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**BUILDING NATIONAL AND REGIONAL ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE:
FROM PROSECUTIONS IN THE FORMER YUGOSLAVIA TO THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS**

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1 Introduction

In 1995, the first criminal proceedings began before the International Criminal Tribunal for the former Yugoslavia (ICTY). The case of the *Prosecutor v Tadic* included the first numerated charges of conflict-related sexual violence.¹ This case marked the first step in building accountability for sexual violence as an international crime, with the ICTY leading progressive developments in this area over the next twenty years. However, *Tadic* also showed the challenges of providing accountability for conflict-related sexual violence (CRSV), including the failure to initially indict these crimes, challenges to protective measures, and the withdrawal of sexual violence victim-witnesses. As prosecutions of CRSV began in the successor states of the former Yugoslavia, it became apparent that national courts also faced many of these same challenges in building national accountability for CRSV.

During this same period, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). When the Protocol enters in force, the Malabo Protocol will establish an International Criminal

¹ *Prosecutor v Duško Tadic*, Case No. IT-94-1, ICTY, <<http://www.icty.org/case/tadic/4>>, accessed 15 August 2018.

Law Section and extend the jurisdiction of the African Court of Justice and Human and Peoples' Rights (ACJHPR) to include international crimes of conflict-related sexual violence. The inclusion of these crimes in the jurisdiction of the ACJHPR is an important advance. But what challenges is the Court likely to face in building accountability for CRSV? And what lessons might be useful to learn from the previous experiences of the former Yugoslavia in prosecuting these crimes?

The prosecution of CRSV together with other crimes committed in the conflicts in the State of the former Socialist Federal Republic of Yugoslavia (SFRY) marked a major development in building accountability for these crimes. These prosecutions established the legal basis of these crimes, showed that they were an integral part of the illegal conduct of these conflicts, and that they could be successfully prosecuted at international and national levels. However, these prosecutions also reveal the challenges of building national and regional accountability for CRSV that the ACJHPR is likely to face. The article frames accountability for CRSV in terms of a model of 'gender justice', which insists that criminal justice should be part of a process that transforms, rather than reproduces, gendered inequalities. This article focuses on two key sets of challenges to building 'gender justice' accountability for CRSV, which are (1) developing 'best practice' within regional and national courts, and (2) linking these prosecutions to peace processes and post-conflict reconstruction. The article then sets out a set of guiding principles for developing a 'gender justice' framework that can build effective and equitable CRSV prosecutions and contribute to post-conflict justice for these crimes.

2 Prosecuting CRSV in the Region of the Former Socialist Federal Republic of Yugoslavia: International, Regional, and National Accountability

The ACJHPR will be the first regional court to be established with the jurisdiction to prosecute international crimes. However, it is arguable that modern international criminal tribunals have provided ‘regional’ accountability since Nuremburg and Tokyo.² There is no ‘regional’ court for the former Yugoslavia as such. However, the ICTY, together with the national courts of the successor states in the former Yugoslavia, should be considered as providing a system of ‘regional’ accountability. Similarly to earlier international tribunals, the ICTY prosecuted crimes committed in all regions of the territory of the former Socialist Federal Republic of Yugoslavia (SFRY), both as specific theatres of conflict within, and broader criminal campaigns across, this territory. Under the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute),³ the ICTY had supremacy over the national courts of the successor states of SFRY since its establishment in 1993. By the end of 2016, the ICTY had prosecuted 78 individuals, or 48% of 161 accused, with charges of sexual violence included in their indictments in completed cases. Of those accused, 32 accused, or approximately 41%, were convicted for their responsibility for sexual violence.⁴

Despite significant challenges, formal regional co-operation has been established between the

² For further discussion of ‘the regional’ dimensions of ICL, see William A Schabas, ‘Regions, Regionalism and International Criminal Law’ (2007) 4:3 *New Zealand Yearbook of International Law* 3 and Matiangai VS Sirleaf, ‘Regionalism, Regime Complexes, and the Crisis in International Criminal Justice’ (2015) 54 *Columbia Journal of Transnational Law* 699.

³ UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993).

⁴ ICTY, Crimes of Sexual Violence in Numbers, <<http://www.icty.org/en/features/crimes-sexual-violence/in-numbers>> accessed 15 August 2018.

ICTY and prosecutors' offices, and between the prosecutors' offices in each successor state. With the adoption of the Completion Strategy in 2003 and the planned closure of the ICTY from this time onwards, there was increasing focus on strengthening national capacity to prosecute war crimes in the successor states of the former Yugoslavia. These successor states are Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia. In contrast to the ICTY, the national courts of the successor states apply national criminal codes that set out international offences under national law (whether of the former SFRY or successor state criminal codes), or prosecute these offenses as 'ordinary' domestic criminal offences. Bosnia and Herzegovina (2005), Croatia (2003) Kosovo (2000) and Serbia (2003) established specialised war crimes chambers at state level or 'county' level, or specialist panels within local courts.⁵ However, they also prosecute these crimes in 'lower level' 'ordinary' or 'general jurisdiction' criminal courts.

Bosnia and Herzegovina is typically described as the 'most affected' country in the conflict. It has undertaken the largest number of national prosecutions in the region before the War Crimes Chamber of the State Court of Bosnia and Herzegovina ('BiH State Court'). By the end of 2016, 59 of 183 accused, or approximately 30%, were charged with sexual violence in the BiH State Court. There are currently 58 ongoing CRSV cases, with another 600 under investigation.⁶ In the other national jurisdictions of Serbia, Kosovo, and Croatia, no systematic or comparable data is available. However, it is clear that sexual violence has been prosecuted in significantly fewer numbers and at lower conviction rates.⁷

⁵ In the case of Bosnia and Kosovo, war crimes prosecutions initially included international judges and prosecutors.

⁶ Preliminary Findings, GoJ Project, 2017. See also OSCE Mission to Bosnia and Herzegovina (OSCE), 'Towards Justice for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014–2016', 20 June 2017, <<http://www.osce.org/mission-to-bosnia-and-herzegovina/324131>>, accessed 16 August 2018 (OSCE Report 2014–2016).

⁷ Systematic and comparable reviews of CRSV prosecutions are not available. For information on prosecutions, Humanitarian Law Centre, 'No Justice for Wartime Victims of Sexual Violence', <<http://www.hlc-rdc.org/?p=30745&lang=de>>, accessed 4 August 2018; Humanitarian Law Centre Kosovo, 'As Time Passes, Justice for War Crimes fades' <<http://hlc-kosovo.org/?wpdmdl=5098>>, accessed 4 August 2018, 470; Documenta, 'Monitoring War Crime Trials Report for 2013' <<https://www.documenta.hr/en/izvje%C5%A1taj-o->

These CRSV prosecutions are instructive for regional and national systems seeking to build greater accountability for these crimes. The case of Rwanda is also clearly important. However, despite the significance of the early International Criminal Tribunal for Rwanda (ICTR) decisions on CRSV, overall the ICTR has a highly criticised record on CRSV and there have been notably few cases heard before Rwandan national courts.⁸ The extensive body of CRSV prosecutions in the former Yugoslavia provides an opportunity to consider how to build greater accountability for CRSV at a regional and national level. They also reveal the significant challenges of courts seeking to prosecute these crimes. Moreover, these prosecutions before the ICTY and BiH State Court have been subject to extensive internal and external review that is not available in the Rwandan context.⁹ For these reasons, the following discussion focuses on CRSV prosecutions in the former Yugoslavia.

In the region of the former Yugoslavia, two key sets of challenges emerge in building accountability for CRSV. These challenges have been identified from an analysis of the ICTY and BiH State Court experience. This analysis draws on the OSCE and ICTY OTP reviews of CRSV prosecutions, as well as five years of fieldwork in the ICTY and the former Yugoslavia

pra%C4%87enju-su%C4%91enja-za-2013.-godinu.html>, accessed 4 August 2018, 66. Macedonia had not undertaken any prosecutions as at the time of writing in 2018.

⁸ See Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Intersentia, 2005) pp. 351–353, and Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, 2014) and Emily Amick, ‘Trying International Crimes on Local Lawns’ (2011) 20(2) *Colum. J. Gender & L.* 1.

⁹ The ICTR Office of the Prosecutor has produced the ‘Best Practice Manual for the Prosecution of Sexual Violence’, ICTR, 2014, <<http://unictr.unmict.org/en/documents/best-practices-manuals-and-conference-reports>>, (‘ICTR Best Practice Manual’), accessed 17 August 2018. The reviews of the ICTY include the book length, Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016), and three significant OSCE reports on CRSV prosecutions before the BiH Court since 2004: OSCE Report 2014–2016 [n 6]; OSCE, ‘Combatting Impunity for Sexual Violence in Bosnia and Herzegovina: Progress and Challenges, An Analysis of Criminal Proceedings Before the Court of Bosnia and Herzegovina between 2005 and 2013’, 3 April 2014, (‘OSCE Report 2005–2013 BiH Court’), <<http://www.osce.org/bih/117051>>; and OSCE, ‘Combatting Impunity for Sexual Violence in Bosnia and Herzegovina: Progress and Challenges, An Analysis of Criminal Proceedings Before the Courts of the Federation of Bosnia and Herzegovina, Republika Srpska, and Brcko District between 2004 and 2014’, 3 July 2015, <<http://www.osce.org/bih/171906>>, (‘OSCE Report 2004–2014 District and Entity Courts’). Both reports were accessed on 4 August 2018.

examining CRSV prosecutions.¹⁰ This analysis shows that these two sets of challenges to building accountability are: firstly, how to develop ‘best practice’ prosecutions to provide greater criminal accountability for CRSV; and secondly, how to link criminal accountability for international crimes and post-conflict justice processes.

2.1 *The First Challenge for Building Criminal Accountability for CRSV:*

Developing ‘Best Practice’ Prosecutions of CRSV Crimes

‘Best practice prosecutions’ are typically understood in terms of implementing international ‘best practice’ standards. While identifying and implementing international standards are important elements of developing greater accountability, the adoption of these standards is not sufficient to build accountability for CRSV as they will not necessarily provide gender just outcomes. Rather, in a ‘gender justice’ approach, ‘best practice’ should be understood more broadly as ‘meaningful’ prosecutions that provide accurate and fair characterisation of crimes; appropriate punishment of those responsible; and significant and active victim participation and protection.

A Defining CRSV as an International Crime

The first and most crucial challenge in building accountability for CRSV concerns the recognition of sexual violence as a crime under international law. Without the formal legal recognition of the criminality of that conduct under international law, it is not possible to prosecute sexual violence as a conflict-related crime or as a crime violating international

¹⁰ The GoJ Project, 2013–2017, <<https://www.gold.ac.uk/genderofjustice/>>, accessed 4 August 2018.

norms. Accordingly, the first challenge for prosecutions of CRSV as an international crime is to establish the positive legal prohibition of these acts under international law.

The criminal prohibition of sexual violence under international law first emerges in the context of armed conflict. The development of the definition of sexual violence as an international crime at the ICTR and ICTY builds upon its prohibition as a serious violation of international humanitarian law. The Statutes of the ICTY and the ICTR only refer to rape as a crime against humanity, and in the case of the ICTR, additionally to rape, enforced prostitution, and indecent assault as outrages upon personal dignity, a violation of common article 3 of the Geneva Conventions 1947. The Tribunals did not develop elements of these crimes as such, but rather defined the elements of offences in their jurisprudence.

The leading case, *Akayesu*, defines sexual violence (which includes rape) ‘as any act of a sexual nature which is committed on a person under circumstances which are coercive’.¹¹ This category of prohibited acts includes rape, forced nudity,¹² and the so-called ‘gender related crimes’ recognised by the Rome Statute of the International Criminal Court (‘ICC Statute’), such as forced pregnancy and enforced sterilisation.¹³ Sexual penetration marks the distinction between the physical element of rape and other sexual violence offences, and the intent to commit the act of penetration knowing that it occurs without the consent of the victim.¹⁴

There is not yet a distinct crime of sexual violence under international law. Rather, if the requisite elements are met, then sexual violence offences are prosecuted as war crimes,

¹¹ *Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para 688. See also: *Delalic*, Case No. IT-96-21-T, Judgement, 16 November 1998, para 478; *Kvočka, Kos, Radic, Zigic, and Prcac*, Case No. IT-98-30/1-T, Judgement, 2001, para 180.

¹² *Kvočka*, para 180

¹³ *Kvočka*, para 180.

¹⁴ *Kunarac*, Case No. IT-96-23 and it-96-23/1-T, Judgement, 22 February 2001, para 460.

genocide, or crimes against humanity. The crime of sexual violence under international law therefore consists of two parts. The first part is the offence of sexual violence. The second part is the ‘international’ element of the crime, that is, the violation of the laws and customs of war; the intent to destroy a protected group, or a systematic attack on a civilian population. It is this context that is understood to ‘raise’ a sexual offence to the status of an international crime.¹⁵ It constitutes the ‘international’ elements of the crime that are distinct from a breach of civil rights or a domestic offence under national criminal codes.

The Malabo Protocol follows this ‘established framework of international law’ in Articles 28(B)–(D). In terms of sexual violence, these provisions essentially reproduce Articles 5–7 of the Rome Statute of the International Criminal Court, with the exception of Article 28(B), which additionally specifies ‘[a]cts of rape or any other form of sexual violence’ as an act of genocide. This reflects the current position under international customary law. Given that the substantive elements of sexual violence crimes under international law are not settled either in customary law or in the ICC jurisprudence, it is unclear as to whether the Court would draw on the ‘established framework of international law’, that is, international customary law, or the elements of offences and/or limited jurisprudence of the ICC, in developing its ‘elements of offences’ and definitions of these crimes. As there is no reference to the definition of ‘gender’ provided by the ICC Statute, it is also unclear as to whether the ACJHPR would follow this highly criticised approach of the ICC, or whether it would seek to develop its own definition of gender. It should also be noted that the other ‘transnational’ crimes proscribed under the Malabo Protocol, such as the trafficking of persons, may also have sexual violence elements. These questions of applicable law will raise issues of contravention of the principle of *nullum crimen sine lege* in cases before the ACJHPR, but also in the national jurisdictions seeking to

¹⁵ *Kunarac*, para 410.

prosecute these crimes, since it is not settled by Article 31.

There are considerable substantive issues in customary international criminal law concerning gender-based and sexual violence crimes. These issues include the customary status of certain norms, the elements of core crimes, normative gaps in the legal framework, and areas of doctrinal uncertainty. There is a lack of specificity and consistency in the definition of sexual violence as an international crime under customary international law.¹⁶ In terms of the contextual ‘international’ elements, for example, in relation to genocide, ‘gender’ is not recognised as a protected group under customary law, the ICC Statute, or the Malabo Protocol. Similarly, while the Protocol follows the ICC in recognising ‘gender’ as a group for the purposes of persecution as a crime against humanity, uncertainty still remains regarding the customary status of this norm. In relation to war crimes, given the regional nature of these crimes, there is some question as to which norms apply according to their classification as an internal or international conflict, which may give rise to potential jurisdictional challenges. Finally, the elements of sexual violence are not settled under customary law. The distinction between rape, sexual violence, or sexual assault remains to be fully clarified, as does consent as an element of the offence. Other crimes, such as sexual enslavement or sexual torture, also require further elaboration.

Both the limitations of the international legal framework and the question of applicable law have proved to be key issues for providing effective and equitable prosecutions before the ICTY and BiH State Court. These prosecutions have faced numerous jurisdictional challenges, particularly focused on the *nullum crimen* principle in relation to CRSV. These issues also can

¹⁶ For example, see *Akayesu* (n 11), *Kunarac* (n 11) and *The Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-A Appeals Chamber Judgement, 2006, para 153. For discussion, see Kirsten Campbell, ‘The Gender of Transitional Justice’ (2007) 1(3) *International Journal of Transitional Justice* 411–432, and Hilmi Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the Tribunals*, (Oxford University Press, 2014) 71 ff.

lead to narrow, incorrect, or overly restrictive interpretation or application of legal norms in justice policies, judicial interpretation, or prosecutorial practice. Examples of these difficulties can be found in the overly restrictive judicial interpretation of substantive elements of offences, such as requiring proof of non-consent (but not for other crimes such as torture or enslavement),¹⁷ the inaccurate application of evidential norms, such as imposing higher evidentiary standards of proof to establish links between senior officials and sexual violence committed by subordinates than other crime, and incorrectly identifying modes of liability, such as requiring systematic war-time rape to establish leadership responsibility.¹⁸ While the ICTY and BiH State Court have led the development of, and often applied, a progressive CRSV jurisprudence, they have also been responsible for regressive applications of legal norms.¹⁹ Where these issues have not been addressed, they have produced prejudicial approaches to CRSV, and inequitable judicial outcomes for its survivors.

Prosecutions of sexual violence before the ACJHR are likely to face similar difficulties unless these issues are addressed by developing, for example, elements of crimes drawing upon customary international law, and/or requiring that national courts subject to the Court's jurisdiction pass criminal codes incorporating more progressive norms.

B Undertaking Meaningful Prosecutions of CRSV

A fundamental building block of meaningful prosecutions is whether prosecutions capture the illegal conduct of conflict. In relation to CRSV, this requires capturing the different patterns of sexual violence in a given conflict, linking conflict-related sexual violence to other gender-

¹⁷ *Prosecutor v Milutinovic et al.*, Case No. ICTY IT-05-87-T, Trial Judgment, v. 1, para 201.

¹⁸ For example, see *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T.

¹⁹ See, for example, OSCE (n 6) and Brammertz and Jarvis (n 9).

based crimes, and contextualising sexual violence within the broader conflict.

As the experience of the ICTY and BiH State Court shows, prosecutorial strategies and judicial findings on sexual violence in these courts may reveal only partial pictures of patterns of sexual violence, and their relationship to the wider crime base in which they occurred. For example, the ICTY cases do not fully capture the different forms or pervasiveness of sexual violence, such as the different types of violence against men and women.²⁰ They also do not adequately connect these acts to wider patterns of gender-based *and* general crime categories, such as connecting sexual violence committed during forcible displacement of women to a broader genocidal campaign.²¹ At the national level, CRSV prosecutions by the BiH State Court have focussed on lower level ‘commanders’ or direct perpetrators, due to the focus of ICTY prosecutions upon leadership cases. However, this can have the effect of characterising sexual violence as a criminal act of an individual, rather than as being part of organized or systemic crimes, or as being integrally related to the conflict itself. Accordingly, these crimes may not be adequately linked to the broader context of the illegal campaigns organised by the ‘most responsible’ at the highest levels in national prosecutions. As a result, CRSV may not be sufficiently contextualized within these conflicts in these prosecutions, in that they do not adequately situate these acts within (and connect them to) the context in which they are committed, including the broader campaign of crimes.²² With this framing, it is difficult to provide an accurate characterization of the crimes committed, to prosecute all forms of sexual and gender-based crimes committed, or to make links between direct perpetrators and the military and political leaders of the organisation to which they belong. As a result, these crimes

²⁰ Campbell (n 16) and for discussion see Brammertz and Jarvis (n 9).

²¹ Brammertz and Jarvis (n 9) 320–332, at 325.

²² *Ibid*, 216–219. For a discussion of these issues in the context of the ICTR, see Chiseche Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press, 2013) and Zawati (n 16).

are not adequately included in the public narratives of the conflict, and these prosecutions do not provide the public recognition of ‘victims as right-holders entitled to redress’ due to their experience of the conflict.²³

The ACJHPR will face the challenge of how to build meaningful prosecutions of CRSV both in those cases where it exercises complementary jurisdiction under Article 46H and in national courts prosecuting such cases. In both cases, the challenge will be how to avoid the individualisation of CRSV. Instead, the task is to properly capture the different patterns of these crimes, to link them to other gender-based crimes, and to contextualise these crimes within the broader conflict. This challenge is made more significant because of two aspects of the ACJHPR. The first aspect concerns the so-called ‘immunity’ clause (Article 46Abis), granting immunity to serving heads of state and senior state officials. If such a clause had been in place in the former Yugoslavia, it is arguable that it would have been impossible to indict political and military leadership for CRSV while they held office during the war. The issuing of these indictments against the serving head of state and state officials in Serbia was seen as having important legal consequences (such as evidencing the foreseeability element of command responsibility), as well as political (such as delegitimizing the existing regime), and social functions (such as deterring the ongoing commission of these crimes) in ICTY cases.²⁴ The second aspect concerns how to properly contextualise CRSV within a ‘regional’ or cross-border conflict in national jurisdictions. If prosecutions before national courts are limited to crimes committed in that territory, then it will become more difficult to accurately characterise CRSV, or to link it to the wider illegal conduct of the conflict.

²³ Gorana Mlinarević and Nela Porobić Isaković, ‘Conceptualizing a comprehensive approach to transformative gender-sensitive reparations: experiences from Bosnia and Herzegovina’ (forthcoming). This analysis of the BiH State Court was developed with Ms Mlinarevic in our forthcoming paper, ‘A Gender Justice Framework for International Criminal Law’.

²⁴ Brammertz and Jarvis (n 9) 254–255; Michael Scharf ‘The Indictment of Slobodan Milosevic’, *ASIL Insight* (1999).

C. Addressing Gendered Stereotypes and Gender Bias

The third challenge to building accountability for CRSV is how to address gendered stereotypes about CRSV and the gender bias of actors within criminal justice systems. The experience of the ICTY and BiH State Court show that gendered stereotypes about CRSV are still commonplace.²⁵ These include notions that conflict-related sexual violence is exclusively a personal or opportunistic crime, is not sufficiently violent or serious to constitute an international crime, or only constitutes an international crime if it is the subject of strategy or policy. This experience also shows the potential significant gender bias of investigative, legal, and judicial actors. This gender bias can be seen in a lack of investigation of CRSV, different charging of CRSV against men and women, disadvantageous assumptions that survivors of sexual violence are reluctant to testify due to stigma, or that female witnesses only have evidential value for proving sexual violence (rather than other international crimes).²⁶ These ideas reflect wider social beliefs concerning male and female sexuality, how violence against men and women is characterised, and gender roles in society. In both courts, the reviews of prosecutions by the ICTY OTP and the OSCE show that these gender stereotyping and gender bias impact upon the investigation, prosecution, and adjudication of CRSV.²⁷

It is highly likely that the ACJHPR will face similar challenges in building greater accountability for these crimes. Unless there is a proactive approach to building gender and criminal expertise, there is little reason to believe that gender stereotypes and biases will not be present in the ACJHPR. However, in a permanent court addressing these crimes, there is

²⁵ See Brammertz and Jarvis (n 9), and OSCE (n 6).

²⁶ *Ibid.*

²⁷ See Brammertz and Jarvis (n 9), and OSCE (n 6).

more likelihood that such proactive policies can be developed because of the ongoing nature of prosecutions, and the capacity of the Court to build on the progressive human rights jurisprudence of the African Commission on Human and Peoples' Rights, such as *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, Communication 341/2007 (16 November 2015). Nevertheless, this case also shows that in national courts, these obstacles may be both more onerous and difficult to address. In most countries world-wide, domestic jurisdictions typically fail to deliver accountability for domestic sexual offences, and state responses to rape and sexual assault are generally weak.²⁸ As the experience of BiH State Court has shown, there is little reason to suppose that these failures would not be compounded in CRSV cases prosecuted before national courts (as they have been in BiH).

D Addressing Institutional Obstacles

The fourth challenge to addressing impunity for CRSV consists of institutional obstacles in criminal justice systems. These institutional obstacles include gendered practices, culture, and systems that obstruct adequate CRSV prosecutions in criminal justice systems. As identified by the ICTY, such obstacles may include inadequate gender competence and/or conflict-related sexual violence expertise, lack of leadership or commitment to prosecution, and the failure to develop or implement gender policies or strategies.²⁹

Without considerable institutional commitment and resources, the ACJHPR is also likely to

²⁸ Equality Now, *The World's Shame, the Global Rape Epidemic: How Laws Around the World are Failing to Protect Women and Girls from Sexual Violence* (2017), <https://www.equalitynow.org/sites/default/files/EqualityNowRapeLawReport2017_Single%20Pages.pdf> accessed 17 August 2018.

²⁹ Brammertz and Jarvis (n 9), and ICTR Best Practice (n 9).

struggle to address these institutional obstacles. To take the example of gender parity on the bench, there is an explicit reference to ‘equitable gender representation’ in the nomination and election of judges under Articles 3 and 7 of the Malabo Protocol. Nevertheless, the African Court on Human and Peoples’ Rights has not yet achieved gender parity.³⁰ This difficulty may be compounded by the substantive areas of legal expertise required for appointment to the ACJHPR, given that criminal, humanitarian, and international law have traditionally been male dominated areas of the profession. While the situation is more complex at the regional level, similar issues of gender under-representation in the judiciary can be seen in national courts in African states.³¹ Like national courts in Bosnia and Herzegovina, such institutional obstacles to sexual violence prosecutions are likely to be faced by national courts in African states, with such obstacles becoming more evident in ‘lower’ or non-specialist ‘ordinary’ domestic courts. In line with the situation with courts in Bosnia and Herzegovina, national courts in African states are also less likely to have established gender policies and strategies that would serve as a basis for addressing such obstacles.

E. CRSV Prosecutions Before National Courts and Complementary Jurisdiction

The fifth challenge concerns specific ‘national’ issues concerning domestic prosecutions of CRSV as an international crime. The Malabo Protocol provides that national courts will have primacy over the ACJHR in regards to prosecutions of international crimes. The jurisdictional structure of the Malabo Protocol follows the ICC in proposing complementary jurisdiction between the ACJHR and national courts (Article 46H). This principle of ‘complementary

³⁰ Josephine Dawani, ‘African Women Judges and Achieving Gender Parity on the African Court of Human and Peoples’ Rights’ (1 February 2017), <<https://ilg2.org/2017/02/01/african-women-judges-and-gender-parity-on-the-african-court-on-human-and-peoples-rights/>> accessed 18 August 2018.

³¹ Josephine Jarpa Dawuni and Hon Akua Kuenyehia, eds. *International Courts and the African Woman Judge: Unveiled Narratives* (Routledge, 2017).

jurisdiction’ as set out in the Malabo Protocol provides that a case will only be admissible to the ACJHPR if the State with relevant jurisdiction is ‘unwilling or unable to carry out the investigation or prosecution’; the accused has not already been tried for the same conduct, and the case is of ‘sufficient gravity’ (Article 46H(a)–(d)). While significant issues have been raised in scholarly commentary on the general operation of these provisions, this discussion focuses on the specific implications of these provisions for CRSV prosecutions.

Given that the Malabo Protocol envisages that the majority of CRSV prosecutions will take place in national jurisdictions, this raises the issue of the specific difficulties faced by domestic prosecutions of CRSV. The experience of the BiH State Court shows that domestic prosecutions face five key difficulties. The first, and most obvious, is the broader conflict and post-conflict context. This context produces significant capacity and commitment challenges, such as large numbers of complex cases, destroyed state infrastructure, de-legitimized criminal justice systems, political interests, and displacement or impoverishment of the population, for all domestic war crimes cases.³² However, ‘gender’ factors amplify the impact of these challenges for prosecuting CRSV cases. For example, the ICTY notes, ‘[b]asic issues, such as the layout of court buildings and lack of witness waiting rooms, can exacerbate the trauma of sexual violence victims who have agreed to testify’.³³ The deepening of gender structural inequalities during and after the conflict also impacted upon women’s access to justice. Again, these impacts may be as basic but crucial as adequate healthcare and housing, or requiring financial support to travel or pay for childcare while attending trials.

The second ‘national’ issue concerns existing obstacles to CRSV prosecutions in domestic systems. While these issues have been referred to above, it should be noted that prosecutions

³² See OSCE (n 6) 11.

³³ Brammetz and Jarvis (n 9) 338.

of CRSV before national courts raises specific obstacles because of existing national legal and cultural norms and practices. For example, in the case of BiH prosecutions, this included restrictive definitions of sexual violence as an international and domestic crime that did not reflect international norms, lack of adequate witness protection, and insufficient prioritisation of CRSV cases.³⁴ Similar issues are present in the other national jurisdictions of the successor states of the former Yugoslavia, but with the additional element of a lack of political will at state level to prosecute such crimes. In the context of the former Yugoslavia, national CRSV prosecutions show the particular vulnerability of CRSV to these challenges, and the wide impunity gap that can emerge in national systems. Given that the Malabo Protocol envisages a regional structure with primacy given to national courts, this structure raises the issue of how to address the specific difficulties and challenges faced by national courts in prosecuting these crimes. Without addressing these issues, national courts will not be able to undertake effective or equitable CRSV prosecutions. However, the experience of the ICTY OTP and BiH State Court also show that addressing these issues can significantly improve criminal accountability for CRSV.

These challenges for building accountability for CRSV prosecutions at the national level raise the issue of ‘negative’ and ‘positive’ models of complementary jurisdiction under the Malabo Protocol. A ‘negative’ complementarity model concerns the criteria for assessing whether the ACJHPR has jurisdiction over a case on the grounds that a national court is ‘unwilling or unable’ to prosecute. In relation to the ICC, feminist scholars have noted the limitations of a ‘gender neutral’ approach to assessing negative complementary, which does not address the specific challenges of national CRSV prosecutions.³⁵ Unless the ACJHPR explicitly considers

³⁴ OSCE (n 6) 6.

³⁵ Fionnuala Ní Aoláin, ‘Gendered Harms and their Interface with International Criminal Law’ (2014) 16(4) *International Feminist Journal of Politics* 622–646.

the ‘best practice’ standards for CRSV prosecutions outlined above as part of its criteria for assessing whether to exercise its jurisdiction, then it will not be able to fully contribute to building accountability in this area. However, even if the ACJHPR were to follow this approach, there are two further issues that remain to be addressed. The first is that ‘complementary jurisdiction’ focuses upon the admissibility of a single case. However, the impunity gap for CRSV prosecutions at national levels is only seen when prosecutions are considered as a whole, such that rates and quality of prosecutions are compared to other war crimes prosecutions and to the estimated prevalence of these offences. The second concerns the final element of the criteria for admissibility to the ACJHPR, namely, that the case is of sufficient gravity to justify further action by the Court. Unless CRSV is properly contextualised in the broader criminal campaign, and is not seen as an individual or opportunistic crime, then that case may be improperly characterised as of insufficient gravity to justify further action by the Court.

In contrast, a ‘positive complementarity’ model focuses on ‘a proactive policy of cooperation aimed at promoting national proceedings’.³⁶ While the ICC takes a narrow view of positive complementarity, it may be useful to consider a wider approach to positive complementarity in the complementary jurisdiction system of the ACJHPR. In relation to the ICC, feminist scholars have argued that such ‘active’ complementarity is crucial for developing national accountability for CRSV.³⁷ Drawing on the experiences of the former Yugoslavia, such a positive model would address: (a) how to ensure the harmonisation of standards (international legal norms) and best practice (legal and institutional) between the ACJHPR and national courts; (b) how to build upon legal traditions of national cultures in establishing or developing

³⁶ ICC, Office of the Prosecutor, *Prosecutorial Strategy, 2009–2012* (February 2010) (‘Prosecutorial Strategy’) 5.

³⁷ Ní Aoláin (n 35); Amrita Kapur ‘Complementarity as a Catalyst for Gender Justice in National Prosecutions’, in Fionnuala Ní Aoláin et al., eds. *The Oxford Handbook of Gender and Conflict*, (Oxford University Press, 2018) 225.

national prosecutions (particularly important in a regional context with civil and common law traditions, as well as mixed systems); (c) how to provide sufficient economic and political resources to undertake these prosecutions at the national level; and (d) how to monitor the number and quality of prosecutions. This broader approach would also address the potential shortcomings identified above concerning the admissibility criteria of the ACJHPR.

F. Regional and International Accountability

The structure of regional complementarity proposed under the Malabo Protocol raises wider issues for building accountability for CRSV at international and regional levels beyond that of the ACJHR. The ‘regional’ complementarity model envisaged by the Protocol can be said to have two dimensions of ‘regional accountability’. The first is vertical, and concerns the relationship between the ACJHR and national courts discussed above. The second is horizontal regional accountability, and concerns the relationship between national courts in the regional system. Horizontal regional accountability implies that all national courts in an affected region will undertake CRSV prosecutions. The experience of the ICTY and Bosnia shows that regional co-operation, including extradition, evidence exchange, and witness protection, is crucial for successful prosecutions of cross-border international crimes.³⁸ This experience underscores how inadequate co-operation negatively impacts upon building regional accountability, even where individual states, such as Bosnia, are themselves committed to prosecution. For example, the OSCE has noted that the failure to extradite suspects from other successor states to Bosnia had impacted upon the ability of the judicial system to try CRSV

³⁸ For further discussion, see Richard Steinberg, ed. *Assessing the Legacy of the ICTY* (Martinus Nijhoff, 2011), and ‘Prosecutors at BIRN War Crimes Conference Urge Cooperation’, *Balkan Insight*, 22 September 2016, <<http://www.balkaninsight.com/en/article/prosecutors-at-birn-war-crimes-conference-urge-cooperation-09-22-2016>>, accessed 18 August 2018.

cases.³⁹ Where states are not fully committed to such prosecutions, then horizontal regional accountability cannot be achieved, as is the case in the former Yugoslavia. The poor record of CRSV prosecutions in successor states other than Bosnia again shows the particular vulnerabilities of these crimes to failed prosecution where impunity gaps in legal systems are created. Finally, it should be noted that international (at the UN level) and regional (European Union) policy focus and resources has also been crucial for building greater regional accountability for CRSV in the former Yugoslavia.

The third dimension of building regional and national accountability for CRSV is international. The Malabo Protocol has been met by a number of serious criticisms, most notably regarding the so-called ‘immunity’ provision, and the relationship between the ICC and the ACJHPR. Given that the Malabo Protocol is silent on the relationship between the ICC and the proposed ACJHPR regional system, scholars have raised concerns regarding the relationship between these two jurisdictions, and the potentially problematic politics of establishing an alternative ‘venue’ to the ICC, particularly in view of the ‘withdrawal strategy’ from the ICC proposed by the African Union.⁴⁰ Any weakening of international norms and international systems of enforcement has serious implications for CRSV prosecutions. Undermining international norms and enforcement – and the concomitant weakening of regional and national norms and enforcement – will contribute to the already significant impunity gap for these crimes. For this reason, if the aim is to build accountability for CRSV at all levels, then efforts to build regional accountability should not be undertaken in isolation from efforts to strengthen international criminal law and humanitarian law regimes. Rather, they should be undertaken with a view to how regional and international systems can mutually complement and strengthen greater

³⁹ OSCE Report 2005–2013 BiH Court (n 9)17.

⁴⁰ For an overview of these debates, please see Kamari M. Clarke, Abel S Knottnerus, and Eefje de Volder, eds. *Africa and the ICC* (Cambridge University Press, 2016) and Ademoloa Abass, ‘Historical and Political Background to the Malabo Protocol’, in Gerherd Werle and Moritz Vormbaum (eds.) *The African Criminal Court* (Springer, 2017).

accountability for CRSV.

G. CRSV and Gender-Based Crimes

The final challenge is to consider the consequences of focusing on CRSV for prosecutions in particular, and for gender justice more broadly. In the case of the former Yugoslavian conflicts, the struggle to date to prosecute CRSV has resulted in the neglect of gender-based crimes. Sexual violence is not the only gender-based crime committed in conflict. Other gender-based crimes are also likely to form an integral part of the conduct of war. The Malabo Protocol has made a step in this direction by following the ICC's inclusion of 'gender' as a prohibited ground of persecution as a crime against humanity (Article 28C(1)(h)). The Protocol also reflects the progressive jurisprudence of the ICTR and ICTY, which recognises gender-based crimes as core crimes, such as sexual violence against women as genocide.⁴¹ The Protocol stipulates sexual violence as a material element of all core crimes, including such as sexual violence as genocide. (Article 28B(f)).

The ACJHPR could usefully further elaborate the current legal norms of gender-based crimes in the elements of crimes or in its jurisprudence. For example, the gender elements of existing core crimes, such as elaborating how attacks directed towards women on the basis of their gender can be an element of genocide, could be further developed in the elements of crimes. Equally importantly, it could lead the development of the criminalisation of other distinctive harms experienced by women in war, by, for example, recognising the disproportionate impact of particular means and methods of warfare upon women as members of the civilian

⁴¹ See, for example, *The Prosecutor v Krstić*, Case No IT-98-33 Appeals Judgement, 2004, and *Akayesu* (n 11) respectively.

population.⁴² Accordingly, a central issue for prosecutions involves developing the legal categories of, and strategies for prosecuting, gender-based crimes.

H. Gender Strategies for Building Criminal Accountability for CRSV and Gender-Based Crimes

Neither the ICTY nor BiH State Court developed comprehensive gender policies or strategies across all sections of the court from their establishment. Subsequently, there has been uneven development and implementation of such policies and strategies within these courts. However, the efforts of the ICTY and BiH State Court have also shown the importance of developing such policies and strategies. As noted by both the ICTY and the OSCE, the absence of gender policies and strategies has a negative impact upon the number and quality of prosecutions and outcomes, while the development and implementation of these policies has a positive impact upon accountability for CRSV.⁴³ Patricia Sellers has persuasively argued that ‘a gender strategy is not a luxury’ in prosecuting international crimes, and is particularly important for complementarity systems, such as the ICC.⁴⁴ The complementary system that is to be established by the Malabo Protocol is no exception.

The experiences of regional and national prosecutions in the former Yugoslavia reveal important lessons for building greater accountability for CRSV and gender-based crimes that regional and national prosecutions proceeding under the Malabo Protocol can usefully draw on. These include developing gender policies and strategies that include:

⁴² For discussion, see Judith Gardam and Michelle Jarvis, *Women, Armed Conflict, and International Law* (Kluwer, 2001).

⁴³ See Brammetz and Jarvis (n 9), and OSCE (n 6).

⁴⁴ Patricia Viseur Sellers, ‘Gender Strategy is Not Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts’ (2009) 17(2) *American University Journal of Gender, Social Policy & the Law* 327– 335.

- i. development of elements of crimes, modes of liability, and evidential standards;
- ii. accurate charging of offences against men and women, with proportionate numbers of male and female victims;
- iii. prosecutorial strategies that undertake jurisprudential development and representative cases;
- iv. contextual charging and prosecution, which involves situating conflict-related sexual violence within wider patterns of gender-based harms, and also within the broader context of patterns of illegality in the conflict;
- v. equal access to justice for male and female witnesses, meaningful witness support in all phases of the criminal process (before, during, and after trial), provision of victim-witness representatives, and links to reparations and specialized support programmes;
- vi. regular review of sexual violence and gender-based crimes patterns of prosecution, trial practices, and sentencing;
- vii. ‘outreach’, public information, and advocacy strategies for these crimes; and
- viii. strengthening regional and international vertical and horizontal accountability.

2.2 *The Second Challenge for Building Accountability for CRSV:*

Linking Criminal Accountability for International Crimes and Post-Conflict Justice Processes

Criminal accountability for international crimes can only be a partial component of the wider aims of building accountability for CRSV and gender-based crimes. Prosecutions alone do not address the structural and social causes and consequences of these crimes. As the example of the former Yugoslavia shows, prosecutions in themselves do not provide gender justice, whether in terms of addressing the individual material and social needs of survivors, or the

broader collective challenge of transforming gendered inequalities.⁴⁵ While CRSV prosecutions are clearly supported by victims and the wider society, there has been a disconnected approach to criminal, civil, and transitional justice policies. This approach did not integrate other elements of gender justice, such as civil justice policies (such as provision of reparations, provision of psycho-social or medical support, or recognition as civilian victims), or transitional justice policies (such as wider post-conflict programmes aimed at post-conflict reconciliation). As a result, the needs of the survivors were not met, and gender inequalities were further deepened and entrenched.⁴⁶ The example of the former Yugoslavia clearly shows the necessity of linking ‘regional’ prosecutions of gender-based and sexual violence crimes, integrating prosecutions and national post-conflict processes, and including women and gender policies in post-conflict processes. Like the ICTY, the establishment of the ACJHPR under the Malabo Protocol is tied to the promotion of ‘peace, security, and stability’ (as set out in the Preamble of the Protocol). Given this context, it is crucial to address the question of how to link criminal justice and post-conflict gender justice.

Recent theories of ‘transformative gender justice’⁴⁷ propose a ‘transformative justice [which] challenges fundamentally unjust power relations within society; power relations that are often at the heart of the conflict itself’.⁴⁸ This approach acknowledges that international criminal justice may reproduce the gender norms and inequalities that underlie gender-based crimes

⁴⁵ For an important feminist analysis of these issues, see see WILPF, ‘Concept and Framework for Gender-Sensitive Reparations Programme for Civilian Victims of War in Bosnia and Herzegovina’ (2016) <<http://womenorganizingforchange.org/Development/wp-content/uploads/2016/02/Reparations-BiH.pdf>> accessed 13 August 2018; and WILPF, ‘A Feminist Perspective on Post-Conflict Reconstruction and Recovery: The Case of Bosnia and Herzegovina’ (2017) <<http://womenorganizingforchange.org/en/resource-library/>> accessed 13 August 2018.

⁴⁶ See, for example, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Bosnia and Herzegovina*, (CEDAW/C/BIH/4–5), Committee on the Elimination of Discrimination against Women, 30 July 2013, and Rashida Manjoo, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on her Mission to Bosnia and Herzegovina, UN Doc A/HRC/23/49/Add 3, 4 June 2013.

⁴⁷ See Jelke Boesten and Polly Wilding ‘Transformative Gender Justice: Setting an Agenda’ (2015) 51 *Women’s Studies International Forum* 75–80.

⁴⁸ Nahla Valji, *Gender Justice and Reconciliation* (Friedrich-Ebert-Stiftung, Paper No. 35, 3, 2007).

even as it seeks to provide justice for them. Transformative gender justice addresses this challenge by insisting that international criminal justice must be part of a process that transforms, rather than reproduces, gendered inequalities. This new approach links post-conflict justice for gender harms to social transformation, in which international justice does not sustain the power relations that produce the violence of war. Instead, it seeks to change them. Accordingly, it ties international criminal accountability to broader processes of social change in conflict settings.

Accordingly, the second set of challenges for building accountability for CRSV and gender-based crimes concerns how to tie criminal accountability to broader post-conflict processes to enable transformative social change and ensure the non-recurrence of these crimes. Without the integration of accountability for CRSV into post-conflict justice processes, broader structural and social conditions for these crimes will not be addressed, and there can be no guarantee of non-repetition. As Rashida Manjoo observed:

[g]uarantees of non-repetition, if duly implemented, have the potential to detect the enabling conditions and long-term legacies of gender violence, and can therefore be a suitable platform for broader structural reforms for all women, not just victims, and hence for the construction of a more inclusive and gender-just political order.⁴⁹

Regional and national prosecutions must involve active engagement with both the affected victims and with the broader society if effective strategies to end impunity and non-recurrence of these crimes are to be developed in conflict contexts. Unless this broader gender justice approach is taken, prosecutions are less effective in providing accountability for these crimes. They will not provide justice to these victims, or support post-conflict reconciliation.

The crucial aspect of this challenge is how to integrate strategies for criminal and civil

⁴⁹ Rashida Manjoo, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, (UN Doc A/HRC/14/22), 23 April 2010, 17.

accountability for sexual violence and gender-based crimes at regional and national levels. This challenge involves incorporating international standards for prosecutions in national jurisdictions, establishing investigative, implementing, and review mechanisms, and adopting relevant standards of criminal and civil accountability. It also involves incorporating criminal justice into post-conflict strategies, as well as linking strategies for criminal prosecutions and civil justice programmes (including reparations, advocacy, economic and psycho-social support).

A Gender Strategies for Linking Criminal Justice and Post-Conflict Gender Justice

It is now widely recognised in United Nations (un) policy and current scholarship that gender strategies are also not ‘a luxury’ for conflict-affected countries seeking to address the causes and consequences of these crimes.⁵⁰ Drawing on the experience of regional and national prosecutions in the former Yugoslavia, gender strategies for building greater accountability for CRSV and gender-based crimes in the context of post-conflict peace processes should include:

- i. meaningful and active participation of women in all levels of peace talks and decision-making mechanisms, as well as in all criminal and civil justice institutions, and any bodies responsible for implementation;
- ii. assessment of gaps in existing criminal and civil justice provision at the national level;
- iii. identification of implementing mechanisms and parties, including review, report, ‘outreach’ and public information elements; and
- iv. provision of reparations, psycho-social and economic support, and strategic advocacy.

The specific content of these gender strategies cannot be identified ‘in the abstract’. The

⁵⁰ See, for example, two leading studies, Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi Cahn. *On The Frontlines: Gender, War, and The Post-Conflict Process* (Oxford University Press, 2011), and Doris Buss, et al., eds. *Sexual Violence in Conflict and Post-Conflict Societies: International Agendas and African Contexts* (Routledge, 2014).

appropriate approach and application are necessarily determined by the nature of the conflict context. Feminist scholars have repeatedly shown that ‘templates, applied uniformly across very different transitional contexts, will inevitably fail to consider the political dynamics driving transitional justice in a particular context’.⁵¹ Too often, they also fail to consider the particular social and economic dynamics of a conflict context. For these reasons, gender strategies for linking criminal justice and post-conflict gender justice must always be contextual.

B A Gender Justice Framework for CRSV and Gender-Based Crimes at National and Regional Levels

In the context of CRSV, ‘gender analysis’ is typically focussed upon gender representation and gender policies in courts, understood as the ‘consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities’ in prosecutorial practice.⁵² However, to build regional and national accountability for CRSV and gender-based crimes requires developing a broader approach that links gender strategies for courts to the broader aim of gender justice in post-conflict contexts. This larger aim is to build meaningful justice processes that can transform (rather than reproduce), gendered norms and inequalities in conflict-affected countries. This broader approach involves using a gender justice framework that integrates the gender strategies for criminal justice and post-conflict justice outlined above.

How, then, to build a contextual gender justice framework that might serve to complement the

⁵¹ Catherine O’Rourke, *Gender Politics in Transitional Justice* (Routledge, 2014) 246.

⁵² See Louise Chappell, *The Politics of Gender Justice at The International Criminal Court: Legacies and Legitimacy* (OUP, 2016), and ICC, ‘Policy Paper on Sexual and Gender-Based Crimes’ <<https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>>, last accessed 15 August 2018.

Malabo Protocols? On the basis of the above discussion of challenges to building accountability for CRSV and gender-based crimes, and the outline of potential elements of gender strategies for criminal and post-conflict justice, it is possible to identify a set of guiding principles that can serve as the basis for developing a gender justice framework for the Malabo Protocols. These principles include:

- i. Developing appropriate models of the concepts of gender and gender-based crimes for international crimes;
- ii. Undertaking doctrinal development of legal norms, particularly in relation to substantive elements and modes of liability;
- iii. Identifying and addressing gender norms and power biases in the values, design, culture, and established practices of legal institutions;
- iv. Integrating gender analysis of the conflict into criminal and civil justice processes;
- v. Providing significant and active victim participation and protection in the criminal process; and
- vi. Undertaking active engagement with the affected society to incorporate prosecutions into post-conflict social transformation.

Given that in every particular context the specific policies, guidelines and protocols of each gender justice framework will be different, the guiding principles outlined above are intended to open, rather than to end, the important discussion of how to build regional and national accountability for CRSV and gender-based crimes. Developing a contextual and complementary gender justice framework to the Malabo Protocol is the starting point for a wider discussion of how to undertake this challenging task. Inevitably also, that gender justice framework will evolve in line with developments in the ACJHPR and the wider regional and national contexts.

3 Conclusion

The experience of building ‘regional accountability’ for CRSV in the former Yugoslavia has shown the importance of prosecuting CRSV, and that CRSV can be prosecuted successfully. However, there are a number of significant legal, social, and political challenges in building accountability for these crimes. These challenges can be summarised as how to develop ‘best practice’ within regional and national courts, and how to link these prosecutions to peace processes and post-conflict reconstruction. These experiences also show that addressing these challenges requires recognising that gender strategies and policies are essential elements of building greater national and regional accountability for these crimes. To this end, this article identifies six principles that can form the basis for developing a contextual gender justice framework to complement the Malabo Protocol. Ultimately, the successful development and implementation of such a framework will be a crucial part of building national and regional accountability for sexual violence and gender-based crimes committed during conflict.

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