced Marriage 2003, Trafficking 2003 & 2009, Female Genital Mutilation 2004
760 Belize	5 April 2000	5 April 2000	Sexual Harassment 2000 & 2007, Domestic Violence 2000 & 2007, Trafficking 2003

765 (Continued)

	<i>Country</i>	<i>ICC</i>		<i>Legislation and year</i>
		<i>ICC signature</i>	<i>ratification</i>	
770	Tajikistan	39 November 1998	5 May 2000	Trafficking 2004 & 2007, Violence Against Women 2005 & 2010 Trafficking 2007
	Iceland	26 August 1998	25 May 2000	Violence Against Women 2008, Sexual Harassment 2008
775	Venezuela	14 October 1998	7 June 2000	Domestic Violence 2007, Sexual Harassment 2007, Trafficking 2007, Forced Sterilization 2007, Sexual Violence 2007, Violence Against Women 2007
780	France	18 July 1998	9 June 2000	Trafficking 2003, Domestic Violence 2004, 2005, 2006, 2007, 2009, 2010 & 2011, Violence Against Women 2005, 2006, 2010 & 2011, Female Genital Mutilation 2006, Forced Marriage 2010 & 2011, Sexual Harassment 2010
785	Belgium	10 September 1998	28 June 2000	Domestic Violence 2000 & 2003, Female Genital Mutilation 2000, Sexual Violence 2000, Sexual Harassment 2002, 2006 & 2007, Violence Against Women 2002, 2006 & 2007, Domestic Violence 2003, Trafficking 2005, Forced Marriage 2007
790	Mali	17 July 1998	16 August 2000	Female Genital Mutilation 2002
795	Lesotho	30 November 1998	6 September 2000	Sexual Violence 2003, Marital Rape 2003, Domestic Violence 2006
	New Zealand	7 October 1998	7 September 2000	Domestic Violence 2000, Violence Against Women 2002, Domestic Violence 2006
800	Botswana	8 September 2000	8 September 2000	Domestic Violence 2007
	Luxembourg	13 October 1998	8 September 2000	Domestic Violence 2003, Female Genital Mutilation 2008
805	Sierra Leone	17 October 1998	15 September 2000	Trafficking 2005, Domestic Violence 2007, Sexual Harassment 2007, Early Marriage & Forced Marriage 2007, Sexual Violence 2012

(Continued)

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<i>Country</i>	<i>ICC</i>		<i>Legislation and year</i>
	<i>ICC signature</i>	<i>ratification</i>	
815 Gabon	22 December 1998	20 September 2000	Trafficking 2001
Spain	18 July 1998	24 October 2000	Trafficking 2000 & 2004, Domestic Violence 2003, 2004, 2005, 2006 & 2007, Female Genital Mutilation 2003 & 2005, Trafficking 2004, Sexual Harassment 2004 & 2007
820 South Africa	17 July 1998	27 November 2000	Female Genital Mutilation 2000, Violence Against Women 2000, Trafficking 2007, Sexual Violence 2007, Domestic Violence 2011, Sexual Harassment 2011, Stalking 2011
825 Marshall Islands	6 September 2000	7 December 2000	Sexual Violence 2005
830 Germany	10 December 1998	11 December 2000	Domestic Violence 2002 & 2009, Stalking 2002 & 2006, Trafficking 2005
Austria	7 October 1998	28 December 2000	Sexual Violence 2000, 2002, 2004 & 2009, Trafficking 2002 & 2004, Female Genital Mutilation 2002 & 2006, Domestic Violence 2003, 2004 & 2009, Sexual Harassment 2004, Forced Marriage 2006, Stalking 2006 & 2009, Violence Against Women 2009
835 Finland	7 October 1998	29 December 2000	Trafficking 2004, 2006 & 2007, Domestic Violence 2005
Sweden	7 October 1998	28 January 2001	Trafficking 2002 & 2004, Sexual Violence 2005
845 Argentina	8 January 1999	8 February 2001	Domestic Violence 2008 & 2009, Trafficking 2008, Sexual Harassment 2009, Sexual Violence 2009
Dominica		12 February 2001	Domestic Violence 2002
850 Andorra	18 July 1998	30 April 2001	Domestic Violence 2005, Sexual Harassment 2005, Sexual Violence 2005
Paraguay	7 October 1998	14 May 2001	No national legislation on gender violence since ICC Ratification

(Continued)

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		ICC		
	<i>Country</i>	<i>ICC signature</i>	<i>ratification</i>	<i>Legislation and year</i>
860	Croatia	12 October 1998	21 May 2001	Trafficking 2003, Domestic Violence 2003, 2004 & 2008, Stalking 2003,
	Costa Rica	7 October 1998	7 June 2001	Domestic Violence 2007, Femicide 2007, Violence Against Women 2007
865	Antigua and Barbuda	23 October 1998	18 June 2001	No national legislation on gender violence since ICC Ratification
	Denmark	25 September 1998	21 June 2001	Female Genital Mutilation 2003, Domestic Violence 2004, 2007 & 2008, Trafficking 2007
870	The Netherlands	18 July 1998	17 July 2001	Trafficking 2005, Domestic Violence 2007 & 2008
	Serbia	19 December 2000	6 September 2001	Domestic Violence 2005
	Nigeria	1 June 2000	27 September 2001	Trafficking 2003
875	Liechtenstein	18 July 1998	2 October 2001	Domestic Violence 2001 & 2008, Violence Against Women 2001 & 2008, Marital Rape 2001, Sexual Harassment 2001, Sexual Violence 2008
880	Central African Republic	7 December 1999	3 October 2001	Violence Against Women 2004, Domestic Violence 2006, Female Genital Mutilation 2006, Sexual Harassment 2006
	Switzerland	18 July 1998	12 October 2001	Domestic Violence 2004, 2006, 2008 & 2009, Marital Rape 2004, Sexual Violence 2004, Trafficking 2004, Stalking 2006, Violence Against Women 2009
885				
	Peru	7 December 2000	10 November 2001	Sexual Violence 2004, 2006 & 2007, Violence Against Women 2004 & 2007, Marital Rape 2004, 2006 & 2007, Trafficking 2004, 2007 & 2008
890				
	Nauru	13 December 2000	12 November 2001	No national legislation on gender violence since ICC ratification
895	Poland	9 April 1999	12 November 2001	Domestic Violence 2005

(Continued)

	<i>Country</i>	<i>ICC</i>		<i>Legislation and year</i>
		<i>ICC signature</i>	<i>ratification</i>	
905	Hungary	15 January 1999	30 November 2001	Trafficking 2002, Violence Against Women 2006, Domestic Violence 2007, Stalking 2007
910	Slovenia	7 October 1998	31 December 2001	Violence Against Women 2002, 2006 & 2008, Domestic Violence 2003, 2006 & 2008, Marital Rape 2008, Sexual Harassment 2008, Sexual Violence 2008, Stalking 2008, Trafficking 2008
915	Benin	24 September 1999	22 January 2002	Early Marriage & Forced Marriage 2002, Female Genital Mutilation 2003
	Estonia	27 December 1999	30 January 2002	Violence Against Women 2004, Trafficking 2005 & 2012, Sexual Violence 2006, Domestic Violence 2006
920	Portugal	7 October 1998	5 February 2002	Domestic Violence 2006 & 2007, Trafficking 2007
	Ecuador	7 October 1998	5 February 2002	Domestic Violence 2002, Violence Against Women 2002, 2006, 2007 & 2008, Trafficking 2004, Sexual Violence 2005
925	Mauritius	11 November 1998	5 March 2002	Domestic Violence 2004 & 2007
	Macedonia	7 October 1998	6 March 2002	Domestic Violence 2004, 2006, Marital Rape 2005, Sexual Harassment 2005, Sexual Violence 2005, Trafficking 2006, Violence Against Women 2006
930	Cyprus	15 October 1998	7 March 2002	Female Genital Mutilation 2003, Domestic Violence 2004, Trafficking 2007
935	Panama	18 July 1998	21 March 2002	Sexual Violence 2004, Domestic Violence 2007
940	Democratic Republic of the Congo	8 September 2000	11 April 2002	Forced Marriage 2006, Sexual Violence 2006 & 2009, Violence Against Women 2006 & 2009, Sexual Harassment 2009, Trafficking 2009

(Continued)

		<i>ICC</i>		
<i>Country</i>	<i>ICC signature</i>	<i>ratification</i>	<i>Legislation and year</i>	
950	Niger	17 July 1998	11 April 2002	Female Genital Mutilation 2003 & 2006, Marital Rape 2003, Sexual Harassment 2003, Sexual Violence 2003, Trafficking 2006, Violence Against Women 2006 & 2010
955	Jordan	7 October 1998	11 April 2002	No national legislation on gender violence since ICC ratification
	Mongolia	29 December 2000	11 April 2002	Sexual Violence 2002 & 2005, Trafficking 2002, Violence Against Women 2002 & 2005, Domestic Violence 2005
960	Cambodia	23 October 2000	11 April 2002	Domestic Violence 2005, Sexual Violence 2005 & 2007, Trafficking 2005 & 2008, Sexual Harassment 2005
965	Bosnia and Herzegovina	17 July 2000	11 April 2002	Domestic Violence 2003, Sexual Harassment 2003, Stalking 2003, Violence Against Women 2003 & 2007, Trafficking 2003, Sexual Violence 2007
	Slovakia	23 December 1998	11 April 2002	Domestic Violence 2005 & 2008, Trafficking 2005
970	Bulgaria	11 February 1999	11 April 2002	Trafficking 2003, Domestic Violence 2005
	Romania	7 July 1999	11 April 2002	Domestic Violence 2003, Sexual Violence 2004, Trafficking 2005
975	Ireland	7 October 1998	11 April 2002	Domestic Violence 2002 & 2007, Trafficking 2004 & 2008, Sexual Violence 2006 & 2007, Female Genital Mutilation 2012
	Greece	18 July 1998	15 May 2002	Trafficking 2002 & 2003, Domestic Violence 2006, Marital Rape 2006, Sexual Violence 2006
980	Uganda	17 March 1999	14 June 2002	Trafficking 2008, Domestic Violence 2009
	Brazil	7 February 2000	20 June 2002	Violence Against Women 2003, Domestic Violence 2004 & 2006, Sexual Violence 2005 & 2006
985				

(Continued)

	<i>Country</i>	<i>ICC signature</i>	<i>ICC ratification</i>	<i>Legislation and year</i>
995	Namibia	27 October 1998	25 June 2002	Domestic Violence 2003, Sexual Harassment 2003, Sexual Violence 2003, Stalking 2003, Violence Against Women 2003
1000	Bolivia	17 July 1998	27 June 2002	Trafficking 2006, Domestic Violence 2009, Sexual Violence 2009, Sexual Harassment 2012, Violence Against Women 2012
	Gambia	4 December 1998	28 June 2002	No national legislation on gender violence since ICC ratification
1005	Latvia	22 April 1999	28 June 2002	No national legislation on gender violence since ICC ratification
	Uruguay	19 December 2000	28 June 2002	Sexual Violence 2002, 2004 & 2005, Domestic Violence 2002 & 2003, Trafficking 2008
1010	Australia	9 December 1998	1 July 2002	Trafficking 2005, Domestic Violence 2011, Stalking 2011
	Honduras	7 October 1998	1 July 2002	Sexual Violence 2005, Trafficking 2005
1015	Columbia	10 December 1998	5 August 2002	Trafficking 2002 & 2005, Sexual Violence 2002, 2004, 2005, 2007 & 2008, Sexual Harassment 2006 & 2008, Domestic Violence 2008
	Tanzania	29 December 2000	20 August 2002	No national legislation on gender violence since ICC ratification
	Timor-Leste		6 September 2002	Domestic Violence 2004 & 2010
1020	Samoa	17 July 1998	16 September 2002	No national legislation on gender violence since ICC ratification
	Malawi	2 March 1999	19 September 2002	Domestic Violence 2006
1025	Djibouti	7 October 1998	5 November 2002	Violence Against Women 2003, Trafficking 2007, Female Genital Mutilation 2009

(Continued)

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	<i>Country</i>	<i>ICC signature</i>	<i>ICC ratification</i>	<i>Legislation and year</i>
1040	Zambia	17 July 1998	13 November 2002	Female Genital Mutilation 2005 & 2011, Sexual Harassment 2005 & 2011, Trafficking 2005, 2008 & 2011, Domestic Violence 2011, Early Marriage & Forced Marriage 2011, Sexual Violence 2011, Stalking 2011, Violence Against Women 2011
1045	Republic of Korea	8 March 2000	13 November 2002	Trafficking 2004, Domestic Violence 2006 & 2007, Sexual Violence 2007 & 2008
1050	Malta	17 July 1998	29 November 2002	Domestic Violence 2006
	Saint Vincent and the Grenadines		3 December 2002	No national legislation on gender violence since ICC ratification
1055	Barbados	8 September 2000	10 December 2002	No national legislation on gender violence since ICC ratification
	Albania	18 July 1998	31 January 2003	Trafficking 2004 & 2008, Domestic Violence 2006
	Afghanistan		10 February 2003	Early Marriage & Forced Marriage 2009, Sexual Harassment 2009, Sexual Violence 2009, Violence Against Women 2009
1060	Lithuania	10 December 1998	12 May 2003	Trafficking 2005, Violence Against Women 2011
	Ghana	18 July 1998	14 July 2003	No national legislation on gender violence since ICC ratification
1065	Georgia	18 July 1998	5 September 2003	Sexual Violence 2003 & 2006, Trafficking 2003 & 2006, Domestic Violence 2006, 2008, 2009 & 2010, Sexual Harassment 2010, Violence Against Women 2010
1070	Burkina Faso	30 November 1998	16 April 2004	No national legislation on gender violence since ICC ratification
	Congo	17 July 1998	3 May 2004	No national legislation on gender violence since ICC ratification
	Burundi	13 January 1999	21 September 2004	No national legislation on gender violence since ICC ratification
1075	Liberia	17 July 1998	22 September 2004	Trafficking 2005, Sexual Violence 2006

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	<i>Country</i>	<i>ICC signature</i>	<i>ICC ratification</i>	<i>Legislation and year</i>
1085	Guyana	28 December 2000	24 September 2004	Trafficking 2005, Domestic Violence 2008, Sexual Violence 2008 & 2010, Violence Against Women 2008 & 2010
1090	Kenya	11 August 1999	15 March 2005	Violence Against Women 2006, Marital Rape 2006, Sexual Harassment 2006, Sexual Violence 2006, Trafficking 2006, Female Genital Mutilation 2011
1095	Dominican Republic	8 September 2000	12 May 2005	Violence Against Women 2007 & 2010, Domestic Violence 2010, Trafficking 2010
	Mexico	7 September 2000	28 October 2005	Trafficking 2005, Domestic Violence 2007, Femicide 2007, Marital Rape 2007, Sexual Harassment 2007, Sexual Violence 2007
1100	Comoros	22 September 2000	18 August 2006	No national legislation on gender violence since ICC ratification
	Saint Kitts and Nevis		22 August 2006	No national legislation on gender violence since ICC ratification
1105	Montenegro		23 October 2006	No national legislation on gender violence since ICC ratification
	Chad	20 October 1999	1 November 2006	Sexual Violence 2007
	Japan		17 July 2007	Domestic Violence 2007
	Madagascar	18 July 1998	14 March 2008	No national legislation on gender violence since ICC ratification
1110	Suriname		15 July 2008	Marital Rape 2009, Sexual Violence 2009, Domestic Violence 2009
	Cook Islands		18 July 2008	No national legislation on gender violence since ICC ratification
1115	Chile	11 September 1998	29 June 2009	Femicide 2010, Domestic Violence 2010, Trafficking 2011
	Czech Republic	13 April 1999	21 July 2009	No national legislation on gender violence since ICC ratification
	Bangladesh	16 September 1999	23 March 2010	Domestic Violence 2010
1120	Seychelles	28 December 2000	10 August 2010	No national legislation on gender violence since ICC ratification
	Saint Lucia	27 August 1999	18 August 2010	No national legislation on gender violence since ICC ratification

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	<i>Country</i>	<i>ICC signature</i>	<i>ICC ratification</i>	<i>Legislation and year</i>
1130	Moldova	8 September 2000	12 October 2010	Domestic Violence 2010
	Grenada		19 May 2011	No national legislation on gender violence since ICC ratification
	Tunisia		24 June 2011	No national legislation on gender violence since ICC ratification
1135	Philippines	28 December 2000	30 August 2011	No national legislation on gender violence since ICC ratification
	Maldives		21 September 2011	Domestic Violence 2012
1140	Cape Verde	28 December 2000	10 October 2011	Domestic Violence 2011, Violence Against Women 2011
	Vanuatu		2 December 2011	No national legislation on gender violence since ICC ratification
	Guatemala		2 April 2012	No national legislation on gender violence since ICC ratification
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