

Examining Thematic Prosecutions and the Challenges of Understanding and Proving International Sex Crimes

By Morten Bergsmo, Alf Butenschøn Skre, CHEAH Wui Ling and Elisabeth J. Wood
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1. Introduction

The commission of serious sexual violations in armed conflicts is widely condemned and criminalised by the international community as demonstrated by numerous political statements and standard-setting activities, as well as by occasional prosecutorial efforts. Wartime rape has historically been recognised as a crime, but present-day efforts qualitatively distinguish and elevate a range of international sex crimes by singling them out as a criminal justice theme, including through the practice of thematic prosecutions. There has also been extensive normative development of international sex crimes, through the characterisation of such crimes as war crimes, crimes against humanity, and genocide, and the crystallisation of the elements of such crimes. These developments owe much to the persistent efforts of the human rights and feminist movements which have done much to highlight the perpetration of international sex crimes in times of conflict and the consequences suffered by victims of these crimes and their communities.

The perpetration of international sex crimes provokes a strong and visceral reaction due in large measure to their nature and the particular vulnerability of victims involved. This reaction triggers an initial response, often manifested in political statements and normative prohibition. There may be a tendency to engage in expansive political commitments and normative developments, and these, if not met, could weaken the legitimacy of the emerging criminal justice system for core international crimes. Public demands and outrage may give rise to decisions and practices, such as thematic prosecution and the adoption of additional prohibitions whose impact may not be completely thought out. It is important to see beyond these initial reactive stages and consider their

long-term implications in terms of actual prosecution and adjudication. The latter should ideally continue to take place long after the initial condemnatory reaction has faded.

Given the inherent constraints of reactive policies and the rapid developments in standard-setting and raising of awareness about the importance of accountability for international sex crimes, there is a need to subject existing efforts and practices to sober examination to assess whether they lead to the desired results. Particular attention needs to be paid to the ability of criminal justice actors charged with the prosecution and adjudication of these crimes to do their work effectively and fairly. That is a fundamental precondition to the successful implementation and enforcement of the normative frameworks that have been put in place and which are frequently talked about by concerned politicians.

Against this background, the Forum for International Criminal and Humanitarian Law (FICHL) has conducted a two-year joint research project with Yale University and the University of Cape Town on 'International Sex Crimes: Understanding, Proving, Prosecutorial Thematization', with support from the Norwegian Ministry of Foreign Affairs. The project involved two international expert seminars in New Haven (15–16 October 2010)¹ and Cape Town (7–8 March 2011)²; the Policy Brief 'International Sex Crimes as a Criminal Justice Theme'³; and finally the preparation of two anthologies: 'Understanding and Proving International Sex Crimes', edited by Morten Bergsmo, Alf

1 See <http://www.fichl.org/activities/proving-international-sex-crimes/>.

2 See <http://www.fichl.org/activities/thematic-investigation-and-prosecution-of-international-sex-crimes/>.

3 Available at <http://www.fichl.org/policy-brief-series/>.

Butenschøn Skre, and Elisabeth J. Wood (*Understanding and Proving*); and ‘Thematic Prosecution of International Sex Crimes’, edited by Morten Bergsmo (*Thematic Prosecution*)⁴. These seminars and publications examine a number of practices that have developed in the area of international sex crimes, such as thematisation and reliance on popular evidential assumptions, and places several central questions on the agenda, including whether thematic prosecutions of international sex crimes can be properly justified and whether such crimes are more difficult to prove than other core international crimes. This Policy Brief highlights some discussion points and findings of the research project, reflects on their implications, and suggests how they may inspire future research and efforts to strengthen the investigation and prosecution of international sex crimes. It also indicates some essential components of the next stages of international activities to ensure accountability for international sex crimes.

2. A Time for Critical Examination: Assessing Thematic Prosecution of International Sex Crimes

A notable trend in the prosecution of international sex crimes is their thematic prosecution. This trend of engaging in thematic prosecutions is not limited to international sex crimes. In the Lubanga case – which results in the first trial judgement of the International Criminal Court (ICC) – the Office of the Prosecutor (OTP) in fact chose to focus on the recruitment and use of child soldiers. By focusing on these crimes, the ICC gave legitimacy to the practice of thematic prosecution. Such a focus on a narrow range of criminality gives rise to criminal justice themes within criminal justice systems. This process of thematisation is a development that calls for critical assessment. *Thematic Prosecution* is based on the publication that coined the term thematic prosecution⁵, and it is the first book to comprehensively deal with this particular form of thematisation.

Thematic prosecution involves focusing on certain core international crimes in ways which in effect de-focuses others. Such a decision needs to be based on clear criteria that will withstand public debate and scrutiny. A justification should be offered by the pro-

fessional criminal justice agency in question, even if most stakeholders appear to support the practice at the time of its commencement. While thematic prosecutions have long been practised at the domestic level, particularly with respect to serious ordinary crimes, such decisions are usually based on guidelines or governmental policies. They are also ultimately subject to domestic political and legal scrutiny. Compared to the prosecution of most ordinary crimes, criminal justice for core international crimes at the domestic and international levels generally engages the interests of a larger number of victims, even entire communities, due to their more heinous nature or wider impact. It is therefore particularly important for decision-makers to be able to present the underlying rationale of any thematic prosecutions to victims and communities affected by core international crimes, as well as to the general public.

What should be the justificatory or explanatory reasons for thematic prosecution? A rationale commonly cited by jurists in support of the prosecution of core international crimes, including thematic prosecutions, is expressivism. Based on this rationale, the thematic prosecution of international sex crimes aims to express the condemnation of these crimes. While this is an important objective, there is a need to articulate the basis for focusing on one given crime and its accompanying normative framework, rather than focusing on other core international crimes. This will help prevent norm over-expansion, contested interpretations, and, more importantly, the dilution of international consensus and commitment. Also, an over-emphasis on expressivist objectives may lead to the marginalisation of more traditional or accepted prosecutorial objectives, such as retribution and deterrence. The furtherance of such traditional objectives could in certain situations demand the prosecution of core international crimes that violate human life and physical integrity, such as killings or torture. Thematic prosecutions have also been justified in the name of victims and their right to truth. This particular rationale needs to explain why one group of victims is chosen over another. Also, the reality is that in prosecutorial and investigation offices where time and resources are scarce, a decision to focus on a narrow range of criminality may also at times simply be a response to political pressure or pragmatic needs. In light of the varied reasons cited in support of thematic prosecutions, there is a need to consider how they relate to one another, and how they should be prioritised.

The lack of a clear decision-making framework

4 Both are available at <http://www.ficlh.org/publication-series/>.

5 M. Bergsmo, “Tematisk etterforskning og straffefølgning 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. Tryggstad (eds.): *Kjønn, Krig, Konflikt* (*Gender, War, Conflict*), Pax, 2008, pp. 79-91.

gives rise to the risk that thematic prosecutions are subject to political manipulation or unduly influenced by civil society pressure, however well-intentioned the latter may be. A well-reasoned decision is also important because thematic prosecutions have significant strategic and resource implications. Specialised units and specific skill sets may need to be established and institutionalised. This is a significant investment that may be a challenge for less materially resourceful domestic jurisdictions.

3. Beyond Normative Prohibition and Towards Implementation: Understanding, Investigating, and Proving International Sex Crimes

Apart from the need for clarity in prosecutorial decisions, prosecuting international sex crimes requires an adequate understanding of these crimes as well as proper investigatory and evidential processes. Research and advocacy efforts have thus far focused on the normative prohibition of these crimes and the general importance of investigating and prosecuting them. Much less attention has been paid to the details involved in implementing such prosecution. While the normative side may still benefit from certain clarifications (perhaps with respect to questions of aiding and abetting, or a raised awareness of male victims), there is an urgent need to address the gap between the ambition expressed through normative prohibition and the implementation of these norms. Two needs stand out in this respect: first, the critical examination of common assumptions, and second, the development of effective work processes and tools.

It is a widespread assumption among criminal justice actors and commentators that international sex crimes are by their nature particularly hard to investigate and prosecute. Among other common assumptions are the use of rape as a wartime weapon, its prevalence during war, its under-reporting, and the bias of institutional actors. These assumptions influence the way we approach international sex crimes, our allocation of resources, and our investigative or prosecutorial strategies. For example, some experienced actors have explained that a decision not to investigate international sex crimes may be simply due to the evidential difficulties associated with the use of witness testimonies rather than the gender biases of institutional actors or a lack of familiarity with such crimes. Such an argument may make sense if criminal justice actors are working under real time and resource constraints, and if the same accused is prosecuted for other atrocities suffered by the same victims. But the FICHL research project suggests that it is not a viable general proposition that

international sex crimes are more difficult to prove than other core international crimes. The evidentiary challenges linked to allegations of rape as a core international crime when the victim is the only eyewitness do not differ from those associated with rape as an ordinary crime under most domestic criminal codes.

These issues will become even more relevant as the prosecution of core international crimes shifts from the international stage back to the domestic arena, where national authorities may be faced with competing priorities and scarce resources. This is linked to the need to develop investigatory and prosecutorial tools and work processes that will enable the effective and fair prosecution of core international crimes including international sex crimes. Examples of such tools and processes include the Means of Proof Digest and the International Sex Crimes Charts presented in *Understanding and Proving*. By promoting accountability, transparency and precision, the use of such work processes and tools will help prevent arbitrariness in decision-making and enhance quality. For example, more jurisdictions may want to consider requiring investigators and prosecutors set out their reasons for initiating an investigation or prosecution in a prior written investigation plan.

4. Next Steps Forward: More Systematic Investments in National Criminal Justice for International Sex Crimes

To ensure long-term effective prosecution of international sex crimes, international and domestic practice and discourse will need to move beyond normative prohibition and occasional thematic prosecutions. Bringing those responsible for core international crimes to justice involves several stages, chiefly the normative criminalisation of the relevant conduct; the linking of a defendant to the criminal conduct through principles of liability; the translation of abstract legal requirements to factual scenarios; the pleading of the case and material facts before court; and the identification, presentation, and evaluation of specific pieces of evidence. Without seeing these stages properly through, the apparent objectives of normative criminalisation will continue to be frustrated. Criminalisation efforts could even be interpreted as an exercise in expediency or politics rather than as a preliminary stage in seeking accountability and justice.

Academic attention, advocacy efforts and political action have so far largely focused on the stage of normative criminalisation. This is in fact the easiest of all the stages involved in prosecution and adjudication, often requiring the least cost and time. The latter stages

are more challenging due to the specific and real-life skill sets involved as well as their wider, long-term institutional, resource and societal implications. There is therefore a need to focus on these other stages, particularly on the tedious nitty-gritty aspects of the application of legal norms and the building and pleading of (international) criminal cases. Recommendations and policies must take into account and be guided by the practicalities of the everyday reality experienced by actors involved in criminal justice processes. While this tedious work may be less exciting and far away from the limelight, such a focus is necessary to build a more complete and mature system of accountability for core international crimes at the domestic and international levels.

The awareness-generating activities of States – in particular in the context of the United Nations Security Council and its comprehensive resolutions on the topic, prominently among them resolutions 1325, 1888 and 1889 – are vital to bringing these processes forward. But criminalisation and awareness-generation are not enough to bring about a tangible increase in accountability for those responsible for international sex crimes. Since the ICC Review Conference in 2010 and its resolution on complementarity⁶, the community of States and several large civil society actors have turned their attention to the importance of developing national capacity to investigate and prosecute core international crimes. It is encouraging that international sex crimes are being emphasised as part of this trend of positive or active complementarity, albeit early efforts still seem fragmentary and tentative.

As international stakeholders seek further avenues of action, they should identify a new generation of measures that can strengthen national capacity to investigate and prosecute international sex crimes more effectively and fairly. Some guidelines emerge from the FICHL research project described in this Policy Brief: (1) Capacity development measures should be adjusted to each country and jurisdiction. Sweeping international prescriptions or models are unlikely to address national needs in a sufficiently informed manner.

6 See RC/Res.1 Complementarity.

(2) Prosecution based on misconceptions about the nature of international sex crimes is unlikely to result in convictions. The nature of the crime varies across contexts, with some armed groups engaging in few such crimes while others engage in them as part of widespread or systematic attacks on civilian populations. (3) Formal needs assessments may not yield the desired results if they are not adequately informed by the legal and institutional frameworks of the jurisdiction in question and its resource situation, existing allegations of and information on international sex crimes, as well as established criminal justice expertise on such crimes. (4) Regional approaches may add value when adequately informed by and anchored in the region's jurisdictions, taking cultural and other societal factors into account. (5) Measures should genuinely seek to empower existing criminal justice actors or resources in the countries concerned, rather than the donor or actor providing or facilitating assistance. There should be transparency on the interests of the capacity development actors involved. (6) Needs assessments and new measures to develop national capacity to investigate and prosecute international sex crimes should not limit or distort free competition between capacity development actors. Those actors who directly or indirectly coordinate needs assessments or the meeting of capacity development providers and recipients should not serve as capacity builders themselves to avoid conflicts of interest.

CHEAH Wui Ling is an Assistant Professor at the Faculty of Law of the National University of Singapore. Alf Butenschön Skre holds a bachelor's degree in political science from the University of Oslo where he is pursuing a law degree. Elisabeth J. Wood is Professor at Yale University. Morten Bergsmo is Visiting Professor at Peking University Law School. Work on this Policy Brief ended on 21 January 2013. ISBN 978-82-93081-64-7.