

TOAEP | Torkel Opsahl  
Academic EPublisher

# Thematic Prosecution of International Sex Crimes

Morten Bergsmo (editor)

Second Edition

### **E-Offprint:**

Kai Ambos, “Thematic Investigations and Prosecution of International Sex Crimes: Some Critical Comments from a Theoretical and Comparative Perspective”, in Morten Bergsmo (editor), *Thematic Prosecution of International Sex Crimes*, Second Edition, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-025-2 (print) and 978-82-8348-024-5 (e-book)). This publication was published on 1 June 2018. The First Edition of the anthology was published on 25 April 2012.

TOAEP publications may be openly accessed and downloaded through the web site <https://www.toaep.org> which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors.

This e-offprint is also available in the ICC Legal Tools Database under PURL <https://www.legal-tools.org/doc/8xigyv/>.

© Torkel Opsahl Academic EPublisher. All rights are reserved. This e-offprint and publication should not be disseminated without its covers or with additional covers.

---

# Thematic Investigations and Prosecution of International Sex Crimes: Some Critical Comments from a Theoretical and Comparative Perspective

Kai Ambos\*

The increasing awareness with regard to sexual violence in situations of armed conflict brings up several challenges and questions on best investigative practices. Thematic investigations may offer a suitable approach, but they have to be refined taking into account theoretical considerations and comparative experiences. With this aim in mind, the present chapter proceeds in a threefold manner. In the introduction, three points are set out regarding what we know for sure amounts to sex crimes. In the second part, the possibly still existing disproportion between the number of sex crimes and investigations is addressed and explanations attempted. In the third and last part, the concept of thematic investigations/prosecutions is defined and justifications for a so defined concept are presented.

## 13.1. Introduction: The Existing State of Our Knowledge of Sex Crimes and Their Prosecution (What We Know for Sure)

There is no longer an issue of definition. While at the beginning of their work the *ad hoc* tribunals were confronted with an absence of a definition of sexual violence under international law,<sup>1</sup> this gap was later remedied.<sup>2</sup>

---

\* **Kai Ambos** is Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen. He is also judge at the District Court in Göttingen. I am grateful to my doctoral student Assessorin Sabine Klein for her most valuable assistance and to Ousman Njikam, LL.M. and doctoral candidate GAU for language revision.

<sup>1</sup> International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgment, ICTR-96-4-T, 2 September 1998, para. 686 ('*Akayesu* Trial Judgment') (<http://www.legal-tools.org/doc/b8d7bd/>):

In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribu-

In any case, the prosecution of sex crimes did not fail because of the absence of a legal definition but for procedural reasons. For example, it could not be proven that the crimes had happened in the first place, or that the accused was involved.<sup>3</sup>

Also, a second problem of a procedural nature, namely the systematic underinvestigation and underprosecution of sex crimes, although certainly a fact in the (missing) history of sex crimes prosecutions,<sup>4</sup> seems to disappear slowly but steadily, with the increasing awareness and media

---

nal must define rape, as there is no commonly accepted definition of the term in international law.

International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, IT-95-17/1-T, 10 December 1998, para. 175 ('*Furundžija* Trial Judgment') (<http://www.legal-tools.org/doc/e6081b/>): "No definition of rape can be found in international law." See also Dianne Luping, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court", in *American University Journal of Gender, Social Policy & the Law*, 2009, vol. 17, no. 2, p. 448.

<sup>2</sup> See my chapter on the criminalisation of sex crimes, "Sexual Offences in International Criminal Law, with a Special Focus on the Rome Statute of the International Criminal Court", in Morten Bergsmo, Alf Butenschøn Skre and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes*, Torkel Opsahl Academic EPublisher, Oslo, 2012, pp. 143–74.

<sup>3</sup> Cf. Daniel J. Franklin, "Failed Rape Prosecutions at the International Criminal Tribunal for Rwanda", in *Georgetown Journal of Gender and the Law*, 2008, vol. 9, pp. 181–208.

<sup>4</sup> See, for example, Tamara F. Lawson, "A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law", in *Southern Illinois University Law Journal*, 2009, vol. 33, pp. 204 ff., arguing that sexual violence was routinely ignored as a crime; it was considered an inevitable consequence of the nature of war and the sexual urges or needs of men; its prosecution before the war crimes tribunals of Nuremberg and Tokyo was largely neglected. See also the statement of Fatou Bensouda, ICC Deputy Prosecutor, who, according to Luping, 2009, p. 433, see *supra* note 1, said: "It was high time that such crimes cease to be regarded as 'inevitable-by-products' of war and receive the serious attention that they deserve". See also Luping, *ibid.*, pp. 436, quoting, *inter alia*, Kelly D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, Kluwer Law International, The Hague 1997, p. 19:

[s]exual assault has been increasingly outlawed through the years, but this prohibition has rarely been enforced. Consequently, rape and other forms of sexual assault have thrived in wartime, progressing from a perceived incidental act of the conqueror, to a reward of the victor, to a discernable mighty weapon of war.

coverage of sex crimes.<sup>5</sup> Today, it is widely recognised that there is an urgent need to address sexual violence in armed conflict and to combat the policy of using sexual violence as a “weapon of war”. An increase in prosecutions and trials dealing with sex crimes has followed suit.<sup>6</sup> However, this does not mean that everything is fine. An understanding of the extent and meaning of sexual violence still needs to be further developed.<sup>7</sup> There may still be a disproportion between the number of prosecutions

---

<sup>5</sup> See, for example, Lawson, 2009, p. 205, *supra* note 4: Modern “on-the-scene” media coverage of the Yugoslav conflict exposed the crimes as they were happening causing public outrage and changing the position towards sex crimes.

<sup>6</sup> See as the first relevant judgment, *Akayesu* Trial Judgment, para. 731, *supra* note 1:

Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [inflicting] harm on the victim as he or she suffers both bodily and mental harm. [...] These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.

See also Susana SáCouto and Katherine Cleary, “The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the ICC”, in *American University Journal of Gender, Social Policy & the Law*, 2009, vol. 17, no. 2, pp. 348 ff., arguing that since the creation of the *ad hoc* Tribunals there have been significant improvements in the prosecution of such crimes; Lawson, 2009, pp. 208 ff., see *supra* note 4, referring to *Akayesu* as the first convicted by an international court for sexual violence in a civil war. For a summary of the development of legal sanctions, see Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, “Criminal Justice for Gendered Violence and Beyond”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, pp. 432 ff. Patricia M. Wald, “Women on International Courts: Some Lessons Learned”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, pp. 401 ff. still complains about significant crimes against women even in peacetime:

I continue to be perplexed by the irony that crimes against women and children committed in wartime – rape, cruel treatment, sexual slavery, and forced marriages – go unrecognised and accepted as part of normal life in peacetime in many parts of the world.

For a critique of the International Criminal Court’s (“ICC”) refusal to accept cumulative charges for sexual crimes in *Bemba Gombo*, see Laurie Green, “First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, pp. 529 ff., claiming sexual crimes at the ICC being “still under-investigated, under-prosecuted and remain the least condemned crime”; Solange Mouthaan, “The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 775.

<sup>7</sup> Cf. for a good critique pointing to open questions despite legal reforms and existing accountability, Ní Aoláin *et al.*, 2011, p. 428, see *supra* note 6.

and the actual extent, severity and number of sex crimes. We shall return to this question below.

Criminal justice, whether international or not, is always and necessarily selective.<sup>8</sup> In the case of the international criminal justice system, this selectivity is intrinsic, since the jurisdiction of international criminal tribunals is always limited in various ways (*ratione materiae*, *ratione temporis*, *ratione personae*). Limitations also result from the specific goals of international criminal justice, the necessary discretion of the international prosecutors (who may formulate ‘streamlined’ indictments, or none at all, in a given situation), and limited personal and financial resources.<sup>9</sup> All these factors make it necessary to develop rational criteria for the prioritisation and selection of cases.<sup>10</sup>

---

<sup>8</sup> For a good definition see, for example, Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge, 1969, p. 163:

When an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be clearly justified, the result is power of selective enforcement [...]. Selective enforcement may also mean selection of the law that will be enforced; an officer may enforce one statute fully, never enforce another and pick and choose in enforcing a third.

On the necessary selectivity, Kai Ambos, “Comparative Summary of the National Reports”, in Louise Arbour *et al.* (eds.), *The Prosecutor of a Permanent International Criminal Court*, Max-Planck Institute for Foreign and International Criminal Law, Freiburg, 2000, p. 525: “[e]ven if a strict mandatory prosecution is called for there are mechanisms of factual discretion since no criminal justice system has nowadays the capacity to prosecute all offences no matter how serious they are”. On the international criminal justice see Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Regime*, Cambridge University Press, Cambridge, 2005, p. 192.

<sup>9</sup> See, for example, Louise Arbour, “Stefan A. Riesenfeld Award Lecture – Crimes Against Women under International Law”, in *Berkeley Journal of International Law*, 2003, vol. 21, no. 2, p. 203: “The offenses in the former Yugoslavia and Rwanda that fell within our jurisdiction were so numerous and deserving of prosecution that we had to be very strict about how we prioritised cases. In general terms, we determined that we had to concentrate on the most serious offenses that could bring us to the highest possible echelons of command”.

<sup>10</sup> See Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2009 ([http://www.fichl.org/fileadmin/fichl/documents/FICHL\\_4\\_Second\\_Edition\\_web.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_4_Second_Edition_web.pdf)); see also Kai Ambos (ed.), *Selección y priorización como estrategia de persecución en los casos de crímenes internacionales*, Deutsche Gesellschaft für Internationale Zusammenarbeit (‘GIZ’) proyecto ProFis, Bogotá, 2011.

## **13.2. Uncharted Territory: Too Little or Disproportionate Investigation/Prosecution? Possible Explanations**

### **13.2.1. Is There Still a Disproportion between the Number of Sex Crimes and the Number of Investigations/Prosecutions?**

The disproportionately low level of international prosecutions of sex crimes has been bewailed.<sup>11</sup> Empirical assessments of this issue are not known and, to be sure, would come along with obvious methodological problems. As for the national level, an examination of crime statistics as well as studies on the estimated numbers of unrecorded cases and their relation to prosecutorial statistics may be a helpful approach, although the outcome will not be certain and will probably differ significantly depending on the country, the particular circumstances of each country (for example, its ability to record prosecutorial statistics), and the respective data assessment practices. As for the international level, an analysis of crimes prosecuted by international tribunals appears possible,<sup>12</sup> but the gathering and assessment of data regarding (gender) crimes in the respective conflict situations proves to be difficult<sup>13</sup> and differs from situation to situation.<sup>14</sup> Moreover, it should be noted that the recognition of large-scale sexual crimes in conflict situations is of recent date,<sup>15</sup> and we are only beginning to understand the impact of such crimes on the conflicts and the persons affected. This entails an uncertainty, which may also influence empirical assessment.

---

<sup>11</sup> Ní Aoláin *et al.*, 2011, pp. 439–40, see *supra* note 6, with further references.

<sup>12</sup> For example, at the ICTY, as of mid-2011, 78 of the 161 accused (48.4 per cent) had been charged with acts of sexual violence. Twenty-eight of them have been convicted, 13 indictments were withdrawn or the accused deceased before the trial, 11 accused were acquitted of the sexual violence charges. Nineteen of the proceedings are still ongoing, six cases have been referred to a national jurisdiction, and one accused is still a fugitive.

<sup>13</sup> Circumstances in conflict situations often entail that atrocities remain unrecorded – given the general reluctance to report widespread crimes to the authorities and the death of possible witnesses.

<sup>14</sup> The problems of date on sexual violence became apparent in different studies on sexual violence in the Democratic Republic of Congo ('DRC'): whereas an UN report estimated the number of rapes as about 16.000 in one year, another study subsequently concluded that the number was about 25 times higher (400,000). Cf. BBC News Africa, "DR Congo: 48 Rapes Every Hour, US Study Finds", 12 May 2011.

<sup>15</sup> Ambos, 2011, p. 145, fn. 6 and 7 (with text), see *supra* note 2.

Apart from the question of proportionality between the number of crimes and the number of prosecutions, one may need to further explore whether the existing prosecutions properly reflect the harm caused in the respective situations of violence. Thus, it has been claimed that violence against women is accompanied by other significant harms not captured by sex crimes prosecutions.<sup>16</sup> Another explanation of disproportion could be the fact that the prosecution of sexual violence is not part and parcel of the ordinary investigatory activities of the international tribunals, but presupposes significant external lobbying and advocacy.<sup>17</sup>

### **13.2.2. Factors Explaining Investigative Disproportions**

If, *arguendo*, we assume that the discussed disproportion exists, the question arises as to how it can be explained. One explanation refers to the above-mentioned selectivity of international criminal justice. Does it not affect the investigation of sex crimes too? Indeed, streamlined indictments necessarily entail the leaving out of potential charges for which enough evidence may exist to satisfy the means of proof, albeit not as much as for other potential charges that become part of the indictment.<sup>18</sup> Yet, more importantly, the disproportion can be explained by factors that are peculiar to sex crimes.

#### **13.2.2.1. Sex Crimes: Difficulties of Proof**

First, there is the problem that sex crimes are particularly difficult to prove. As forensic evidence will rarely be available, the prosecution's case depends heavily on witness testimony.<sup>19</sup> Although the international

---

<sup>16</sup> Ní Aoláin *et al.*, 2011, pp. 426, 428 ff., 439–40, see *supra* note 6, mentioning “emotional harms, harms to the home, harms to children and to those with whom women are intimately connected” (p. 426); see also Jaya Ramji-Nogales, “Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, pp. 463 ff., pointing to “private and opportunistic harms” (p. 463) and to a lack of accountability in connection with forced migrations.

<sup>17</sup> Ní Aoláin *et al.*, 2011, pp. 437 ff., see *supra* note 6, referring to the ICTR *Akayesu* case and the ICC *Lubanga* proceedings.

<sup>18</sup> Critique with regard to sex crimes, see Suzan M. Pritchett, “Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Enquiry into Charges for Gender-based Violence at the International Criminal Court”, in *Transnational Law & Contemporary Problems*, 2008, vol. 17, no. 1, pp. 292–93.

<sup>19</sup> Cf. ICTY, Office of the Prosecutor, “Reliving the Past: The Challenges of Testifying”.

tribunals' procedural rules provide for some flexibility as to the burden of evidence,<sup>20</sup> it remains highly difficult to obtain reliable witness testimony. There are either no direct eyewitnesses because victims are killed after the act, or potential witnesses are killed before or after the act.<sup>21</sup> It is also possible that the sexual violence occurs in private places and is informed by discriminatory gender relations.<sup>22</sup> Existing witnesses are reluctant to testify for reasons of traumatisation, fear and/or mistrust.<sup>23</sup> A related problem is that sex crimes are not easily identifiable since "these crimes inflict physical and psychological wounds, which women can conceal to avoid further emotional anguish, ostracism, and retaliation from perpetrators who may live nearby".<sup>24</sup> As a result, investigation and prosecution depends on the reliance on hearsay and circumstantial evidence.

Apart from these issues relating to the means of proof, it has also been criticised that the 'standard of proof' required in cases of sexual violence is higher than in other cases.<sup>25</sup> While in ordinary cases, so it is ar-

---

<sup>20</sup> ICC, Rules of Procedure and Evidence ('RPE'), adopted 9 September 2002, ICC-ASP/1/3 (<http://www.legal-tools.org/doc/8bcf6f/>), provides that "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence". See also ICTY, Rules of Procedure and Evidence, adopted 11 February 1994, as amended 8 December 2010, IT/32/Rev. 45, Rule 96 (<http://www.legal-tools.org/doc/950cb6/>), and ICTR, Rules of Procedure and Evidence, adopted 29 June 1995, as amended 1 October 2009, Rule 96 (<http://www.legal-tools.org/doc/c6a7c6/>). Both provisions contain evidential eases (for example, a corroboration of the victim's testimony is not required). ICTY Rule 96 was the first rule of this kind at an international tribunal. Therefore, Patricia V. Sellers, "The 'Appeal' of Sexual Violence: The *Akayesu/Gacumbitsi* Cases", in Elize Delpont (ed.), *Gender-based Violence in Africa: Perspectives from the Continent*, Centre for Human Rights, University of Pretoria, 2009, p. 306, describes it as "groundbreaking". On evidentiary rules, see also Luping, 2009, pp. 482–83, *supra* note 1.

<sup>21</sup> Franklin, 2008, pp. 209 ff., see *supra* note 3.

<sup>22</sup> Pritchett, 2008, p. 293, see *supra* note 18.

<sup>23</sup> As described by the ICTY, Office of the Prosecutor, see *supra* note 19:

Victims of sexual violence face various social, psychological and sometimes even physical impediments to coming forward and testifying. Some of the potential witnesses feel that their security may be jeopardised should they come to testify. In addition, identifying oneself as a victim of sexual violence may lead to stigmatisation within one's society, making return to normal life even more difficult.

<sup>24</sup> Beth van Schaack, "Obstacles on the Road to Gender Justice", in *American University Journal of Gender, Social Policy & the Law*, 2009, vol. 17, no. 2, p. 369.

<sup>25</sup> SáCouto and Cleary, 2009, pp. 353 ff., see *supra* note 6, with further references.

gued, circumstantial evidence to prove a certain mode of liability is, as a rule, considered to be sufficient, the case law dealing with sexual violence is more reluctant as regards a specific connection between an accused's conduct and acts of sexual violence.<sup>26</sup>

### 13.2.2.2. Technical Pitfalls

Even if sex crimes cases are investigated and prosecuted, this may, given the complexity of the surrounding factual, cultural and other circumstances, not be done properly. A particularly challenging problem is the treatment of victim witnesses, that is, witnesses who, at the same time, have been the victims of sexual violence. These often-traumatised victims may find some relief after participating in the trial proceedings through testify-

---

<sup>26</sup> *Ibid.*, who point to several decisions where more evidence has been required to prove sex crimes as for other crimes committed by the same perpetrator in the same context. Distinguishing between different modes of liability, SáCouto and Cleary are referring to ICTY *Prosecutor v. Stanislav Galić*, Trial Chamber, Judgment, IT-98-29-T, 5 December 2003, paras. 729–40 (<http://www.legal-tools.org/doc/eb6006/>); ICTY, *Prosecutor v. Stanislav Galić*, Appeals Chamber, Judgment, IT-98-29-A, 30 November 2006, paras. 177, 178, 389 (<http://www.legal-tools.org/doc/c81a32/>); ICTR, *Prosecutor v. Juvénal Kajelijeli*, Trial Chamber, Judgment and Sentence, ICTR-98-44A-T, 1 December 2003, para. 681, 683, 780, 923 ('Kajelijeli Trial Judgment') (<http://www.legal-tools.org/doc/afa827/>), where an order to commit rapes has not been found; while it was proven that the accused knew of and authorised sexual assaults in general, evidence for a specific order was missing; ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeals Chamber, Judgment, IT-95-14/2-A, 17 December 2004, para. 27 (on instigation) (<http://www.legal-tools.org/doc/738211/>); ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber, Judgment, IT-99-36-T, 1 September 2004, paras. 577, 1054 (<http://www.legal-tools.org/doc/4c3228/>); ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber, Judgment, ICTR-2001-64-A, 7 July 2006, paras. 133, 135, 137, 138 (<http://www.legal-tools.org/doc/aa51a3/>), dismissing instigation due to a lack of evidence that the accused's activities [instigation to rape via megaphone] substantially contributed to the commission of rapes. SáCouto and Cleary, 2009, pp. 358 ff., see *supra* note 6, are concluding on the basis of this case law:

In sum, the jurisprudence of the *ad hoc* tribunals suggests that, in cases of sexual violence and gender-based crimes, international tribunals may be reluctant to draw meaningful inferences from circumstantial evidence and appear to prefer direct or more specific evidence as to knowledge or causality, even when such evidence is not required as a matter of law. Thus, without a thorough investigation, significant expertise, and intensive analysis of evidence relating to these crimes-including the broader context which makes clear that the sexual violence is an integral part of the organized war effort rather than mere 'incidental' or 'opportunistic' incidents – these cases are unlikely to be pursued or successfully prosecuted.

ing.<sup>27</sup> Yet, they normally find the act of giving testimony particularly challenging, given their personal situation as a victim witness and the general sensitivity surrounding issues of sexual violence, for example, cultural taboos with regard to the precise description of the sexual acts. In addition, cross-examination may, for these witnesses, be particularly stressful.<sup>28</sup> Thus, the whole exercise of testifying may lead to a secondary victimisation (re-victimisation) of the primary victims, it may reinforce “the invisibility of the crimes and the invisibility of the mainly female victims or survivors of the sexual violence”.<sup>29</sup> The latter has also been recognised by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) in the *Tadić* case:

[T]raditional court practice and procedure has been known to exacerbate the victim’s ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare the experience to being raped a second time.<sup>30</sup>

From the prosecution’s perspective, the inappropriate handling of sexual violence cases may deter potential witnesses from testifying<sup>31</sup> or may have unpredictable implications on the behaviour of a witness in

---

<sup>27</sup> Hereto Wendy Lobwein, former witness support officer at the ICTY: “For some [victims of sexual violence who testified at the ICTY], I’ve letters, even from their medical practitioners saying it was a ‘groundbreaking moment in their life’ and that their psychological and physical health has improved with their testimony”; cited according to ICTY, Office of the Prosecutor, see *supra* note 19.

<sup>28</sup> On encumbrances and risks of victim witnesses of sexual violence (danger of life, distressful memories, lacking information and contact, gaps in terms of time, humiliations while testifying – especially in cross-examination, lacking feedback after trial and so on.) see Karin Griese, *Folgen sexueller Kriegsgewalt*, 2nd ed., Mabuse-Verlag, Frankfurt, 2006, pp. 417 ff.

<sup>29</sup> Sellers, 2009, see *supra* note 20. Similar also Karen Engle and Annelies Lottmann, “The Force of Shame”, in Clare McGlynn and Vanessa E. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives*, Routledge, London, 2010, pp. 81–82 with further references. For a thorough assessment of secondary victimisation, see Stefanie Bock, *Das Opfer vor dem Internationalen Strafgerichtshof*, Duncker and Humblot, Berlin, 2010, pp. 70 ff. (general), 403 ff. (on protection against secondary victimisation), and pp. 422 ff. (on sexual crimes).

<sup>30</sup> ICTY, *Prosecutor v. Duško Tadić*, Trial Chamber, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, 10 August 1995, para. 46 (<http://www.legal-tools.org/doc/ff53bf/>).

<sup>31</sup> Similarly linking ‘procedural safeguards’ for victims and witnesses to their likeliness to report or testify about a crime, Mouthaan, 2011, pp. 788–98, see *supra* note 6.

court. On a more general level, it has been argued that, without a specific unit or body handling gender issues within the Office of the Prosecutor, gender related issues may not be represented properly during the trial and appeals proceedings.<sup>32</sup>

### 13.2.2.3. The ‘Strong Case Problem’

This all leads, in turn, to something that we could call the ‘satisfactory evidence’ or ‘strong case problem’. The argumentative syllogism goes as follows:

1. The provability of charges is the decisive factor for a prosecutor in favour or against prosecution.<sup>33</sup>
2. Sex crimes are generally considered more difficult to prove.
3. Thus, they tend to be avoided and other charges relating to concurrent cases, which are easier to prove, are selected.<sup>34</sup>

---

<sup>32</sup> Sellers, 2009, pp. 14 ff., see *supra* note 20, speaks of “gender injustice” in relation to a “mis-handling of sexual assaults” at the ICTR in times where no legal adviser on gender within the Office of the Prosecutor has been appointed. As an example, she refers to Kajelijeli Trial Judgment, see *supra* note 26. Cf. Doris Buss, “Learning our Lessons? The Rwanda Tribunal Record on Prosecuting Rape”, in Clare McGlynn and Vanessa E. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives*, Routledge, London, 2010, pp. 61 ff., especially p. 64, arguing that the ICTR failed to hold promises made with the Akayesu Judgment and linking this, partly, to the decision to discharge gender advisers. Buss, *ibid.*, p. 64, furthermore draws attention to the case of ICTR, *Prosecutor v. Emmanuel Bagambiki et al.*, Trial Chamber, Judgment, ICTR-99-46-T, 25 February 2004 (<http://www.legal-tools.org/doc/60036f/>), where the Office of the Prosecutor did not pursue charges of sexual violence although evidence on such crimes was available, due to “personnel problems”.

<sup>33</sup> Lawson, 2009, p. 187, see *supra* note 4: “Prosecutors are typically motivated only to pursue cases they can win, and arguably those are the cases which contain the most legitimate evidence of guilt. Additionally, prosecutors are ethically bound to only file a case when there is sufficient admissible evidence to support the charge”. Against this tendency the American Bar Association’s Standards for Criminal Justice: The Prosecution Function 3–3.9(e), 3rd ed., 1993, cited in Lawson, *ibid.*:

In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

<sup>34</sup> See also ICC, Office of the Prosecutor, Paper on Some Policy Issues before the Office of the Prosecutor: Annex: Referrals and Communications, 5 September 2003, p. 3 (<http://www.legal-tools.org/doc/f53870/>): “the Prosecutor has to take into account [...] the likelihood of any effective investigation being possible”. With regard to sex crimes, Lawson,

As Binaifer Nowrojee puts it: “[i]n a bid to comply with pressure to speed up the trials, prosecuting teams were encouraged to cut unnecessary charges. Sexual violence charges were seen to be in that category”.<sup>35</sup>

### 13.3. Thematic Investigations and Prosecution

The question remains as to whether (and if so, to what extent) the issues presented above can be addressed by ‘thematic’ investigations and prosecutions. First, thematic prosecution must be defined and examples given, before the possible justifications are discussed.

#### 13.3.1. Definition and Examples

According to the convenors of our seminar, thematic prosecutions are to be understood as:

[P]rosecutorial prioritization [...] of [...] sex crimes over other crimes [...] sometimes [...] necessary in order to focus adequate resources to build complex and time-consuming cases when there is a large backlog of cases.<sup>36</sup>

This is in contrast to the standard approach, according to which the totality of crimes – including possible sex crimes – is to be considered first. Only after that has been done, can or should one proceed to prioritise those crimes that are most serious overall. On the other hand, so the seminar convenors continue, thematic prosecution:

[...] entails that these crimes are singled out and prioritized for investigation and prosecution, even if that means that there may not be enough resources to investigate murders or other serious crimes that do not involve sexual violence.<sup>37</sup>

It is my understanding that thematic investigations and prosecutions cannot operate at the expense of other important investigations. The con-

---

2009, p. 193, see *supra* note 4, on the difficulty in the setting up ‘the strong case’ and resulting in urge to avoid pursuing less ‘winnable’ sexual violence cases.

<sup>35</sup> Binaifer Nowrojee, ‘*Your Justice Is Too Slow: Will the ICTR Fail Rwanda’s Rape Victims?*’, United Nations Research Institute for Social Development, Occasional Paper 10, November 2005, p. 10.

<sup>36</sup> Forum for International and Humanitarian Law, Seminar on “Thematic Investigation and Prosecution of International Sex Crimes”, Concept and Programme, Cape Town, 7–8 March 2011.

<sup>37</sup> *Ibid.*

cept can only mean that a given criminal justice system, international or national, puts a special emphasis on certain areas of criminality to increase the efficiency of investigations and prosecutions in these areas. Understood in this way, thematic prosecutions are nothing unique or new to national criminal justice systems. In fact, they are quite common in established special fields of criminal law and criminality, for example, in economic criminal law (including fraud offences), corruption, drugs law and tax law. Many national jurisdictions also consider the prosecution of international crimes on the basis of international criminal law as a special field of criminal law. Thus, national systems set up specialised units or branches of their national prosecution authorities to deal with these offences.<sup>38</sup> On a supranational level, European Union law provides for such units.<sup>39</sup>

Following this practice, it seems perfectly possible to also set up special units for the prosecution of sexual violence. Such units already exist in some jurisdictions or sub-jurisdictions, where sexual violence is recognised as a major social problem and the political will and resources to set up a specialised infrastructure exists.<sup>40</sup> In fact, such a unit exists on the international level within the ICC Office of the Prosecutor (the Gender

---

<sup>38</sup> For example, European countries like Belgium, Denmark, Germany, Sweden, the Netherlands, Norway and the United Kingdom; moreover, Canada and the United States. See the overview in Jürgen Schurr, “Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units”, in Redress and International Federation for Human Rights, December 2010 (overview list on p. 31). As an example of one of the ICC situation countries, Uganda is currently establishing an International Crimes Division at its High Court with corresponding units within the prosecution and police authorities; see the Ugandan Judiciary’s website. Schurr, *ibid.*, p. 18, even doubts whether national jurisdictional bodies could, at all, be efficiently able to prosecute international crimes if they are not equipped with special arrangements; see also Olympia Bekou’s chapter on specialised units in this volume, Chapter 11.

<sup>39</sup> Thus, the Council of the European Union, with Decision 2002/494/JHA, 13 June 2002, set up a European network of contact points in respect of international crimes to facilitate cooperation between the competent international authorities (Article 1). Then, with Decision 2003/335/JHA, 8 May 2003, it called its members to “consider the need to set up or designate specialist units within the competent law enforcement authorities with particular responsibility for investigating and, as appropriate, prosecuting the crimes in question”. See Article 4 (2003) of the Council Decision.

<sup>40</sup> This is, for example, the case in Germany. On special police and judicial divisions to deal with sexual and gender-based violence cases in Liberia, see Laura Golakeh, “Liberia Becoming Leader in Eradicating Sexual and Gender-Based Violence”, in *Global Press Institute*, 14 June 2011.

and Children's Unit, 'GCU')<sup>41</sup> and within other international/mixed tribunals as well.<sup>42</sup> Such specialised units within the Office of the Prosecutor are to be distinguished from specialised victims support units, which belong, in organisational terms, to the registries of the international tribunals.<sup>43</sup> These units have, rather, a supporting function and are in charge of

---

<sup>41</sup> Cf. Luping, 2009, pp. 434, 489, see *supra* note 1. Moreover, Luis Moreno-Ocampo appointed in November 2008, to counter mounting criticism; Sellers, 2009, p. 330, fn. 81, see *supra* note 20; Catharine MacKinnon as special gender adviser, see ICC "ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes", Press Release, 26 November 2008 (<http://www.legal-tools.org/doc/866eda/>). Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, Article 42(9) ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>) provides that the prosecutor "shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children".

<sup>42</sup> At the ICTY, already as early as October 1994, Patricia Viseur Sellers had been appointed as a legal adviser for gender at the Office of the Prosecutor; cf. Sellers, 2009, p. 307, see *supra* note 20. According to Michelle Jarvis, senior legal adviser to the prosecutor, e-mail of 13 September 2011 to the author, a "sexual assault and rape investigation team" has been created in the Office of the Prosecutor in 1995, and in the subsequent years, specific female investigators were hired. Currently, a Prosecuting Sexual Violence Working Group within the Office of the Prosecutor has the mandate to strengthen the Office's work on gender issues, and a senior legal adviser with special knowledge on gender issues has been appointed. Sellers has subsequently (1995–1999) also been appointed as a legal adviser for gender at the ICTR's Office of the Prosecutor where, after her departure, there were two gender advisers (Sellers, *ibid.*, p. 307). Nevertheless, since the millennium's turn the ICTR Office of the Prosecutor was no longer equipped with such an adviser (Sellers, *ibid.*, pp. 314–15, criticising prosecution's mishandling of sexual violence case but also seeing improvement in the recent jurisprudence). At the Special Court for Sierra Leone ('SCSL'), the chief prosecutor, David Crane, "incorporated policies and modalities to investigations of crimes committed against women", but did not appoint an adviser for gender; see Sellers, *ibid.*, p. 316. At the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), no special units for gender crimes are in place (Sellers, *ibid.*, p. 316), but when in 2009 a request for the investigation of gender related crimes were brought before the ECCC, those granted these applications stating:

With respect to the request that gender trained female investigators and interpreters be assigned to conduct interviews relating to forced marriage allegations, the Co-Investigating Judges affirm the need for gender sensitive techniques in cases concerning sexual and gender-based violence testimony. Although the current staffing of OCIJ does not include female investigators, all efforts are being made to ensure best practices are fully implemented.

See ECCC, Office of the Co-Investigating Judges, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECC-OCIJ, D268/2, 18 December 2009, para. 15.

<sup>43</sup> For example, at the ICC, a Victims and Witnesses Unit has been established pursuant to ICC Statute, Article 43(6), see *supra* note 41. According to this Article, measures of the Victims

measures of witness/victims protection. In contrast, specialised units within the Office of the Prosecutor such as the GCU are part of the investigation and prosecution machinery and thus see victims as potential witnesses for the prosecution's case. Yet, given the ICC prosecutor's obligation to protect victims and witnesses during the investigative stage (pursuant to Article 68(1) of the ICC Statute),<sup>44</sup> specialised units within the Office of the Prosecutor and gender advisers may also help to comply with this obligation and react to the specific circumstances linked to cases of sexual violence. The specialised units assigned to the Registry can assist the prosecutor in this task.<sup>45</sup>

Still, this does not deny the fact that sex crimes are normally not committed in isolation but together with ordinary offences (for example, unlawful deprivation of liberty, bodily injury, manslaughter) or even, at the level of international criminal law, as part of a broader campaign against the civilian population. Then the question arises as to whether the sexual offences can be properly isolated or taken out from the broader criminal conduct. Even if this were possible, it may not always be reasonable to do so, for example, in a case where the sex crimes are intimately

---

and Witnesses Unit are to be provided "in consultation with the Office of the Prosecutor". Here, "[p]articular attention is given to vulnerable groups, such as victims of sexual or gender violence, children, the elderly and persons with disabilities. The VWU [Victims and Witnesses Unit] support services promote gender-sensitive measures to facilitate the testimony of victims of sexual violence". At the ICTR, pursuant to ICTR, Rules of Procedure and Evidence, Rule 34, see *supra* note 20, a Witness and Victims Support Section exists under the authority of the Registrar. The ICTY has a similar unit. Warning of dangerous overlaps between units located at the Registry and the Office of the Prosecutor, see Mouthaan, 2011, p. 788, *supra* note 6.

<sup>44</sup> ICC Statute, Article 68(1), see *supra* note 41 reads:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.

See also Luping, 2009, pp. 479 ff., *supra* note 1.

<sup>45</sup> Seeing "specialized support services [...] [as] vital to the successful prosecution of gendered violence"; Ní Aoláin *et al.*, 2011, p. 436, see *supra* note 6.

linked or overlapping with the other crimes; otherwise one would lose sight of the broader context.<sup>46</sup>

From a practical prosecutorial perspective, the question arises at what point thematic prosecutions are possible at all. An investigator or a prosecutor normally does not dissect the criminal events to be investigated and prosecuted in fine pieces. They take a look at the crime scene and the criminal results as a whole, at least at the beginning of the investigation, and this very practical approach is difficult to reconcile with a thematic one.<sup>47</sup> In the words of an experienced international prosecutor: “The prosecution works with big lamps, not magnifying glasses”.<sup>48</sup> Consequently, sexual violence will always be investigated and prosecuted together with other crimes, while special attention may be paid to acts of sexual violence. As stated by the ICC Office of the Prosecutor, the Office is committed “to do a selection of cases that represent the entire criminality and modes of victimisation. The Office will pay particular attention to methods of investigations of crimes committed against children, sexual and gender-based crimes”.<sup>49</sup> In fact, the Office of the Prosecutor has already set up special mechanisms and organisational approaches to better assess sexual crimes that may have occurred in a situation under investigation. Thus, for example, in Uganda, the Office’s investigators working on the ground were all trained in the handling of sexual and gender-based crimes.<sup>50</sup> In any case, this is still a work in progress and constant improvement is necessary: “The Office will work with external actors, *inter alia*, with regard to sexual and gender crimes to constantly update prosecutorial techniques”.<sup>51</sup>

Up to now, the only exclusive or focused sex investigation – regarding a situation of sexual slavery and forced prostitution – was carried out

---

<sup>46</sup> As argued by Valerie Oosterveld in Chapter 9 of this volume.

<sup>47</sup> The point was convincingly made by prosecutor Herminia T. Angeles from the Philippine Ministry of Justice, who participated most actively in the seminar.

<sup>48</sup> Fabricio Guariglia, a senior appeals counsel at the ICC Office of the Prosecutor, statement at the seminar on “Thematic Investigation and Prosecution of International Sex Crimes”, Cape Town, 7–8 March 2011.

<sup>49</sup> ICC, Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006 (<https://www.legal-tools.org/doc/6e3bf4/pdf>).

<sup>50</sup> Luping, 2009, p. 48, see *supra* note 1.

<sup>51</sup> ICC, Office of the Prosecutor, ICC Prosecutorial Strategy 2009–2012, 1 February 2010, para. 29 (<http://www.legal-tools.org/doc/6ed914/>).

in the ICTY's *Foča* case.<sup>52</sup> This is the exception that confirms the rule, since, in this case, the sex crimes offered such a pattern of widespread and systematic crimes that it was worthwhile to be investigated and prosecuted for its own sake. In any case, the ICC, despite having a special gender adviser since November 2008<sup>53</sup> focusing specifically on sex crimes,<sup>54</sup> has so far not grounded a prosecution exclusively on international sex offences. In *Lubanga*, the prosecution abstained from charging sex crimes<sup>55</sup> and this decision was not remedied until the trial judgment of 14 March 2012.<sup>56</sup> In *Katanga*, four out of 10 charges (three of crimes against hu-

---

<sup>52</sup> ICTY, *Prosecutor v. Dragoljub Kunarać, Zoran Vuković and Radomir Kovač*, Trial Chamber, Judgment, IT-96-23-T and IT-96-23/1-T, 22 February 2001, especially pp. 217 ff. (<http://www.legal-tools.org/doc/fd881d/>); and ICTY, *Prosecutor v. Dragoljub Kunarać, Zoran Vuković and Radomir Kovač*, Appeals Chamber, Judgment, IT-96-23 and IT-23/1-A, 12 June 2002 (<http://www.legal-tools.org/doc/029a09/>). The three defendants were convicted for rape, torture and enslavement as crimes against humanity. For a critical analysis see James McHenry, "Justice for FOCA: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement as Crimes Against Humanity", in *Tulsa Journal of Comparative and International Law*, 2002, vol. 10, no. 1, pp. 183 ff., especially pp. 218 ff. on the judgment's significance; Doris Buss, "Prosecuting Mass Rape: *Prosecutor v. Dragoljub Kunarać, Radomir Kovač and Zoran Vuković*", in *Feminist Legal Studies*, 2002, vol. 10, no. 1, pp. 91 ff. For statistics concerning the coverage of sexual crimes at the ICTY, see *supra* note 12. On policy considerations how to better emphasise sexual crimes in international proceedings, see Nowrojee, 2005, p. 3, fn. 4, *supra* note 35; and Arbour, 2003, p. 203, *supra* note 9, saying on the issue of thematic investigations and prosecutions the following: "One of the debates that we had constantly in the office of the prosecutor was: should we "normalise" the prosecution of sexual violence, or should we keep nurturing it as separate issue? The debate was whether we should just announce that a sexual offence was like any other offence that all investigators must be attentive to and must prosecute as part of any investigation".

<sup>53</sup> See *supra* note 42.

<sup>54</sup> See ICC, Office of the Prosecutor, Fatou Bensouda, "Update on Judicial Proceedings: A Focus on Charging and Prosecuting Sexual and Gender Crimes", Speech, 30 September 2008.

<sup>55</sup> For a critical analysis see SáCouto and Clearly, 2009, p. 341, *supra* note 6, arguing that Lubanga was charged only with recruiting and using child soldiers, although the evidence of sexual violence was present. See also Pritchett, 2008, p. 293, *supra* note 18, according to which the prosecution could not establish a link between individual rapists and Lubanga himself.

<sup>56</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012, paras. 16, 630 (<http://www.legal-tools.org/doc/677866/>). This procedural decision cannot be remedied by reading 'sexual violence' into the conduct of the war crime of recruiting children pursuant to Article 8(2)(e)(vii) of the ICC Statute (but see Judge Odio Benito's Dissent, paras. 15–21) since this violates the strict construction requirement and amounts to a prohibited analogy (Article 22(2) of the ICC

manity and seven of war crimes) referred to sexual violence (sexual slavery under Articles 7(1)(g), 8(2)(b)(xxii)) and rape under Articles 7(1)(g), 8(2)(b)(xxii)).<sup>57</sup> Even in the *Bemba* case, which is generally considered as a case about rape as a weapon of war,<sup>58</sup> rape was only one, albeit highly significant,<sup>59</sup> count among three, namely, in addition to rape, murder as a crimes against humanity (Article 7(1)(a)) and a war crime (Article 8(2)(c)(i)) and pillaging as a war crime (Article 8(2)(e)(v)). Finally, the Forces démocratiques de libération du Rwanda leader, Callixte Mbarushimana, has been charged, *inter alia*, with rape as crime against humanity and war crime.<sup>60</sup> Also, other IC investigations in Uganda,<sup>61</sup> Su-

---

Statute). Regrettably, the prosecutor and his deputy (Fatou Bensouda) omitted to mention the procedural side of this issue in their press conference the day after the judgment where they criticised the majority decision. See for a comprehensive analysis of the judgment and this issue, Kai Ambos, “The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues”, in *International Criminal Law Review*, 2012, vol. 12, no. 2, pp. 137–38, fn. 156.

<sup>57</sup> ICC *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber, Warrant of Arrest for Germain Katanga, ICC-01/04-01/07, 3 July 2007, pp. 4–5 (<http://www.legal-tools.org/doc/4a8301/>); ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber, Decision on the Confirmation of the Charges, ICC-01/04-01/07, 30 September 2008, paras. 354, 436, 444 (*‘Katanga Confirmation of Charges’*) (<http://www.legal-tools.org/doc/67a9ec/>).

<sup>58</sup> According to Sudan Vision, “Africa in Focus: Prosecutor: Ex-Congo VP Used Rape as Weapon”, 13 January 2011, Fatou Bensouda has said that “rape outnumbered killings, and the prosecution intended to focus its case on sexual violence as a weapon of war”. See also Maggie Fick, “Bemba at The Hague: A Focus on Sexual Violence”, in *Enough*, 15 January 2009.

<sup>59</sup> See ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 01/05–01/08, 15 June 2009, paras. 171–85 (*‘Bemba Confirmation Decision’*) (<http://www.legal-tools.org/doc/07965c/>) enumerating various acts of rape and witnesses; also in para. 186 referring to “indirect evidence, such as hearsay evidence and several NGO and UN reports, is of a corroborating nature and reflects the large number of acts of rape which occurred in the same locations referred to by direct witnesses during the same period, namely from on or about 26 October 2002 to 15 March 2003” (fn. omitted).

<sup>60</sup> ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber, Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10, 9 April 2012, para. 10 (vii) and (viii) (<http://www.legal-tools.org/doc/27b448/>).

<sup>61</sup> Charges of *rape and sexual slavery* are part of warrants of arrests in the Ugandan situation; see ICC, *Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo*, Pre-Trial Chamber, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, Public redacted version, ICC-02/04-01/05-53 (<http://www.legal-tools.org/doc/db11ef/>): sexual slavery: count 1 (p. 12), rape: counts 2, 3 (pp. 12–13); ICC, *Prosecutor v. Joseph Kony*,

dan,<sup>62</sup> Kenya<sup>63</sup> and Libya<sup>64</sup> are targeting, but never exclusively, alleged acts of sexual violence.

### 13.3.2. Justifications

There are essentially four justifications for thematic prosecutions in the sense explained above.

#### 13.3.2.1. The Sensitivity and Complexity of International Sex Crimes

As already mentioned above, international sex crimes are of an extraordinarily sensitive nature. The prosecution will often have to deal with traumatised witnesses/victims to obtain the necessary evidence. Depending on the cultural context, it may be taboo to speak of any sexual behaviour at

---

*Vincent Otti and Okot Odhiambo*, Pre-Trial Chamber, Warrant of Arrest for Vincent Otti, Public redacted version, ICC-02/04-01/05-54, 8 July 2005, (<http://www.legal-tools.org/doc/f7c78c/>): sexual slavery: count 1 (p. 12), rape: count 3 (p. 13). See also Luping, 2009, pp. 493, 495, *supra* note 1, on the gendered nature of crimes occurred in Uganda, and pp. 493–94, on the investigative approach and challenges.

<sup>62</sup> Charges of rape and of persecution as crime against humanity through sexual violence are part of warrants of arrests, see ICC, *Prosecutor v. Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”), Pre-Trial Chamber, Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3, 27 April 2007 (<http://www.legal-tools.org/doc/cfa830/>): rape: counts 13, 14, 42, 43 (pp. 8–9, 14–15), persecution: count 10 (p. 8), count 39 (p. 14); ICC, *Prosecutor v. Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”), Pre-Trial Chamber, Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07-2, 27 April 2007 (<http://www.legal-tools.org/doc/7276ad/>): rape: count 13, 14, 42, 43 (pp. 8–9, 13–14), persecution: count 10 (p. 8), count 39 (p. 13); ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, 4 March 2009, p. 6 (“thousands of rapes”) and p. 8, para. vii (<http://www.legal-tools.org/doc/e26cf4/>).

<sup>63</sup> The ICC’s summons to appear against Muthaura, Kenyatta und Ali include rape allegations: “Muthaura and Kenyatta are criminally responsible as indirect co-perpetrators in accordance with article 25(3)(a) of the Rome Statute for the crimes against humanity of murder, forcible transfer, rape, persecution and other inhumane acts”. Cf. ICC, “Pre-Trial Chamber II Delivers Six Summonses to Appear in the Situation in the Republic of Kenya”, Press Release, 9 March 2011, ICC-CPI-20110309-PR637.

<sup>64</sup> As one point among several activities, the ICC prosecutor reported to the UN Security Council to investigate rape allegations: ICC, Statement to the United Nations Security Council on the Situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011), 4 May 2011, para. 12.

all, least of all acts of sexual violence.<sup>65</sup> In such a context, a full-fledged investigation of alleged acts of sexual violence is hampered. Moreover, sexual violence, its consequences and the specific harms caused,<sup>66</sup> call for further exploration and more profound understanding.<sup>67</sup> In other words, the actual meaning of sexual violence for the victims and their relatives and friends may not yet be fully revealed at the moment of a criminal investigation or trial – it may need more time to find out the complete truth with all its consequences.

If one adds to this the fact, already mentioned above, that sex crimes are (more) difficult to prove, it is clear that their investigation is of a complexity that makes specialisation indispensable. Various authors complain that rape prosecutions have failed because of insufficiently skilled and trained investigators and inappropriate interview techniques.<sup>68</sup>

---

<sup>65</sup> For example, in some societies any conversation about sexual behaviour is considered completely taboo. In other societies, to speak about rape may be taboo given the violation of the dignity and honour of the people involved (of either the victim, his or her marriage partner, family, clan and/or tribe); see *infra* note 68 and “Crimes of Sexual Violence: Overcoming Taboos, Ending Stigmatization, Fighting Impunity”, International Federation for Human Rights, The Hague, 29 October 2007.

<sup>66</sup> Critically as to whether international criminal accountability duly reflects women’s subjective experiences and harms, see Ní Aoláin *et al.*, 2011, pp. 428 ff., *supra* note 6.

<sup>67</sup> See *supra* note 7 and text; *ibid.*, p. 428.

<sup>68</sup> Franklin, 2008, pp. 210, see *supra* note 3, arguing that the effective realisation of interviews with the witness and victims requires that they feel safe and comfortable to share their experience. There is need of highly skilled expert interviewers otherwise the sexual violence might be ignored as it was in the past, when some investigators ignored rape entirely because of an assumption that “African women don’t want to talk about rape”; Nowrojee, 2005, p. 9, see *supra* note 35: “A shortage in investigators, budget difficulties and the lack of training for investigators all contributed to spotty investigations. Additionally, inappropriate interviewing methodology and the absence of an organized effort precluded the office from effectively obtaining many rape testimonies”; and p. 12: “Often investigators come from backgrounds where they have not had any experience with this issue, or they believe this is not a crime that deserves serious attention. Many investigators, though fully equipped with the necessary skills to investigate cases, lack training and direction on how to elicit information about sexual violence from witnesses”. van Schaack, 2009, p. 369, see *supra* note 24: investigators need to be specifically trained to elicit sensitive information; SáCouto and Clearly, 2009, pp. 353 ff., see *supra* note 6, p. 358: “Thus, without a thorough investigation, significant expertise, and intensive analysis of evidence relating to these crimes-including the broader context which makes clear that the sexual violence is an integral part of the organized war effort rather than mere ‘incidental’ or ‘opportunistic’ incidents-these cases are unlikely to be pursued or successfully prosecuted”. See also Stephanie K. Wood, “A Woman Scorned for the Least Condemned War Crime”, in *Columbia Journal of Gender and Law*, 2004, vol. 13, no. 2, pp.

The former ICTY/ICTR chief prosecutor, Louise Arbour, recalls that because of the difficulty of investigating sex crimes, it was debated whether her Office should “continue to use a team that is particularly trained and sensitive to the special need of this kind of an investigation, one that will ensure that these investigations are not neglected?”<sup>69</sup>

Thus, clearly, specialised (especially psychological) skills for investigation, in particular for properly interviewing rape victims and witnesses are required.<sup>70</sup> Also, specialised experience in prosecution and litigation is necessary, especially with regard to the presentation of hearsay and circumstantial evidence.

### 13.3.2.2. Great Interest and Concern of the International Community

A series of UN Security Council resolutions has been issued in recent years, which shows the awareness of the international community as to the use of sexual violence as a ‘tactic of war’ and the risks that this implies for national and regional peace and security.<sup>71</sup> At the same time,

---

304–05: “Some prosecutors come to the Tribunal with domestic experience in investigating and prosecuting local murders and homicides. When these individuals investigate in the field, they may ask leading questions that do not allow survivors to paint a full picture of the suffering they endured” (fn. omitted).

<sup>69</sup> Arbour, 2003, p. 203, see *supra* note 9.

<sup>70</sup> The highly required expertise in sexual violence investigations has been convincingly demonstrated by Xabier Agirre Aranburu, “Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases”, in *Leiden Journal of International Law*, 2010, vol. 23, no. 4, pp. 609 ff.

<sup>71</sup> UN Security Council, Resolution 1820, UN Doc. S/RES/1820 (2008), 19 June 2008, para. 1 (<http://www.legal-tools.org/doc/298f16/>):

[...] that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, affirms in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security.

See also UN Security Council, Resolution 1960, UN Doc. S/RES/1960 (2010), 16 December 2010, Preamble, para. 11 (<http://www.legal-tools.org/doc/e1de8f/>): “[...] noting that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims”.

these resolutions show a considerable trust in criminal justice as a means of not only to end impunity but also to achieve “sustainable peace, justice, truth, and national reconciliation”.<sup>72</sup> The ICC Statute does not only criminalise certain sexual acts as crimes against humanity (Article 7(1)(g)) and war crimes (Article 8(2)(b)(xxii) and (e)(vi)) but also draws particular attention to sexual violence in other provisions, for example in Article 54(1)(b).<sup>73</sup> In the same vein, Regulation 34(2) of the Office of the Prosecutor Regulations explicitly refers to sexual violence,<sup>74</sup> and the ICC’s Rules of Procedure and Evidence include a special provision on the Principles of Evidence in cases of sexual violence.<sup>75</sup>

Thus, thematic investigations may also be demanded by the emerging international law on the matter and in light of the increasing concern of international policymakers. Such investigations may further reinforce the international commitment to fight sexual violence as a means of war, and may help to refute still existing perceptions, which continue to underestimate the destructive potential of sexual violence in armed conflicts.<sup>76</sup>

---

<sup>72</sup> *Ibid.*, para. 4: “[...] the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.” Similarly, UN Security Council, Resolution 1888, UN Doc. S/RES/1888 (2009), 30 September 2009, Preamble, para. 8 (<http://www.legal-tools.org/doc/874a1a>).

<sup>73</sup> ICC Statute, Article 54(1)(b), see *supra* note 41, provides that the prosecutor shall “take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, [...] take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”.

<sup>74</sup> ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, entry into force 23 April 2009, Regulation 34(2) (<http://www.legal-tools.org/doc/a97226/>) reads:

In each provisional case hypothesis, the joint team shall aim to select incidents reflective of the most serious crimes and the main types of victimisation – including sexual and gender violence and violence against children – and which are the most representative of the scale and impact of the crimes.

<sup>75</sup> ICC, Rules of Procedure and Evidence, *supra* note 20. Cf. also ICTY, Rules of Procedure and Evidence, Rule 96, see *supra* note 20.

<sup>76</sup> For example, Ní Aoláin *et al.*, 2011, p. 428, see *supra* note 6, identifies an “ongoing intellectual and legal resistance to accepting the extensive empirical evidence that women’s bodies have been specifically targeted to further military-political objectives”.

### 13.3.2.3. Specialised Prosecution Better Reinforces the Validity of the Norm

Recourse to the purposes of punishment is always of doubtful argumentative force in criminal law theory for the simple fact that available theories are of a normative, value-based nature and, as such, fraught with ambiguities. This has been demonstrated in our Cape Town seminar by the emphasis laid on purposes by some,<sup>77</sup> and the relativisation of these theories by others.<sup>78</sup> To name but a few arguments: such prosecutions may restore the dignity and integrity of the victim<sup>79</sup> or even the (international) order;<sup>80</sup> the establishment of international standards against sexual violence may possibly have a ‘knock-on effect’ on domestic criminal proceedings.<sup>81</sup> Reviewing all these approaches, in my view, it is most convincing, in line with the theory of positive general prevention or – how it is now labelled – ‘expressivism’,<sup>82</sup> to argue that thematic prosecutions compellingly reinforce and confirm the norms prohibiting sexual violence, actually breached by the commission of these crimes. Clearly the existence of thematic prosecutions carried out by specialised prosecution authorities or

---

<sup>77</sup> See, for a feminist’s approach, Margaret M. deGuzman’s chapter in this volume (Chapter 2); see also Margaret M. deGuzman, “Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda”, in *International Criminal Law Review*, 2011, vol. 11, pp. 515 ff., arguing that priority to sex crimes in favour of killing crimes may better advance the goals of international justice. On the other hand, calling for limitations and warning of potential costs of international criminal prosecution of sexual violence as a feminist goal: Doris Buss, “Performing Legal Order: Some Feminist Thoughts on International Criminal Law”, in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 423.

<sup>78</sup> Hence Neha Jain’s caveat with regard to retribution, during her seminar presentation; cf. summary in Morten Bergsmo, “International Sex Crimes as a Criminal Justice Theme”, FICHL Policy Brief Series No. 4, 2011, p. 3 (<http://www.toaep.org/pbs-pdf/4-bergsmo>) and her chapter in this volume, Chapter 10.

<sup>79</sup> Ní Aoláin *et al.*, 2011, p. 440, see *supra* note 6.

<sup>80</sup> Buss, 2011, p. 422, see *supra* note 77.

<sup>81</sup> Ní Aoláin *et al.*, 2011, p. 443, see *supra* note 6. Ramji-Nogales, 2011, p. 475, see *supra* note 16, connects this possible effect with the concept of “positive complementarity”.

<sup>82</sup> For Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, pp. 173 ff. expressivism means that the purpose of punishment is to strengthen faith in rule of law among the general public and the pedagogical dissemination to the public of historical narratives is viewed as a central goal. Comparing expressivism and the much older theory of positive general prevention it becomes clear that both theories are based on the same concept: strengthening confidence in the rule of law by punishing.

units gives this kind of crime a much higher visibility in the public domain and thus better reinforces the perception that these crimes are especially serious and the respective prohibitions will be strictly enforced.

#### **13.3.2.4. Specialised Prosecutions are More Efficient**

The setting up of highly specialised teams within a prosecutorial authority may enhance the efficiency of the entire institution. It may entail a concentration of resources, and this may also increase the efficiency of the institution as a whole. As to sexual violence, a thematic and focused approach may improve the quality of the charges brought forward, and thus increase the chances for convictions.<sup>83</sup> The ICC Office of the Prosecutor's approach of providing specialised assistance and advice through the GCU, ensuring that the members of investigation teams have the necessary specialised knowledge and that witness interviews are conducted accordingly,<sup>84</sup> is certainly to be welcomed in this regard.

Obviously, there is a flip side to this. Given the limited resources of international criminal justice, a concentration of resources in one area would only be possible at the expense of investigation and prosecution in other areas.<sup>85</sup>

### **13.4. Conclusion**

Thematic investigations and prosecutions in the sense of focused, but not exclusive, prosecutions of sex crimes are a useful tool to increase awareness of and reinforce the norms prohibiting and criminalising acts of sexual violence. They may help not only to draw attention to the sexual violence, but also to clarify the broader context in which such sexual vio-

---

<sup>83</sup> See, for example, Luping, 2009, p. 434, *supra* note 1:

In this context, it is crucial that investigations and prosecutions are focused to be effective. Careful selections need to be made regarding the scope and focus of any investigation or prosecution in a case. A focused approach to sexual and gender-based violent crimes must be taken from the outset, during the pre-analysis phase and before any decision is made to initiate an investigation in any country.

<sup>84</sup> *Ibid.*, pp. 489 ff.

<sup>85</sup> Given the limited resources, Mouthaan, 2011, p. 802, see *supra* note 6, calls for a "good dialogue between the ICC and the expanding community of victims about what is achievable within the constraints of its limited resources".

lence takes place. They may enable prosecutions in an area where the otherwise high degree of traumatisation of the surviving victims often hampers serious investigations in the first place. Clearly, such focused investigations and prosecutions require specialised knowledge, which is not always easy to get hold of and may involve additional costs. As recent experience shows, however, such knowledge can be made available by specialised units or especially skilled advisers without negatively affecting investigative or prosecutorial capacities regarding other crimes. As this experience also shows, albeit complex, “if done properly, investigating crimes of sexual violence need not be overly burdensome or difficult”.<sup>86</sup>

---

<sup>86</sup> Linda Bianchi, “The Investigation and Presentation of Evidence Relating to Sexual Violence”, Paper presented at a Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26–28 November 2008.

FICHL Publication Series No. 13 (2018, Second Edition):

## **Thematic Prosecution of International Sex Crimes**

Morten Bergsmo (editor)

By singling out the theme of recruitment and use of child soldiers in its first case (against Mr. Lubanga Dyilo), the International Criminal Court legitimized the very idea of thematic prosecution at the international and national levels. The Court convicted the accused of a narrow range of criminality, to the exclusion of killings and physical-integrity violations such as rape that characterized the conflict in which the accused was an actor. Can specific prosecutorial themes be meaningfully pursued by criminal justice?

This is the first book to deal with the topic of thematic prosecution of core international crimes. Its focus is on international sex crimes. It is important to justify the singling out of a narrow range of criminality for prosecution. Thematic prosecutions should be explained to the public. Absent proper justification, the thematic prosecution of core international crimes is likely to generate increasing controversy. This book offers different justifications that jurisdictions can turn to as they develop policies that include thematic prosecution. It goes to the heart of discussions on prioritisation of cases, prosecutorial discretion, and accountability for violations against children and women.

The 2012 first edition has helped to raise awareness and generate discussion about the possibilities and challenges of the use of thematic prosecution. This second edition contains 125 pages of new material, including three new chapters.

ISBNs: 978-82-8348-025-2 (print) and 978-82-8348-024-5 (e-book).

**TOAEP** | Torkel Opsahl  
Academic EPublisher

**Torkel Opsahl Academic EPublisher**  
E-mail: [info@toaep.org](mailto:info@toaep.org)  
URL: [www.toaep.org](http://www.toaep.org)

**CILRAP**: Centre for International  
Law Research and Policy

ISBN 978-82-8348-025-2



9 788283 480252