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International Sex Crimes as a Criminal Justice Theme

By Morten Bergsmo
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This publication distills the presentations and discussions at the expert seminar 'Thematic Investigation and Prosecution of International Sex Crimes' co-organized in Cape Town on 7-8 March 2011 by the FICHL, Yale University and the University of Cape Town, with support from the Norwegian Ministry of Foreign Affairs. Framed on the basis of the first publication on the topic[1], the FICHL has placed thematic prosecution on the agenda for wide discussion, seeking to assist criminal justice actors at the national but also international levels to contribute more effectively to accountability for international sex crimes. Emphasizing such crimes can make them a criminal justice theme, both as thematic investigation and prosecution and by constructing special institutional capacity in criminal justice for such crimes. Experts were invited to address both of these aspects of thematicity, first at the seminar summarized below, then in an anthology of papers that will be published in 2011. The FICHL is committed to the broadest possible dissemination of the ideas it incubates, both to serve practice and to broaden the discourse community. Hence this Brief will appear in English, French, Portuguese and Spanish.

Although some seminar experts focused on international jurisdictions, their ideas can be transposed to national criminal justice to which attention is now inevitably shifting. Each jurisdiction must address the issue of thematic prosecution of international sex crimes on its own terms. This FICHL project seeks to equip criminal justice actors with arguments for well-reasoned choices to enhance the legitimacy of their decisions.

Selection and prioritization in criminal justice for atrocities is primarily a practical challenge of applying limited resources prudently. But the examination of prosecutorial thematization is also partially theoretical. Such considerations of principle may become operational when they are anchored in tools like investigation plans and prioritization criteria. Jurisdictions should consider making it obligatory for international crimes investigators and prosecutors to justify why an investigation should start in a written investigation plan that places the alleged crimes in a broader context. This tool may be less susceptible to tokenism than public announcements of special institutional capacity to deal with international sex crimes.

Kai Ambos (University of Göttingen and Landgericht Göttingen) stated that thematic investigations and prosecutions in the sense of focused, but not exclusive prosecutions of sex crimes, are a useful tool to increase awareness and reinforce the prohibition of sexual violence. They may also help not only to emphasize the sexual violence, but also to clarify the broader context in which the respective crimes occurred. This type of crimes requires expert knowledge that may be made available by specialised units or particularly skilled advisers for reasons, *inter alia*, of evidentiary issues or the danger of the re-victimisation of primary victims.

Olympia Bekou (University of Nottingham) discussed the advantages and disadvantages of creating specialized institutional capacity for thematic prosecution of international sex crimes. Arguments in favour of specialized units include: long-term commitment; development of knowledge and expertise (training);

1 See M. Bergsmo, 'Tematisk etterforskning og straffeforfølgning av seksualisert vold i konflikt: er det en uproblematisk praksis?' ('Thematic investigation and prosecution of sexualized violence in conflict: is that an unproblematic practice?'), in H. Skjeie, I. Skjelsbæk and T.L. Tryggestad (eds.): *Kjønn, Krig, Konflikt* ('Gender, War, Conflict'), Pax, 2008, pp. 79-91.

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better resource allocation and mobilization; better international co-operation; visibility, accountability and outreach; consistency, efficiency, successful prosecutions, and increased capacity. The disadvantages include: added complexity; cost; unit-straddling; rarity of incidence; impact on personnel; impact on victims; de-skilling and marginal influence on case outcomes. The benefits of *ad hoc* arrangements include mobility and flexibility, lower costs, as well as the use of existing expertise; whereas the drawbacks mentioned were increased workload, lack of institutional memory, quality control and sustainability. Bekou advocated in favour of expert training and increasing capacity, regardless of whether this is part of a formal setting.

Margaret M. deGuzman (Temple University) addressed philosophical justifications for giving priority to the prosecution of sex crimes at international criminal courts. Such courts can generally prosecute only a small fraction of the serious crimes within their jurisdictions due to resource constraints. Selecting sex crimes for prosecution often requires leaving other serious crimes unpunished, including crimes that resulted in death. Some have questioned the appropriateness of such selection decisions. Empirical evidence from various national fora indicates that many people consider sex crimes less serious than crimes resulting in death. deGuzman examined the primary philosophical bases advanced for international prosecution to determine how they inform decisions whether to give priority to sex crimes. Retribution and deterrence support such selections at least some of the time, and expressivism and restorative justice provide an even stronger foundation for giving priority to sex crimes. An argument can be made that at least some perpetrators of sex crimes are more deserving of punishment than some perpetrators of crimes resulting in death. Prosecution of sex crimes may also provide greater deterrent benefits at least under some circumstances. Most importantly, claimed deGuzman, there is a significantly greater need for the international community to express condemnation of sex crimes than of killings, which are already considered serious violations of moral norms throughout the world. Restorative justice goals may be more achievable in the context of sex crimes than crimes involving killing because the immediate victims remain alive and thus potentially able to participate in and benefit from restorative processes.

Fabricio Guariglia (International Criminal Court, Office of the Prosecutor (ICC-OTP)) stated that the development of criteria and principle for case selection is an area where international criminal jurisdictions have shown progress since 2000. The ICC-OTP, mindful of the ICC's limitations in addressing massive victimization in multiple situations, has developed criteria for both situation and case selection, which essentially revolve around the notions of gravity and of the 'most responsible' perpetrators. The latter concept means that the OTP will focus its limited resources on those holding the highest positions within the systems and groups involved in the crimes. The consequences of these policies for the effective prosecution of sexual crimes are, at least, two: on the one hand, focusing on the persons holding positions of leadership allows for a comprehensive prosecution presenting a broader narrative as to the manner in which sexual crimes were committed; on the other, the further up we go in the chain of command, the further away we move from the individual victim's episode of sexual violence and its drama. To compensate, the ICC-OTP can resort to several avenues: ensuring a representative sample of crimes in its charging, so victims of uncharged crimes can relate to the victimization portrayed in the charges; utilizing efficiently the contextual evidence necessary to establish crimes against humanity, and using it as a mechanism to portray the true extent of victimization; optimizing the use of overview evidence, thereby placing the charged cases in a wider context; and, in the context of sentencing, leading victim impact evidence that adequately reflects the effects on individual victims of the sexual violence. In cases where perpetrators have been involved in particularly notorious sexual violence, the OTP may consider moving down the chain of command to avoid a perception of impunity for grave instances of victimization.

Valerie Oosterveld (University of Western Ontario) discussed whether thematic prosecutions focused specifically on sexual violence to the exclusion of other prohibited acts can adequately capture the context surrounding such crimes. Absent specific factual circumstances in which such prosecutions might be valuable, it may be best to pursue sexual violence charges within a range of other serious charges. This would allow for the proper contextualization of gendered harms in a given scenario involving international crimes. Sexual violence is usually part of a wider picture of victimization and often intersects with other seemingly gender-neutral crimes. As well, seemingly gender-neutral prohibited acts may have been carried out in gender-specific ways or may have gendered outcomes. By pursuing investigations and prosecutions in which sex-

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ual violence is explored within the context of other crimes, both the serious nature of the sexual violence and the potentially gendered nature of the other crimes can be highlighted and understood. Heightened gender competence is needed within investigation and prosecutorial offices, among counsel for victims and within judiciaries.

Neha Jain (Georgetown University) offered a pluralistic account of the international criminal trial that posits the importance of institutional and structural factors that may differ between tribunals and that have a bearing on the validity of thematic prosecutions, particularly investigations and prosecutions of international sex crimes. She argued that three such factors will be particularly influential in seeking justifications for the practice of thematic prosecutions. The first is the status of the court – whether it is a post-conflict tribunal or one which may intervene in situations of on-going conflict. This status will influence what aims the tribunal may legitimately strive towards – retributive, expressive, or deterrent. The second factor is whether an international court can be envisaged as mainly a tool of post-conflict peace building and the establishment of the rule of law. If it is indeed set up to serve this instrumentalist goal, it may be able to expressly pursue didactic goals and prioritize investigation and prosecution of sex crimes. The third factor is the extent of civil party involvement in the tribunal proceedings. If victim participation can be considered desirable either because it promotes restorative justice or assists in the determination of truth by the tribunal, the enhanced role of the victim will influence the extent to which sex crimes may be prioritized by the court.

Christopher Mahony (Oxford University) recalled that the Special Court for Sierra Leone, often cited as a 'new model' for post-conflict international criminal justice, has been lauded for trying 'persons bearing the greatest responsibility' for crimes during Sierra Leone's conflict. He revised narratives depicting neo-liberal intent on the part of the Court's designing and cooperating states. Examining empirical data in this case illuminates state behavior seeking to shape case selection for real or perceived interests, including entrenching and weakening regimes in the region. He asked whether pressure to prioritize particular crimes would provide tribunal designers one more instrument to deploy where politically amenable. Placing the creation of the Special Court in historical context illuminates geopolitical objectives outside the parameters of orthodox transitional justice narratives which highlight the dangers of selective prosecution. Mahony warned against assisting duplicitous actors who could selectively preference thematic prosecution of sex crimes against the grain of emerging case selection norms. Homogenizing case selection criteria rather than diversifying it without broad consensus mitigates the politicization risk.

Benson Chinedu Olugbuo (University of Cape Town) explained how victims of international sex crimes will always tend to demand justice for perpetrators and a prioritization of the investigation and prosecution of these crimes at both national and international levels. While national judicial institutions may lack the capacity and personnel to carry out complex investigations, reliance on international justice mechanisms may create impunity gaps. The challenge is to develop synergies of co-operation under the principle of positive complementarity to ensure that states can hold accountable those who bear responsibility for international sex crimes.

Susanna Greijer (European University Institute) spoke of thematic prosecutions of the crimes of recruiting and using children in armed conflict. The two first ICC trials both contain charges for these crimes and the OTP has, in its prosecutorial strategy, manifested a particular interest in crimes against children and sex/gender crimes. Nevertheless, it is important to identify the reasons behind thematic prosecutions of such crimes, as this approach may imply that a smaller amount of resources is dedicated to the prosecution of other crimes. Greijer addressed the questions whether prosecution of crimes against children is part of a deliberate ICC prosecutorial strategy; whether the underlying reasons for choosing to prosecute thematically are the same regardless of whether the focus is on sex crimes or on child recruitment; and whether there are particular justifications for thematic prosecution of crimes against children. She pointed out that the choice to prosecute exclusively for recruitment and use of children in armed conflict risks not showing the whole picture of children's involvement in war, as they are often victims of other crimes as well, for example sex crimes.

Alejandra Azuero Quijano (Harvard Law School) explored how scientific epistemologies of sex difference might provide answers to the following questions: do scientific theories of sex difference serve to explain the channeling of political and economic resources to the investigation of crimes traditionally imagined to be committed by men against women? How is thematic

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investigation participating in the legal hierarchization of crimes and how is scientific knowledge related to this phenomenon? Drawing from recent critical literature on the history of science, she presented a two-part argument. First, the emergence of genomics as the new descriptive mode of sex difference has provided productive metaphors that justify the need for sex-specific research agendas within laboratories around the world. In other words, the mapping of DNA sequences has given the scientific world new grounds to prioritize research agendas focused on issues associated with either one sex or the other. Secondly, thematic criminal investigation of sex crimes can be read as an example of sex-specific research agendas carried out in *legal* laboratories.

Flor de Maria Valdez (Organization of American States) analyzed relevant decisions of the Inter-American Court of Human Rights, while **Paloma Soria Montañez** (Women's Link Worldwide) highlighted the role of civil society in promoting the prosecution of international sex crimes in national courts. **M. Sanaul Huq** (International Crimes Tribunal, Bangladesh) described the importance given to international sex crimes in his Tribunal. **Herminia T. Angeles** (Ministry of Justice, the Philippines) stated that the thematic investigation and prosecution of sex crimes is a welcome new paradigm that should seriously be considered to ensure that justice is served.

Nobuo Hayashi (Peace Research Institute Oslo, PRIO) offered several reflections at the end of the seminar. First, prioritization and selectivity in core international crimes prosecutions may be inevitable. Does it follow however that thematicity, whether to the exclusion of other serious crimes or as a matter of emphasis, is also inevitable, let alone justifiable, as a basis for such prioritization and selectivity? Does it follow further that thematic focus on international sex crimes is justifiable? This FICHL project seeks to identify justifications for such thematic focus. Candidates were proposed during the seminar, such as expressivism, gravity, retribution, restoration and contextualization. They are relevant, yet tentative.

Second, the seminar maintained its victim-focus when examining legitimacy for thematic prosecution of international sex crimes. It also addressed perspectives of prosecutors afflicted by resource constraints, NGOs advocating community empowerment and judges potentially in need of specialist input. There was less focus on the views of accused persons, the international community and epistemic communities such as that of international criminal law experts.

Third, one reason for giving thematic priority to international sex crimes is arguably the victims' emerging right to the truth. If so, what would be the implications of thematicity for victims whose crimes are excluded or de-emphasized as a result? Are international sex crimes qualitatively different from other, otherwise comparably serious international crimes? It would appear that understanding the victimhood of international sex crimes will benefit from further comparison *vis-à-vis* that of other international crimes.

Fourth, the highly political environment in which institutions of international criminal justice find themselves might mean that it would be unwise for them to depart from a well-established, legally secure set of prioritization criteria and a widely accepted priority among crimes. On this view, altering them in favour of international sex crimes would risk opening the entire prosecutorial process to manipulation by third-party entities. It is simply a fact of life, however, that administering criminal justice is susceptible to politics – and *vice versa*. And this is as true, if not truer, of international criminal justice. Taking refuge in the rigidity and insularity of law by declining to embrace new thematicity is perhaps not what we need here. The lesson may rather be that those courts and tribunals which choose to pursue thematic prosecution should be more astute in navigating criminal justice through the treacherous waters of international politics.

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