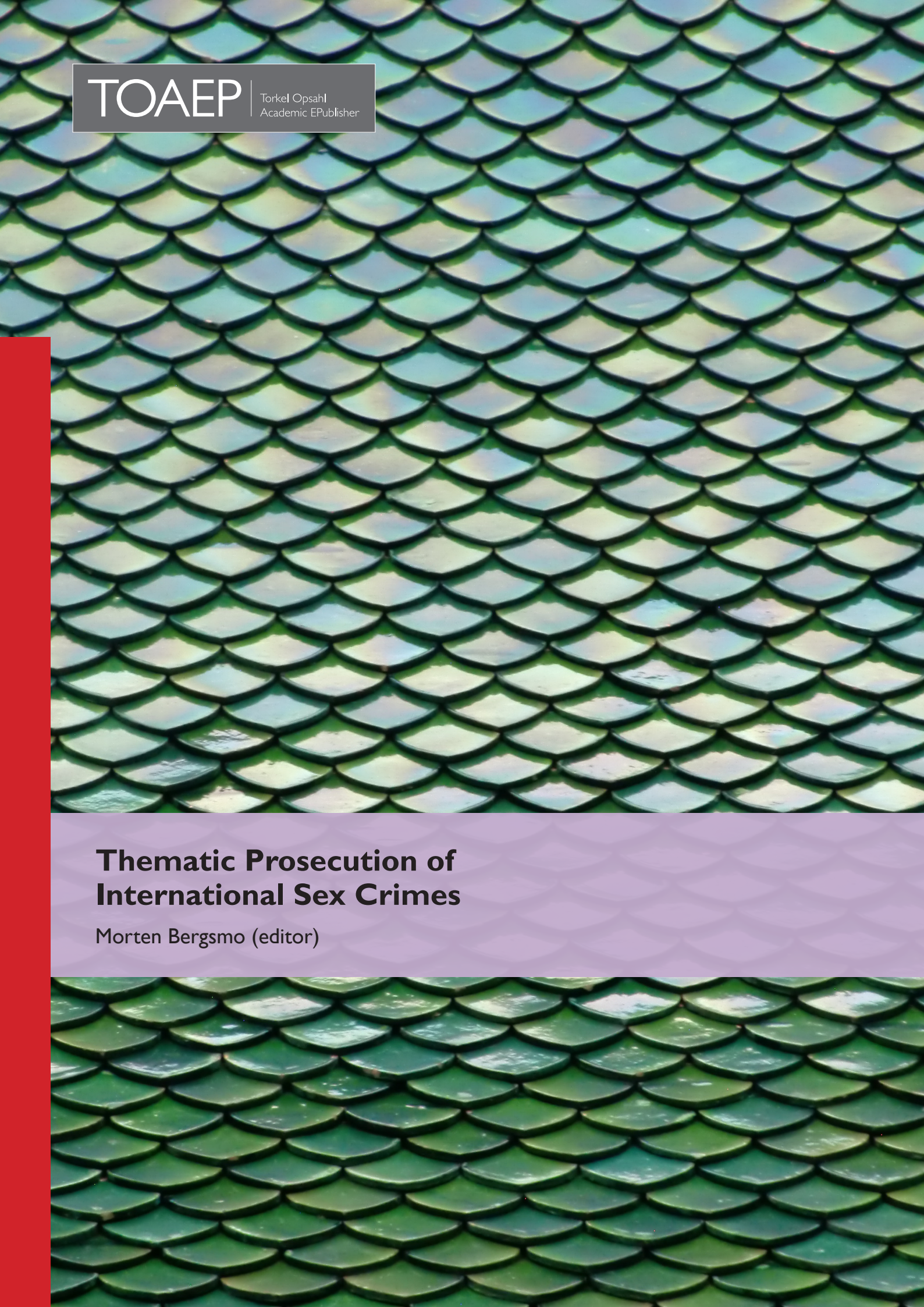


Thematic Prosecution of International Sex Crimes

Morten Bergsmo (editor)

Thematic Prosecution of International Sex Crimes

Morten Bergsmo (editor)

2012
Torkel Opsahl Academic EPublisher
Beijing

This and other books in the FICHL Publication Series may be openly accessed and downloaded through the Forum website (www.fichl.org). This site uses Persistent URLs (PURL) for all publications it makes available. The URLs of these publications will not be changed. Printed copies may be ordered from distributors such as www.amazon.co.uk. This book was first published on 25 April 2012.

ISBN 978-82-93081-31-9

Dedicated to the memory of Antonio Cassese

SERIES PREFACE

The Torkel Opsahl Academic EPublisher is pleased to release this anthology on *Thematic Prosecution of International Sex Crimes* in its *FICHL Publication Series.* It is the first book to deal with the topic of thematic prosecution of core international crimes. It is important to justify the singling out of a narrow range of criminality for prosecution, whether in internationalized or national criminal jurisdictions. Thematic prosecutions should be explained to the public both when practised by design or less deliberately. Absent proper justification, the thematic prosecution of core international crimes is likely to generate increasing controversy. This publication should raise awareness and generate discussion about the possibilities and challenges of the use of thematic prosecutions among those working in criminal justice agencies, academia, civil society, and the media.

The publisher places on record its appreciation for the assistance of KAM Kai Qi, SHEN Wanqin, Gayathri MOHANAKRISHNAN, Heidi TAN, Sanjay PALA KRISHNAN, Eunice LAU, Timotheus KOH, and CHEAH Wui Jia in the preparation of this volume.

Morten Bergsmo
Editor-in-Chief, TOAEP

CHEAH Wui Ling
Editor, TOAEP

Kiki A. Japutra
Editorial Assistant, TOAEP

FOREWORD

For three reasons, it is an unusual privilege to write the foreword to this anthology. The first is that it is dedicated to the memory of Antonio Cassese whose recent passing saddened his family, friends and colleagues. It was my good fortune to work closely with Nino (as he was known to his friends) after I arrived at the United Nations International Criminal Tribunal for the former Yugoslavia ('ICTY') effectively as its first Chief Prosecutor. Nino was then the first President of the Tribunal and his leadership in those early years was crucial to its development. Nino's contribution to the jurisprudence that came from the ICTY is well recognised and highly respected by both academics and practitioners. He will be missed.

The second reason is that the ICTY can be credited with having pioneered the modern law regarding gender-related crimes and especially the perpetration of systematic mass rape as a war crime. It was from the ICTY that the first thematic investigation and prosecution of sex crimes came.

The third is being associated again with my friend and colleague, Morten Bergsmo, who provided the inspiration for the conference that gave birth to this anthology. He is the founder and director of the Forum for International Criminal and Humanitarian Law ('FICHL') whose Torkel Opsahl Academic EPublisher is the publisher of this volume.

The ICTY was the first truly international war crimes tribunal. (I exclude the Nuremberg Tribunal of 1945 – it was a multi-national tribunal set up by the victorious allies after World War II.) Even before the investigations began in The Hague in the middle of 1994, reports proliferated of the rape of many thousands of women and girls, especially in Bosnia and Herzegovina. The jurisdiction of the ICTY was limited to the investigation and prosecution of the most serious crimes defined in the Security Council resolution that set up the ICTY. The only reference to rape as a war crime was to be found in the definition of crimes against humanity. This is a huge crime requiring sufficient evidence to establish that serious crimes are intentionally committed against a "civilian population". The first indictments we were able to issue were against so-called "small fish" as we were still investigating the more senior leaders under whose com-

mand horrific war crimes had been and were then still being perpetrated. With the encouragement, particularly from the two female judges of the ICTY, we began to charge rape as inhumane treatment, torture and a grave breach of the Geneva Convention which are all crimes falling within the jurisdiction of the ICTY.

Because of the neglect of gender-related crimes in humanitarian law, we decided in the Office of the Prosecutor to issue a thematic indictment based on sex crimes (which became known as the Foča Indictment because it was in the town of Foča that the crimes were alleged to have been committed). I believe this is the first ever of such prosecution of international sex crimes. It is thus of particular significance and provides a good measure of satisfaction that a conference was held in Cape Town on the topic of the thematic prosecution of sex crimes. It is also fitting that Morten Bergsmo who played a significant role in putting together that first thematic indictment played a leading role in the conference. I congratulate FICHL, Yale University, the University of Cape Town and the Royal Norwegian Ministry of Foreign Affairs for cosponsoring this conference. The chapters that make up this anthology are of an extremely high standard and make a meaningful contribution to the ever-growing literature on what is still a new discipline – international criminal justice. It remains for me to congratulate all who have been involved in this project.

Richard J. Goldstone
Former Chief Prosecutor of the ICTY and ICTR, and
Former Justice of the Constitutional Court of South Africa

TABLE OF CONTENTS

1

Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes

Morten Bergsmo* **and CHEAH Wui Ling****

1.1. Understanding and Enhancing Criminal Justice Work Processes: the Concepts of Thematic Prosecution and Criminal Justice Themes

The first judgment of the International Criminal Court ('ICC') – the Lubanga Trial Judgment of 14 March 2012[1] – is important for several reasons, among which are the following three. First, it confirms that the ICC will be a court. Until several of its judgments on guilt and punishment are final and enforced, the ICC remains a court in the making, yet to exercise the full powers vested in it by more than 120 States. The credibility of the ICC – and of its well-compensated high officials and staff – rests on how its core mandate is implemented, nothing else.

---

* **Morten Bergsmo** is Visiting Professor, Peking University Law School; Visiting Professor, Georgetown University (2010–); Researcher, University of Oslo, Faculty of Law; Visiting Fellow, Stanford University (2010–); and ICC Consultant and Co-ordinator of the ICC Legal Tools Project (2006–). He was formerly Visiting Scholar, UC Berkeley (2010 Spring); Senior Researcher, PRIO (2006–2009); Special Adviser to the Office of the Director of Public Prosecution of Norway (2007–2008); Senior Legal Adviser and Chief of the Legal Advisory Section, ICC Office of the Prosecutor (2002–2005); Co-ordinator of the establishment of the ICC Office of the Prosecutor (2002–2003); Legal Adviser, ICTY (1994–2002); and Legal Adviser, UN Commission of Experts for the Former Yugoslavia established pursuant to Security Council resolution 780(1992) (1993–1994). He represented the ICTY to the UN negotiation process to establish the ICC (1996–2002). He founded and directs the capacity building platform *CMN* (http://www.casematrixnetwork.org/) and the *Forum for International Criminal and Humanitarian Law* (www.fichl.org).

** **CHEAH Wui Ling** is Assistant Professor at the National University of Singapore (NUS)'s Faculty of Law, where she is also a Research Fellow at the NUS Centre of International Law.

1 *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/06, 14 March 2012.

Second, the Lubanga Trial Judgment shows that in the opinion of Judge Fulford, Judge Odio Benito, and Judge Blattmann of Trial Chamber I, the ICC Office of the Prosecutor ('ICC-OTP') is able to prepare and prosecute cases that meet the requirements of the Court's legal infrastructure. The OTP has been charged with several key functions, the most important of which are its duties of fact-gathering, fact-analysis, and fact-presentation. The Office should serve as the engine of the ICC by driving the Court's fact-gathering and fact-analysis work processes on behalf of the community of States that has established the Court. It is the force, focus, and precision of the OTP's work on facts, potential evidence, and evidence that will define the factual scope, depth, and quality of cases before the ICC. The OTP's performance of these fact-oriented duties is subject to the scrutiny of ICC judges who determine whether the Office is worthy of the trust placed in it by ICC States Parties. Judgments, such as that by Trial Chamber I in the Lubanga case, serve as touchstones of the OTP's ability in this area.

Third, and most relevant to this anthology's subject matter, the Lubanga Trial Judgment limits itself to the war crimes of conscripting, enlisting, and using child soldiers. Compared with cases before the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Lubanga Trial Judgment convicted Mr. Lubanga Dyilo of a very narrow range of criminality, which did not include the killings or violations of physical integrity, such as torture or rape, that have characterised the conflict in which he was an actor. It is not easy to argue that Lubanga's conviction is reflective of the overall victimisation in the relevant armed conflict in the Democratic Republic of the Congo ('DRC'). This is not to say that the recruitment and use of child soldiers are serious international crimes. Their relatively recent criminalisation in international law does not detract from this, but is simply indicative of a slowly changing consensus, from a time when we accepted that children could be war heroes by performing intelligence, communications or other acts of bravery to our contemporary recognition of the importance of the developmental needs of children and youth.

By singling out the theme of recruitment and use of child soldiers in its first case, the ICC legitimises the very idea of thematic prosecution at the international and national levels. In doing so, it confirms the significance of this book's topic and the issues it raises. It reinforces the timeliness of an examination of the bases and merits of thematic prosecution,

the use of criminal justice themes, and prosecutorial thematisation more generally.

This anthology is composed of papers presented at the expert seminar "Thematic Investigation and Prosecution of International Sex Crimes" held in Cape Town on 7-8 March 2011, and co-organised by the Forum for International Criminal and Humanitarian Law ('FICHL'), Yale University, and the University of Cape Town, with financial support from the Norwegian Ministry of Foreign Affairs. It also contains chapters by Roisin Burke and Niamh Hayes, contributions made outside the specific context of the seminar.

Framed on the basis of the first publication on this topic[2], the FICHL has – through the Cape Town seminar and this anthology – placed the *problématique* of thematic prosecution on the agenda for wide and critical discussion, with the objective of assisting criminal justice actors at the national and international levels to contribute more effectively to the securing of accountability for international sex crimes. Such discussion can generate an increased self-awareness within criminal justice agencies of explicit or implicit institutional practices that may amount to thematic prosecution or criminal justice themes. Incubating self-reflection of this nature can, if the discourse is sufficiently practice-oriented and contains a diversity of perspectives, rationalise the institutional practices in question and, by that, increase their quality, cost-efficiency and fairness. Discourse can in this way be a critical component of institutional professionalisation. Facilitating such discourses is one of the main objectives of the FICHL.

Placing a particular emphasis on international sex crimes or on another similarly narrow range of criminality, such as torture or the destruction of cultural monuments, can turn these crimes into a criminal justice theme within the criminal justice systems in question. Such themes may take the form of focused or thematic investigations and prosecutions of these crimes, or the construction of crime-specific institutional capacity within the criminal justice system.

The authors were invited to address aspects of this thematic emphasis. Their contributions significantly contribute to our awareness and un-

[2] See Morten Bergsmo, "Tematisk etterforskning og straffeforfølgning av seksualisert vold i konflikt: er det en uproblematisk praksis?" ("Thematic investigation and prosecution of sexualized violence in conflict: is that an unproblematic practice?"), in Hege Skjeie, Inger Skjelsbæk and Torunn L. Tryggestad (eds.), *Kjønn, Krig, Konflikt ("Gender, War, Conflict")*, 2008, pp. 79–91.

derstanding of the practice of thematic prosecution and criminal justice themes, specifically in relation to international sex crimes.

Although some authors focus on international jurisdictions, their ideas can be transposed to national criminal justice systems. It is the latter to which attention is now gradually, and inevitably, shifting. The issue of thematic prosecution of international sex crimes, and other core international crimes, must be addressed by each jurisdiction on its own terms. By analysing thematic prosecution's possibilities, challenges, and consequences, this anthology seeks to equip and empower criminal justice actors. It hopes to assist them in the making of choices that are fully considered and well-reasoned, which will in turn enhance the legitimacy of their decisions.

Crime selection and prioritisation in the field of criminal justice for atrocities primarily takes place in response to the practical challenge of prudently applying limited resources. But examining the concept and practice of prosecutorial thematisation also partially requires the engagement of theoretical questions. Such considerations of principle may only become operational when they are anchored in tools, such as investigation plans and prioritisation criteria. These tools also ensure a measure of transparency and accountability, and can go some way to preventing the politicisation of, or the consideration of irrelevant factors during, the decision-making process. Indeed, jurisdictions should consider making it obligatory for international crimes investigators and prosecutors to justify why an investigation should be initiated in a written investigation plan that places the alleged crimes in a broader context. The institutionalisation of such practical and concrete tools is less susceptible to tokenism, unlike more high profile implementation measures, such as public announcements of special institutional capacity to deal with international sex crimes.

1.2. Chapter Contributions: Theoretical Perspectives, Case Studies, and Critical Analysis

The first part of this anthology comprises two chapters that serve as an introductory stage to the topic of thematic prosecution by providing an overview of issues from two different viewpoints: a theoretical perspective and a prosecutorial-institutional perspective. Margaret M. deGuzman's Chapter 2 sets out and examines how different theoretical bases may inform decisions on whether to give priority to sex crimes. Accord-

ing to deGuzman, while retribution and deterrence bases support selective prosecutions at least some of the time, expressivism and restorative bases provide an even stronger foundation for giving priority to international sex crimes. An argument can be made that at least some perpetrators of sex crimes are more deserving of punishment than some perpetrators of crimes resulting in death. The prosecution of international sex crimes may also provide greater deterrent benefits at least in some circumstances. Most importantly, argues deGuzman in favor of expressivism, there is a significantly greater need for the international community to express its condemnation of international sex crimes than of killings, which are already considered as serious violations of moral norms throughout the world. Victim restorative goals may be more achievable in the context of international sex crimes because, unlike the victims of killing, the immediate victims of sex crimes remain alive and are potentially able to participate in, and benefit from, restorative processes.

While theoretical discussions on the goals of thematic prosecution are important, such prosecutorial decisions are necessarily implemented within specific institutions by real institutional actors who will need to reflexively develop standards and practices that guide such prosecutorial efforts and address their consequences. In Chapter 3, Fabricio Guariglia highlights how the ICC-OTP has developed criteria for situation and case selection, which essentially revolve around the notions of gravity and of the 'most responsible' persons. While the latter's focus on those who hold positions of leadership allows for comprehensive prosecutions which present a broader narrative on the manner in which international sex crimes were committed, the higher we go up the chains of command, the further away we move from the individual victim's episode of sexual violence and his or her suffering. Guariglia highlights how the ICC-OTP may compensate for this, such as by ensuring a representative sample of crimes in its charging, so that victims of uncharged crimes can relate to the victimisation portrayed in the charges; by efficiently utilising the contextual evidence necessary to establish crimes against humanity, and in so doing, portraying the true extent of victimisation; and, in the context of sentencing, leading victim impact evidence that adequately reflects the effects experienced by individual victims of the sexual violence.

The second part of this anthology aims to broaden our understanding of thematic prosecution through a variety of case studies. In Chapter 4, Christopher Mahony undertakes a case study of the Special Court of

Sierra Leone ('SCSL'). The SCSL, which has often been cited as a "new model" for post-conflict internationalised criminal justice, has been lauded for trying "persons bearing the greatest responsibility" for crimes during Sierra Leone's conflict. By placing the creation of the SCSL in its historical context and by analysing empirical data, Mahony reveals how the Court's designing and co-operating States pursued neo-liberal geopolitical objectives through, *inter alia*, the prioritisation of certain crimes over others. Not only does this pressure to prioritise particular crimes undermine the emergence of case prioritisation norms, it may also end up assisting duplicitous actors who could selectively prefer the thematic prosecution of international sex crimes for political purposes. Homogenising case selection and prioritisation criteria, rather than diversifying it without broad consensus, mitigates the risk of politicisation.

In Chapter 5, Flor de Maria Valdez-Arroyo studies the use of thematic prosecution for sex crimes in Latin America based on the jurisprudence of the Inter-American Court of Human Rights ('IAHRC') and its impact in national prosecutions. She notes that the IAHRC's judgments provide guidance for the prosecution of sex crimes, and supports the use of thematic prosecution for expressive objectives. To fully understand the evolving emphasis on international sex crimes, there is a need to study how various practices have developed within their different regional or national contexts. The next chapter by Benson Chinedu Olugbuo examines, among others, the use of mobile courts in the DRC to prosecute serious sex crimes. Susanna Greijer's following chapter brings us beyond jurisdictional case studies to an analysis of the comparable subject of the thematic prosecution of conflict crimes committed against children, whose victimisation and silencing experiences may be said to be similar to that of victims of international sex crimes. Paloma Soria Montañez, who works as a staff attorney at the NGO, Women's Link Worldwide, offers us a civil society perspective on the prosecution of international sex crimes. While she acknowledges that there is a need to consider whether thematic prosecutions make sense in national courts in light of available material and human resources, she emphasises the need to ensure the integrated prosecution and effective mainstreaming of gender crimes.

The third part of this anthology brings together chapters of a distinct analytical nature. These chapters apply a variety of analytical frameworks and approaches to their subject matter. They challenge assumptions that may underlie thematic prosecution, and explore how social, institutional,

and political factors interact in this field. In Chapter 9, Valerie Oosterveld discusses whether the thematic prosecution of international sex crimes to the exclusion of other prohibited acts adequately delivers justice to victims. Such prosecutions fail to capture the crimes' context, nature, and implications. Sexual violence is usually part of a wider picture of victimisation, and often intersects with other seemingly gender-neutral crimes. As well, apparently gender-neutral prohibited acts may have been carried out in gender-specific ways or may have gendered outcomes. By pursuing investigations and prosecutions in which sexual violence is explored within the context of other core international crimes, both the serious nature of the sexual violence and the potentially gendered nature of the other crimes can be highlighted and understood. To achieve this, there is a need for heightened gender competence and expertise among criminal justice actors.

In Chapter 10, Neha Jain applies a pluralistic framework to the international criminal trial that posits the importance of institutional and structural factors that may differ between tribunals, and that have a bearing on the validity of thematic prosecutions, particularly with respect to international sex crimes. She argues that three such factors will be particularly influential when justifying the practice of thematic prosecutions. The first is the status of the court, namely, whether it is a post-conflict tribunal or one that may intervene in situations of on-going conflict. This status will influence what aims the tribunal may legitimately strive towards – retributive, expressive, or deterrent. The second factor is whether an international court can be envisaged as mainly a tool of post-conflict peace building. If it is indeed set up to serve this instrumentalist goal, it may be able to expressly pursue didactic goals and prioritise the investigation and prosecution of international sex crimes. The third factor is the extent of civil party involvement in tribunal proceedings. If victim participation is considered desirable either because it promotes restorative justice or because it assists in the determination of truth by the tribunal, the enhanced role of the victim will influence the extent to which international sex crimes may be prioritised by the court.

In Chapter 10, Olympia Bekou adopts an institutional approach in considering the question of thematic prosecution. She discusses the advantages and disadvantages of creating specialised institutional capacity for the thematic prosecution of international sex crimes. Arguments in favour of specialised units include: long-term commitment; development of

knowledge and expertise (training); better resource allocation and mobilisation; better international co-operation; visibility, accountability and outreach; consistency, efficiency, successful prosecutions, and increased capacity. The disadvantages include: added complexity; cost; unit-straddling; rarity of incidence; impact on personnel; impact on victims; potential loss of skill; and marginal influence on case outcomes. The benefits of *ad hoc* arrangements include: mobility and flexibility; lower costs; and the use of existing expertise. Whereas the drawbacks include: increased workload, and the lack of institutional memory, quality control, and sustainability. Bekou advocates for expert training and increasing capacity, regardless of whether this takes place as part of a formal setting.

Drawing on critical legal studies, the next chapter by Alejandra Azuero Quijano explores the potential consequences of how scientific epistemologies of sex difference might provide answers to the following questions: do scientific theories of sex difference serve to explain the channeling of political and economic resources to the investigation of crimes traditionally imagined to be committed by men against women? How is thematic investigation participating in the legal hierarchisation of crimes, and how is scientific knowledge related to this phenomenon? Among others, she highlights the problems associated with binary reasoning and legal categorisation, which has resulted from the feminist advocacy project, and which may have excluded others or damaged the feminist cause.

In the final chapter to part three of this anthology, Kai Ambos studies how thematic investigations and prosecutions, in the sense of focused, but not exclusive, prosecutions of international sex crimes, are a useful tool to increase awareness of and reinforce the prohibition of sexual violence. They may help not only to emphasise sexual violence, but also to clarify the broader context in which the respective crimes occurred. This type of crime requires expert knowledge that may be provided by specialised units or particularly skilled advisers for reasons, *inter alia*, of evidentiary issues or the danger of the re-victimisation of primary victims.

In the last section of this anthology, we have included two invited chapters that were not presented at the seminar. They have been included because their broader subject matter of prosecuting sex crimes is relevant to this anthology's topic of thematic prosecution of international sex crimes. In Chapter 14, Roisin Burke examines the problem of holding UN peacekeepers accountable for sexual abuses, and proposes different insti-

tutional set-ups to facilitate this. In Chapter 15, Niamh Hayes broadly explores the prosecutorial strategy employed by international criminal tribunals to prosecute international sex crimes.

1.3. Further Analysis and Research

In addition to placing the topic of thematic prosecution on the national and international scene, this anthology also highlights the need for further discussion and implicitly identifies a number of directions for future research. Its conceptualisation of this topic and its chapters serve as a suitable starting point for such endeavours, drawing on the seminar concept note and discussions at the FICHL Cape Town seminar referred to above.[3]

First, there needs to be a critical and open-minded consideration of the justifications of thematic prosecution. Mirroring ongoing debates on the objectives of international criminal prosecutions, some authors apply and consider in their chapters below the philosophical justifications of retribution, deterrence, expressivism, and restoration in the context of thematic prosecution. Other authors seek justifications by referring to legal and institutional frameworks, such as the ICC's reference to gravity. In reality, decisions on thematic prosecution are often explained, and at times justified, by pragmatic or political reasons. What is the nature and relationship between these justificatory and explanatory concepts, and how do they contribute to our understanding and implementation of thematic prosecution? More conceptual work should be undertaken, starting with this anthology.

Second, by mapping the various institutional landscapes in which the practice of thematic prosecution has evolved, this anthology's chapters have begun to identify the actors involved in, and impacted by, thematic prosecutorial decisions. It has examined how such prosecutions are often legitimised in terms of victim interests, but may not in effect advance such interests. It has explored the perspective of prosecutors afflicted by resource constraints, that of NGOs advocating community empowerment, and that of judges potentially in need of specialist input. There is a need to explore how other actors and stakeholders view and react to thematic prosecution. For example, one reason for giving thematic priority to international sex crimes is arguably the victims' emerging right to the truth. If so, what are the implications of thematic prosecution for victims whose

[3] The seminar interventions by Nobuo Hayashi should be noted in this context.

crimes are excluded or de-emphasised as a result? Are international sex crimes qualitatively different from other, otherwise comparable serious international crimes? It would appear that understanding the victimhood of international sex crimes will benefit from further comparison *vis-à-vis* that of other international crimes. There is, therefore, a need to consider how such prosecutions impact accused persons, other conflict victims, affected communities, and even epistemic communities, such as that of international criminal law experts.

Last, but not least, this anthology's various chapters warn against an overly enthusiastic or unquestioning acceptance of thematic prosecution. This position goes against that taken by most NGOs, which have widely supported the thematic prosecution of international sex crimes. Given the highly political environment in which the institutions of international criminal justice operate, it would be unwise for them to depart from a well-established and legally secure set of prioritisation criteria, and a widely accepted priority among crimes. Deviating from these standards in favor of thematic prosecution could risk exposing the entire prosecutorial process to manipulation by third-party entities. However, it is often a fact that the administration of criminal justice is susceptible to politics – and *vice versa*. And this is equally, if not more, true of international criminal justice. While this does not require the abandonment of thematic prosecution as a concept or practice, it does require an increased awareness of its associated risks, and the development of appropriate implementation tools that will minimise these risks. Access to such comprehensive knowledge and realistic tools will be particularly important for domestic criminal justice actors whose decisions and justifications will be subject to more rigorous scrutiny by local populations as compared with any decision taken by their international counterparts.

2

An Expressive Rationale for the Thematic Prosecution of Sex Crimes*

Margaret M. deGuzman**

2.1. Introduction

Most international criminal courts address situations of mass atrocities with resources that allow them to prosecute only a small fraction of the crimes committed. One of the most critical tasks these courts perform therefore is to decide how to allocate their scarce investigative and prosecutorial resources. A strategy some courts have adopted is to pursue "thematic prosecutions" – that is, to orient cases around particular themes of criminality. This strategy was used in some of the earliest prosecutions for international crimes after World War II.[1] More recently, thematic prosecutions have been employed to focus attention on sex crimes.[2] At the

* This essay expands the analysis in my earlier publication entitled "Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda", in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 515. I am indebted to Marie-Theres DiFillippo and Michael Witsch for excellent research assistance.

** **Margaret M. deGuzman**, Assistant Professor, Temple University Beasley School of Law.

1 *See* Jonathan A. Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", in *Columbia Law Review*, 2009, vol. 109, pp. 1167–1173 (discussing the history behind prosecutors' decisions to pursue thematic prosecutions at the Nuremberg Military Tribunals). Examples include the trials of industrialists, doctors, and judges. Nuremberg Military Tribunal, *United States of America v. Friedrich Flick et al.*, Judgment, 22 December 1947; Nuremberg Military Tribunal, *United States of America v. Carl Krauch et al.*, Judgment, 30 July 1948; Nuremberg Military Tribunal, *United States of America v. Alfried Krupp et al.*, Judgment, 31 July 1948; Nuremberg Military Tribunal, *United States of America v. Karl Brandt et al.*, Judgment, 19 August 1947; Nuremberg Military Tribunal, *United States of America v. Josef Altstötter et al.*, Judgment, 4 December 1947.

2 John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, 2003, pp. 181–182; Morten Bergsmo *et al.*, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Torkel Opsahl Academic Epublisher, Oslo, 2010, p. 109, fn. 46.

International Criminal Tribunal for the Former Yugoslavia ('ICTY') teams of investigators have been assigned to uncover evidence of sex crimes, and prosecutions have been brought that involve exclusively charges of sex crimes. Thus, for example, the *Foča* case charged a number of former soldiers with crimes related to the infamous "rape camps" in that city.[3]

Even when prosecutors have not pursued thematic sex crime prosecutions, many have articulated an intention to focus special attention on such crimes. For example, the Prosecutor of the International Criminal Court ('ICC'), Luis Moreno-Ocampo, has pledged that in selecting cases he will "pay particular attention to […] sexual and gender-based crimes".[4] The ICTY's first Prosecutor, Richard Goldstone, has observed that both the ICTY and the International Criminal Tribunal for Rwanda ('ICTR') have shown a unique concern for prosecuting sex crimes.[5] The current prosecutor of the ICTR has also confirmed that sex crime prosecutions are a priority for the tribunal.[6] In fact, in August 2010, a group of current and

[3] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac et al.* ("Foča case"), Judgment, 22 February 2001; see also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, Judgment, 10 December 1998 (charging exclusively sex crimes).

[4] The Office of the Prosecutor for the International Criminal Court, "Report on Prosecutorial Strategy", 14 September 2006, p. 7, available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf, last accessed on 6 July 2011; see also The Office of the Prosecutor for the International Criminal Court, "Criteria for Selection of Situations and Cases", June 2006, p. 13, unpublished draft document on file with the author ("The Office will pay particular attention to methods of investigations of crimes committed against children, sexual and gender-based crimes"); The Office of the Prosecutor for the International Criminal Court, "Factsheet: Situation in the Central African Republic", p. 3, available at http://www.icc-cpi.int/NR/rdonlyres/6FED881F-D117-4C96-84DF-127F082C02DF/277260/ICCOTPFSCAR20080121ENG5.pdf, last accessed on 6 July 2011 ("The OTP is paying particular attention to the many allegations of sexual crimes").

[5] Richard J. Goldstone, "International Crimes Against Women: Prosecuting Rape as a War Crime", in *Case Western Reserve Journal of International Law*, 2002, vol. 34, p. 278.

[6] Hassan B. Jallow, "Prosecutorial Discretion and International Criminal Justice", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 153.

former international prosecutors issued a declaration drawing attention to the special need for investigation and prosecution of sex crimes.[7]

Despite the increased focus on sex crime prosecutions in recent years, no effort has been made, either at the tribunals or in the scholarship, to provide a philosophical justification for the practice of giving priority to sex crimes. Those who prosecute and write about sex crimes generally assume that international courts should increase their focus on such crimes. Commentators sometimes point to the practical and institutional benefits of thematic sex crime prosecutions. Such prosecutions can, for example, increase an institution's capacity to address sex crimes by developing relevant investigative and prosecutorial expertise and expanding the applicable law.[8] But a prior normative question must be addressed: why should international courts give priority to sex crimes when allocating scarce resources? The need for justification stems primarily from the widely accepted maxim that prosecutors should give priority to the most serious crimes. Although sex crimes are considered very serious in most (although not all) parts of the world, they are generally viewed as less serious than crimes resulting in death. At most international courts, the decision to prosecute sex crimes entails a deselection of some crimes involving killing because resources are insufficient to prosecute all rapes and all killings. It is therefore particularly important to understand why sex crimes should be given priority over killing crimes.

The philosophical grounding for thematic sex crime prosecutions must be found in the underlying purposes of international criminal courts. While the moral justifications of international prosecutions are widely disputed, there are four primary contenders: retribution, deterrence, restoration, and expression. In the first part of this essay, I explain why none of the first three theories precludes giving priority to sex crime prosecutions. In fact, each theory supports such prosecutions, at least under some circumstances. I then explain that the strongest justification for giving priority to sex crimes is found in the expressive rationale for international crim-

---

7 "The Fourth Chautauqua Declaration", Jurist, 31 August 2010, p. 2, available at http://law.wustl.edu/harris/cah/docs/IHLDialogsFourthChautauquaDeclarationAugust312010.pdf, last accessed on 6 July 2011.

8 Karen Engle, "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina", in *The American Journal of International Law*, 2005, vol. 99, no. 4, pp. 781–782 (explaining the ICTY's focus on the development of the law surrounding sex crimes).

inal law. In other words, if international criminal law aims to express global norms it should often seek to promote the norms against sex crimes even at the expense of other important norms. The special importance of prosecuting sex crimes lies in their history of under-enforcement and in the discrimination that the crimes themselves express.

To be clear, I am not arguing that sex crimes should always be given priority over killing crimes. First, the terms 'sex crimes'[9] and 'killing crimes' encompass a wide array of behaviours and harms. Sex crimes can range in seriousness from non-violent sexual humiliation to sexual slavery and forced pregnancy. Similarly, international crimes involving killing include vastly different crimes from individual unintentional war crimes to genocidal exterminations. In deciding how to allocate resources, prosecutors must consider the nature of the particular crimes committed and the seriousness of the harms inflicted – a task that is outside the scope of this general analysis.

Second, resource allocation decisions involve a host of considerations that cannot be accounted for herein. For example, one of the most important factors in selecting cases for prosecution is the strength of the available evidence.[10] A prosecutor may choose to charge a less serious crime for which he or she is confident of obtaining a conviction rather than a more egregious crime for which the evidence is weaker. Thus, even a prosecutor who accepts the special importance of focusing on sex crimes might avoid charging such crimes when the evidence available to prove other crimes is stronger. Moreover, assuming the strength of the evidence is consistent across crimes, a prosecutor might have other legiti-

[9] This essay uses the term 'sex crimes' because it provides a clear contrast with crimes involving killing. Nonetheless, many of the arguments made herein also apply to the broader category of 'gender crimes' – crimes committed on the basis of the victim's (usually female) gender. The choice between sex crimes and crimes involving killing is highlighted herein because the latter are most frequently cited as more serious than sex crimes, and therefore more deserving of prosecution. However, the analysis could be extended to crimes such as torture and slavery that are often placed on a par with sex crimes in terms of seriousness. Such crimes should also sometimes be subordinated to sex crimes for the reasons elucidated herein.

[10] *See,* for example, Abby Goodnough, "Some Charges May Be Dropped in Bulger Case as Prosecutors Focus on Killings", The New York Times, 28 June 2011, available at http://www.nytimes.com/2011/06/29/us/29bulger.html?_r=1&emc=eta1, last accessed on 6 July 2011 (citing a U.S. prosecutor as stating: "It is also in the public interest to protect public resources – both executive and judicial – by bringing the defendant to trial on the government's strongest case").

mate reasons for not charging sex crimes in a particular case. For example, a witness might have expressed a strong preference for testifying about a killing she observed but not a rape she suffered.[11] More controversially, a prosecutor may decide to drop sex crimes charges in exchange for guilty pleas to other serious crimes.[12]

Moreover, the decision whether to engage in thematic prosecutions or otherwise prioritize sex crimes in a particular case must be situated within the broader context of prosecutions undertaken in a given situation.[13] A case selection decision that appears justified in isolation may nonetheless be ill advised when viewed in the context of the other prosecutions in the situation. Thus, for example, while some thematic prosecutions of sex crimes may have been justified in response to the situation in the former Yugoslavia, a decision to focus exclusively on sex crimes despite the prevalence of other serious crimes would have undermined many of the Tribunal's goals. In particular, such a strategy would have detracted from efforts to restore the affected societies by establishing the truth of what happened and building a historical record.

In sum, each case and situation presents unique characteristics, making it unwise to proffer categorical arguments about when prosecutors should give priority to particular crimes. Instead, I make two more modest, but nonetheless important, claims: (1) that each of the philosophical justifications for international criminal prosecutions supports giving priority to sex crimes some of the time; and (2) that the strongest justification for a special focus on sex crimes at international courts lies in the need to express the undervalued norms prohibiting such crimes.

---

11 *Cf.* Bergsmo *et al.*, 2010, p. 122, fn. 80, *supra* note 2 ("Thematic prosecutions should also take the interests of victims duly into account").

12 Hassan B. Jallow, "Session 5: Debates with Prosecutors at the International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders", 11 July 2009, p. 8, available at http://unictr.org/Portals/0/English/News/events/july2009/SESSION5.pdf, last accessed on 7 July 2011 (ICTR prosecutor explaining the need to sometimes bargain away sex crimes charges). A judge of the Special Court for Sierra Leone has opined that such plea-bargaining "sends the wrong message to the perpetrator and community". Teresa A. Doherty, "Summary of the Second Hague Colloquium: Systematic Sexual Violence and Victims' Rights", 2011, p. 7, available at http://lexglobal.org/files/Hague 2 Colloquium Summary Website Version.pdf, last accessed on 2 August 2011.

13 The term 'situation' in international criminal law refers to the geographic and temporal space in which international crimes have been committed.

2.2. No Theoretical Argument Precludes Thematic Prosecution of Sex Crimes

The age-old debates about the moral justifications for criminal punishment have begun to find new expression in the context of international criminal law. A small number of scholars have endeavoured to articulate philosophical rationales for international punishment and to question whether such punishment requires different justification from that inflicted at the national level.[14] The most frequently invoked rationales for international criminal adjudication are the familiar ones of retribution, deterrence, restorative justice, and expressivism. However, as elaborated below, several of these theories take on a different form when invoked at the international level. Moreover, unlike national theorists, most of whom subscribe to retributivist or deterrent rationales, scholars who have written about criminal law theories at the international level are generally unenthusiastic about retribution,[15] and sceptical about deterrence,[16] but more

[14] See, for example, Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law*, 2006, vol. 43, p. 39; Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, no. 3, p. 561; David J. Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, New York, 2010, p. 569; Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, New York, 2007; Stephanos Bibas and William Whitney Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism", in *Duke Law Journal*, 2010, vol. 59, no. 4, p. 637; David S. Koller, "The Faith of the International Criminal Lawyer", in *New York University Journal of International Law and Politics*, 2008, vol. 40, p. 1019; Jean Galbraith, "The Pace of International Criminal Justice", in *Michigan Journal of International Law*, 2009, vol. 31, p. 79; Adil Ahmad Haque, "International Crime: In Context and in Contrast", in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo and Victor Tadros (eds.), *Structures of Criminal Law*, forthcoming 2011, pp. 17–21, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664035##, last accessed on 28 July 2011.

[15] See, for example, Drumbl, 2007, p. 151, *supra* note 14; Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of United Nations Law*, 2002, vol. 6, no. 1, pp. 9; Sloane, 2006, p. 67, *supra* note 14.

[16] See, for example, David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, p. 473; Jenia Iontcheva Turner, "Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court", in *Stanford Journal of International* Law,

sanguine about restorative justice[17] and expressivism.[18] In the discussion that follows, I suggest that each of the theories provides at least a partial justification for international criminal prosecution and that none precludes giving priority to sex crimes.

2.2.1. Retribution

Retributive theories hold that criminal punishment is justified entirely by the moral desert of the perpetrator. While retributivists explain the link between moral desert and punishment in various ways, they share the belief that desert is all that is necessary for the infliction of punishment to be morally right.[19] In fact, many retributivists maintain that criminal punishment is required when moral norms are violated.[20] Retributivism also holds that punishment should be proportionate to the crime committed.[21]

Retribution is one of the most frequently invoked justifications for international criminal punishment.[22] Nonetheless, many scholars reject the

2005, vol. 41, p. 17. See also Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *The American Journal of International Law*, 2001, vol. 95, no. 1, p. 9 (expressing greater optimism about the deterrent effect of international criminal law).

17 Mark Findlay and Ralph J. Henham, *Transforming International Justice: Retributive and Restorative Justice in the Trial Process*, Willan Publishing, Portland, 2005; Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford University Press, Stanford, 2007, pp. 136–187.

18 See, for example, Sloane, 2006, p. 39, *supra* note 14; Diane Marie Amann, "Group Mentality, Expressivism, and Genocide", in *International Criminal Law Review*, 2002, vol. 2, no. 2, p. 93; Mirjan Damaška, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 329.

19 See generally Joshua Dressler, *Cases and Materials on Criminal Law*, West, 2007, pp. 38–48 (discussing different strands of retributive theory that have developed over time); Paul H. Robinson, "Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical", in *The Cambridge Law Journal*, 2008, vol. 67, no. 1, p. 145.

20 Dressler, 2007, p. 39, *supra* note 19 ("For a retributivist, the moral culpability of the offender also gives society the *duty* to punish") (emphasis in original).

21 *Ibid.*, p. 38.

22 *See,* for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Sherushago*, Sentence, 5 February 1999, para. 20 (noting that retribution and deterrence are the primary objectives of international criminal punishment); Allison Marston Danner, "Constructing a Hierarchy of Crimes in International Criminal Sentencing", in *Virginia Law Review*, 2001, vol. 87, no. 3, p. 415, fn. 109 (citing cases in which the international tribunals considered retribution as a key factor in sentencing).

idea that retribution should be a central goal of international criminal adjudication.[23] Critics of retributive justifications for international trials tend to focus on the inability of international courts to prosecute all, or even most, of the crimes committed in a given situation, as well as the difficulty of inflicting retributively proportionate punishments for such heinous crimes as genocide.[24] In these regards, however, international criminal law is not so different from national criminal justice, which is also unable to reach all those who deserve punishment or to inflict proportionate punishment in all cases. Therefore, for those who accept the principle that moral desert justifies punishment, retribution serves as at least a partial justification for international prosecution.

Since retributivists tend to believe that all crimes should be punished, little scholarship exists on how retributive theories should inform crime selection decisions.[25] Without attempting to develop a comprehensive theory here, I propose that retributivism's strong focus on the perpetrator's desert suggests that crimes should be selected, at least in part, according to the relative desert of those who commit them.[26] For present purposes, therefore, the question is whether a person who commits rape is more or less deserving of punishment than one who commits murder when each is committed in a similar context – that is as a war crime, a crime against humanity or with genocidal intent.

---

[23] *See,* for example, Tallgren, 2002, p. 583, *supra* note 14; Koller, 2008, pp. 1025–1026, *supra* note 14; Koskenniemi, 2002, p. 9, *supra* note 15; Drumbl, 2007, p. 151, *supra* note 14; Amann, 2002, p. 116, *supra* note 18. *But see* Adil Ahmad Haque, "Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law", in *Buffalo Criminal Law Review*, 2005, vol. 9, no. 1, p. 273 (proffering a relational theory of retributive justice in international criminal law); Dan Markel, "The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States", in *University of Toronto Law Journal*, 1999, vol. 49, no. 3, p. 390 (arguing that retribution is warranted and required); Larry May, "Defending International Criminal Trials", in Larry May and Jeff Brown (eds.), *Philosophy of Law: Classic and Contemporary Readings*, Oxford University Press, 2010, p. 426 (espousing retribution as partial justification for international criminal law).

[24] *See,* for example, Drumbl, 2007, pp. 152–156, *supra* note 14; Amann, 2002, p. 117, *supra* note 18.

[25] A notable exception is an article by Michael Cahill, applying retributive principles to develop a theory of resource allocation. Michael T. Cahill, "*Retributive Justice in the Real World*", in *Washington University Law Review*, 2007, vol. 85, no. 4, p. 815.

[26] *See ibid.* (exploring a threshold model and a consequential model of retribution, each of which requires a focus on relative desert).

In retributive theories, desert is typically considered to be a function of the seriousness of the harm caused and the defendant's culpability as to that harm.[27] Culpability focuses primarily on the defendant's mental state as to the harm inflicted although it may also include factual circumstances bearing on blameworthiness.[28] Scholars have suggested that desert can be measured either empirically – by ascertaining community views – or deontologically, by appealing to moral principles.[29] Empirical studies of desert generally find that people consider killing more serious than rape.[30]

---

[27] Andrew Von Hirsch and Nils Jareborg, "Gauging Criminal Harm: A Living Standard Analysis", in *Oxford Journal for Legal Studies*, 1991, vol. 11, no. 1, p. 2.

[28] *See ibid*., pp. 2–3.

[29] Robinson, 2008, p. 149, *supra* note 19.

[30] *See,* for example, Alfred Blumstein and Jacqueline Cohen, "Sentencing of Convicted Offenders: An Analysis of the Public's View", in *Law and Society Review*, 1980, vol. 14, no. 2, p. 231 (in a survey of six-hundred three adults from the United States, respondents who were asked to assign the length of a prison sentence in proportion to the seriousness of the crime assigned a shorter mean prison sentence for rape than for first-degree murder, second-degree murder, manslaughter and assault with intent to kill); Jeremy A. Blumenthal, "Perceptions of Crime: A Multidimensional Analysis with Implications for Law and Psychology", in *McGeorge Law Review*, 2007, vol. 38, p. 642 (in a study of forty-two male and female respondents from the United States, rape was ranked as less serious than murder); Peter H. Rossi *et al.*, "The Seriousness of Crimes: Normative Structure and Individual Differences", in *American Sociological Review*, 1974, vol. 39, no. 2, p. 228 (in a study of two hundred adults in the United States, forcible rape after breaking into a home was ranked as less serious than the planned killing of a police officer, the planned killing of a person for a fee and the selling of heroin.); Mark Warr *et al.*, "Norms, Theories of Punishment, and Publicly Preferred Penalties for Crimes", in *The Sociological Quarterly*, 1983, vol. 24, no. 1, p. 82 (in a study of eight hundred adults in the United States, first-degree rape was ranked as less serious than first-degree murder); Ying Keung Kwan *et al.*, "Perceived Crime Seriousness Consensus and Disparity", in *Journal of Criminal Justice*, 2002, vol. 30, p. 626 (in a study of 846 adults from Hong Kong, rape was ranked as less serious than murder). See also Xabier Agirre Aranburu, "Gravity of Crimes and Responsibility of the Suspect", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic Epublisher, Oslo, 2010, p. 211:

> [A] recent survey conducted in Eastern DRC (Democratic Republic of the Congo) confirmed that killing was the highest priority for the local population (92% demanded accountability), followed by rape (69%) and looting (41%).

Citing "Living in Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo", August 2008,

Evidence of such a hierarchy is also found in national sentencing laws, which generally permit greater punishment for murderers than for rapists.[31] For example, the U.S. Supreme Court has ruled that murderers, but not rapists, can be put to death in part on the grounds that rape is less serious than murder.[32] There is some evidence of the murder/rape hierarchy at the international level as well. For example, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has concluded that intentional murder is the only crime for which the death penalty is permissible under international law.[33] International courts also some-

pp. 40–41, available at http://www.law.berkeley.edu/HRCweb/pdfs/LivingWithFear-DRC.pdf, last accessed on 23 March 2012.

[31] *See*, for example, 中华人民共和国刑法 (Criminal Law of the People's Republic of China), 1 July 1979, Chapter IV, Arts. 232, 236, available at http://www.cecc.gov/pages/newLaws/criminalLawENG.php (providing minimum imprisonment of three to five years for rape and ten years to life for murder); Уголовный Кодекс РФ (Criminal Code of the Russian Federation), 13 June 1996, Arts. 105(1), 131(1), available at http://legislationline.org/documents/section/criminal-codes/country/7 (providing term of imprisonment of three to six years for rape and six to 15 years for murder); Code Pénal (The French Penal Code of 1994), Arts. 221(1), 222(23); available at http://195.83.177.9/upl/pdf/code_33.pdf (providing 15 years imprisonment for rape and thirty years imprisonment for murder); Kodeks Karny z Dnia 6 Czerwca 1997 r. (Polish Penal Code of 6 June 1997), Arts. 148(1), 197(1); available at http://km.undp.sk/uploads/public/File/AC_Practitioners_Network/Poland_Penal_Code.pdf (providing one to ten years imprisonment for rape and eight years to life imprisonment for murder); Das Deutsche Strafgesetzbuch (German Penal Code), 13 November 1998, Sections 177(1)–(4), 212(1)–(2); available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (providing one to five year minimum sentence for rape and five years to life imprisonment for murder); Canada Federal Statutes, Criminal Code, R.S.C. 1985, c. C-46, ss. 235(1), 271(1); available at http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html, last accessed on 5 November 2011 (providing a maximum of ten years imprisonment for sexual assault and life imprisonment for first and second degree murder); Hong Kong Offences Against the Person Ordinance, 30 June 1997, Cap. 200 s. 118, Cap. 212 s. 2, available at http://www.hklii.org/hk/legis/en/ord/212/s7.html (providing life imprisonment for rape and murder).

[32] Supreme Court of the United States, *Coker v. Georgia*, Judgment, 29 June 1977, 433 U.S. 584, p. 598 (stating that "in terms of moral depravity and of injury to the person and to the public, [rape] does not compare with murder").

[33] Philip Alston, "Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions", para. 3, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/116/84/PDF/G0611684.pdf?OpenElement, last accessed on 6 July 2011.

times, though not always, impose greater punishment for murder than for rape.[34]

The evidence that many people consider rape less serious than murder does not, however, establish that murderers are more deserving of punishment than rapists as a moral matter. First, social perceptions of the relative seriousness of sex crimes suffer from a discrimination bias. Throughout the world, women's lives and experiences are undervalued. This sexism renders social evaluations of the seriousness of harms typically inflicted on women morally suspect. Professor Paul Robinson, a prominent proponent of empirical measures of desert argues that criminal law and policy must take community views into account or risk undermining their own authority.[35] While this proposition is difficult to dispute, it is also true that when community views are based on deep-rooted biases, law's moral authority requires the use of law and legal policy to change those views. Crimes that disproportionately affect women are one area where societal views tend to be out of step with moral truths. Until women achieve social equality with men, empirical approaches to measuring desert for such crimes should be treated with suspicion. Moreover, most of the empirical data regarding societal views on the seriousness of crimes has been conducted in developed countries.[36] It remains an open question how those in the developing countries where many international crimes are committed view the relative seriousness of rape and crimes involving killing.

At least for the moment, therefore, it seems more appropriate to ground retributive evaluations of desert for purposes of crime selection in deontological arguments. A deontological approach requires the applica-

[34] The Judgment in the ICTR's Semanza case notes that the jurisprudence of the ICTY and ICTR reflects sentences between twelve and fifteen years for rape as a crime against humanity and between twelve and twenty years for murder as a crime against humanity. International Criminal Tribunal for Rwanda, *Prosecutor v. Semanza*, Judgment and Sentence, 15 May 2003, para. 564. *But see* Special Court for Sierra Leone, *Prosecutor v. Sesay et al.* ("RUF case"), Sentencing Judgment, 8 April 2009, p. 93 (sentencing Issa Hassan Sesay to 45 years for rape, and another 45 years for sexual enslavement, while his sentences for extermination and murder were 33 years and 40 years, respectively).

[35] Paul H. Robinson and John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy", in *Southern California Law Review*, 2007, vol. 81, no. 1, p. 25.

[36] *See,* for example, *supra* note 31.

tion of moral principles to assess the harms associated with each type of crime, as well as the levels of culpability of those who perpetrate them.[37] With regard to both harm and culpability, arguments can be made that rape is sometimes more serious than killing in the international context. First, the context of conflict in which many international crimes are committed legitimizes killing. Killing one's enemy is the very purpose of war. The laws of war legitimize intentionally killing other people in many circumstances. As such, one who violates those laws by, for example, killing in a manner that is disproportionate to legitimate military objectives may be less culpable for crossing that ill-defined boundary than one who kills intentionally in peacetime. In contrast, sex crimes are never legitimate – the wartime context does nothing to reduce the culpability of those who perpetrate such crimes. Moreover, sex crimes involve discrimination and/or persecution based on gender, which enhances the culpability of their perpetrators.[38] For these reasons, the culpability of a rapist will sometimes be higher than that of a killer in the international context.

International sex crimes also likely perpetrate greater harm than international killings under some circumstances. The relative harms of crimes are difficult to compare. The concept of harm is under-theorized,[39] and harms against women are particularly poorly understood.[40] Nonetheless, there is reason to suspect that harm against women is especially severe in societies where women's lives are most undervalued, including some of those where many international crimes have been committed in recent years. Where women are marginalized, their experiences of harm may be aggravated.[41] In particular, women who suffer sex crimes may feel shame and humiliation that magnifies the other physical and psycho-

[37] Robinson, 2008, p. 148, *supra* note 19.

[38] *Cf.* Danner, 2001, p. 481, *supra* note 22 (arguing that persecution as a crime against humanity is more serious than non-persecutorial crimes against humanity); Elizabeth A. Pendo, "Recent Developments: Recognizing Violence against Women: Gender and the Hate Crimes Statistics Act", in *Harvard Women's Law Journal*, 1994, vol. 17, p. 157 (arguing that violence against women should be recognized as a hate crime); Kathryn Carney, "Rape: The Paradigmatic Hate Crime", in *St. John's Law Review*, 2001, vol. 75, p. 339 (arguing that rape is a crime of hate since women are targeted because they are women).

[39] Robin West, *Caring for Justice*, New York University Press, New York, 1997, p. 94.

[40] Fionnuala Ní Aoláin, "Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies", in *Queen's Law Journal*, 2009, vol. 35, p. 219.

[41] *Ibid.*, pp. 230–231.

logical harms of the crimes. A rape victim in the Democratic Republic of the Congo expressed the view that "[i]t is better to die than being raped by [the rebels] and their allies, because such rape is the worst humiliation against a human being".[42] Some international judges have even opined that "[f]or a woman, rape is by far the ultimate offence, sometimes even worse than death because it brings shame on her".[43]

Moreover, some societies react to sex crimes by stigmatizing and ostracizing the victim and her family.[44] The Special Court for Sierra Leone highlighted this problem as follows:

> As we have found, the victims of sexual violence continue to live their lives in isolation, ostracized from their communities and families, unable to be reintegrated and reunited with their families, and/or in their communities. Many of these victims of sexual violence were ostracized or abandoned by their husbands, and daughters and young girls were unable to marry within their community […]. The Chamber observes that the shame and fear experienced by the victims of sexual violence, alienated and tore apart communities, creating vacuums where bonds and relations were initially established.[45]

This tendency to blame the victims of sex crimes elevates the harm of sex crimes compared to that of killing crimes. The surviving families of those killed in conflicts, far from being ostracized, often find support in their communities.

---

[42] "UN: rape being used as weapon of war in DRC", Jurist, 6 July 2011, available at http://jurist.org/paperchase/2011/07/un-rape-being-used-as-weapon-of-war-in-drc.php , last accessed on 7 July 2011.

[43] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Stakić*, Judgment, 31 July 2003, para. 803; see also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Brđanin*, Judgment, 1 September 2004, para. 1009 (agreeing with *Stakić* Trial Chamber that "for a woman, rape is by far the ultimate offence.") (Citation omitted).

[44] Adrien Katherine Wing and Sylke Merchan, "Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America", in *Columbia Human Rights Law Review*, 1993, vol. 25, pp. 4–5:

> The consequences of rape are particularly severe in traditional, patriarchal societies, where the rape victim is often perceived as soiled and unmarriageable, thus, becoming a target of societal ostracism.

[45] Special Court for Sierra Leone, *Prosecutor v. Sesay et al.* ("RUF case"), Sentencing Judgment, 8 April 2009, paras. 132–134 (internal citations omitted).

Finally, the harm of rape often includes lasting consequences on a community that may not arise from killings. Again, the Special Court for Sierra Leone explained this problem well:

> In the Chamber's view the [defendant groups] inflicted physical and psychological pain and harm which transcended the individual victim and relatives to an entire society. These acts of sexual violence left several women and girls extremely traumatised and scarred for life, consequently destroying the bearers of future generations. The Chamber infers that crimes of sexual violence further erode the moral fibre of society.[46]

Similarly, a representative of civil parties before the Extraordinary Chambers in the Courts of Cambodia opined that the thousands of forced marriages that took place during the Khmer Rouge era in Cambodia "might have seemed less grave in comparison to the thousands killed, [but] the social consequences of this crime might be equally or even more grave".[47]

In sum, despite the evidence that sex crimes are commonly considered less serious in terms of desert than killing crimes, in the context of international crimes the reverse is likely true in some cases. A retributive approach to international justice therefore does not preclude the thematic prosecution of sex crimes and will sometimes support such a strategy.

2.2.2. Deterrence

Deterrence theory, a product of utilitarian moral philosophy, justifies criminal punishment not by reference to the perpetrators' moral desert but rather via the claim that punishment persuades perpetrators or potential perpetrators not to commit similar crimes in the future. The dominant model of deterrence maintains that prospective perpetrators engage in a cost/benefit analysis in reaching decisions about whether to commit crimes.[48] Punishment affects that calculus by increasing the cost of crime. While deterrence and prevention are often used interchangeably, deterrence is more accurately viewed as a form of prevention. Crimes can be

---

[46] *Ibid.*, para. 135.

[47] "Summary of the Second Hague Colloquium: Systematic Sexual Violence and Victims' Rights", 2011, *supra* note 12.

[48] *See* Richard A. Posner, "An Economic Theory of the Criminal Law", in *Columbia Law Review*, 1985, vol. 85, no. 6, p. 1221 (framing deterrence question as "what criminal penalties are optimal to deter" criminal activity of rational actor).

prevented not only by affecting the calculus of prospective criminals but through various other strategies including promulgating moral norms that inhibit people from even considering committing crimes – the expressive rationale elaborated below.

Deterrence is frequently invoked as a primary justification for the work of international criminal courts. For example, in establishing *ad hoc* criminal tribunals or referring situations to the ICC under Chapter VII, the UN Security Council implicitly proclaims that it believes international prosecutions can deter crimes, thereby helping to restore and maintain international peace and security. International prosecutors invoke deterrence in justifying their work,[49] and judges employ deterrence to validate the sentences they impose.[50] Nonetheless, most scholars have expressed skepticism about the ability of international prosecutions to effectuate deterrence.[51] Such authors argue that international criminals are not rational calculators and that the low likelihood of an international conviction

[49] *See,* for example, Office of the Prosecutor of the International Criminal Court, "Report on Prosecutorial Strategy", 2006, p. 9, *supra* note 4 (stating that Prosecutor's office will take steps to reinforce its deterrent impact); Michael P. Scharf, "The Prosecutor v. Dusko Tadić: An Appraisal of the First International War Crimes Tribunal since Nuremberg", in *Albany Law Review*, 1997, vol. 60, p. 868 (quoting former ICTY prosecutor Richard Goldstone as saying: If people in leadership positions know there's an international court out there, that there's an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren't going to think twice as to the consequences."); Tia Goldenberg, "'Unfinished business' remains at Rwanda genocide court", M&C, 30 March 2007, available at http://www.monstersandcritics.com/news/africa/features/article_1284975.php/Unfinished_business_remains_at_Rwanda_genocide_court, last accessed on 31 July 2011 (citing ICTR Chief Prosecutor, Hassan Jallow, as stating that the certainty of punishment by the ICTR provides deterrence). See also Background Information: Overview, United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court at Rome, Italy, 15–17 June 1998, available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome Proceedings_v1_e.pdf, last accessed on 31 July 2011 ("Effective deterrence is a primary objective of those working to establish the international criminal court.").

[50] *See,* for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Kambanda*, Judgment and Sentence, 4 September 1998, para. 28 (justifying sentence of life imprisonment in part upon the notion that would-be perpetrators of mass atrocity must be dissuaded by demonstrating that the global community is not prepared to tolerate serious violations of international criminal law); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Popović*, Judgment, 10 June 2010, para. 228 (affirming the ICTY's longstanding commitment to deterrence).

[51] *See,* for example, *supra* note 17.

would be unlikely to sway even those who engage in the cost/benefit calculus.[52] Some scholars have even suggested that international criminal law is more likely to promote than to deter criminal conduct.[53] A few are more optimistic.[54]

The question whether criminal punishment deters – either in international or national law – is notoriously intractable. Proof of a counterfactual – that but for the actions of international courts more crimes would have occurred – is elusive. However, it is equally difficult to demonstrate that deterrence does not work: people rarely admit that they were considering committing crimes but were deterred by the threat of punishment. In the absence of conclusive proof on either side, therefore, it is reasonable to continue to invoke deterrence as at least a partial justification for international adjudication.

---

[52] *See* for example, Sloane, 2006, p. 72, *supra* note 15 ("It is doubtful that the average war criminal or *génocidaire* weighs the risk of prosecution, discounted by the likelihood of apprehension, against the perceived benefits of his crimes."); Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?", in *Washington University Law Quarterly*, 2007, vol. 84, p. 807 ("perpetrators of humanitarian atrocities are going to be high-risk individuals who are not likely to be significantly deterred by the prospect of further prosecution by international criminal tribunals."); Wippman, 1999, pp. 477–478, *supra* note 17 (arguing that the conflict mobilized all aspects of society in ways unlikely to be halted for fear of prosecution); James F. Alexander, "The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact", in *Villanova Law Review*, 2009, vol. 54, p. 13 ("Considering the long odds of prosecution, the numbers are arguably 'too small to make a rational wrongdoer hesitate'.") (citation omitted).

[53] *See,* for example, Ku and Nzelibe, 2007, pp. 827–831, *supra* note 52 (discussing "political opportunism effects" by which politicians embrace rhetoric of international criminal tribunals to avoid substantive reforms).

[54] *See,* for example, Akhavan, 2001, p. 10, *supra* note 17 (arguing that although immediate deterrence is unlikely once violence has started, prosecutions at international criminal tribunals can deter future acts of mass violence); May, 2010, pp. 426–427, *supra* note 23 (writing that although the fact that not every perpetrator can be prosecuted decreases the deterrent effect of the international criminal tribunals, the punishments handed down by them can provide adequate deterrence); Theodor Meron, "From Nuremberg to The Hague", in *Military Law Review*, 1995, vol. 149, p. 110 (suggesting that the "failure of deterrence" is not inevitable); Jonathan I. Charney, "Progress in International Criminal Law?", in *The American Journal of International Law*, 1999, vol. 93, no. 2, p. 462 (arguing that consistently prosecuting leaders may eventually deter those who provoke the circumstances that encourage international crimes).

Deterrence theories, unlike retributive theories, are inherently concerned with resource allocation – they seek to achieve the greatest amount of deterrent benefit through the lowest expenditure of punishment resources. Economic deterrence theory posits that the rationally calculating potential criminal will decide whether to commit crimes by balancing the likelihood of apprehension against the severity of punishment.[55] Considering these factors in isolation one might be tempted to conclude that killing crimes will be less costly to deter and therefore should be given priority over sex crimes at international courts. Killing crimes are usually easier to prove since witnesses are more reluctant to testify to sex crimes.[56] Moreover, as already discussed, crimes involving killing tend to incur heavier penalties.

There are at least two flaws in this analysis, however. First, it fails to account for the relative value of deterring sex crimes and killing crimes.[57] As Professor Dan Kahan has written, "Unless we know whether and how much we disvalue a particular species of conduct, we can't determine whether the cost of deterring […] it is worth paying".[58] In order to determine whether to allocate international resources to deterring sex crimes or killing crimes we have to decide how important it is to deter each. I suggest that at least some of the time we should place greater value on deterring sex crimes. As discussed above, some international sex crimes produce greater harms than crimes involving killing. Under those circumstances, a prosecutorial strategy aimed at deterrence should focus on sex crimes.

---

55 *See,* for example*,* Posner, 1985, *supra* note 48.

56 IWPR Staff, "International Justice Failing Rape Victims", Institute for War and Peace Reporting, 15 February 2010, available at http://iwpr.net/report-news/international-justice-failing-rape-victims, last accessed on 31 July 2011; Jocelyn Campanaro, "Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes", in *Georgetown Law Journal*, 2001, vol. 89, p. 2575.

57 Dan M. Kahan, "The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law", in *Ohio State Journal of Criminal Law*, 2004, vol. 1, pp. 644–645 ("Unless we know whether and how much we disvalue a particular species of conduct, we can't determine whether the cost of deterring any particular amount of it is worth paying.").

58 Cahill, 2007, p. 852, *supra* note 25; See also Robinson and Darley, 2007, pp. 964–965, *supra* note 35 (discussing examples where deterrence-based recidivist statutes may impose heavy punishment without consideration of specific crime's relative harm to society).

Furthermore, there are reasons to suspect that deterrence at the international level operates differently from what the economic model posits. International law, unlike national law, does not aim to deter all potential offenders equally but rather sets its sights particularly on leaders. Political and military leaders bear the greatest responsibility for most international crime and deterring them is therefore most important. An economic deterrence analysis is less convincing when applied to such leaders.[59] Leaders are influenced not just by the likelihood of apprehension and severity of punishment, but also by the reputational effects of international indictment. They tend to be motivated by desires for status and power, each of which can be diminished significantly by an international arrest warrant.[60] Moreover, there is evidence that rape charges carry greater reputational costs for international defendants than charges involving killing. International defendants are often more willing to plead guilty to killing crimes than to sex crimes.[61] In fact, ICTR Chief Prosecutor Jallow has stated that defendants before that tribunal might be more willing to plead guilty to genocide than to sex crimes.[62]

In sum, when international prosecution aims to deter future criminal conduct, it will sometimes make sense to select sex crimes rather than crimes involving killing.

2.2.3. Restorative Justice

Restorative justice is a contested concept,[63] but generally seeks to focus society's response to crime on the needs of the affected people. Crime is conceived not merely as an act against the state, but as an offense against a particular victim or victims and relevant communities. Restorative justice therefore seeks to focus society's response to crime on repairing the damage caused to all parties rather than on imposing suffering on the of-

[59] Sloane, 2006, pp. 73–74, *supra* note 14.

[60] *Ibid*., p. 74.

[61] Beth Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, p. 395.

[62] Jallow, 2009, p. 8, *supra* note 12.

[63] John Braithwaite, "Narrative and 'Compulsory Compassion'", in *Law and Social Inquiry*, 2006, vol. 31, no. 2, pp. 425–426 (noting that restorative justice's "values framework is not settled and clear").

fender.[64] Restorative justice processes typically involve the victim and offender working collaboratively to heal the wounds inflicted by the crime.[65] Such efforts can be alternatives or adjuncts to punishment,[66] and generally require the offender to admit guilt.[67]

Although international criminal trials are not restorative justice processes in the sense typically employed in the national law context, they arguably have the potential to implement restorative justice principles. In other words, international courts can structure their work so as to strive to repair the damage caused by the offense rather than merely to punish the offender.[68] In fact, international courts often invoke restorative goals, and some scholars have urged such courts to place greater emphasis on restorative justice.[69]

---

64 Erik Luna, "Punishment Theory, Holism, and the Procedural Conception of Restorative Justice", in *Utah Law Review*, 2003, vol. 2003, pp. 228–229.

65 *Ibid.*, p. 228. The UN Basic Principles on Use of Restorative Justice Programmes in Criminal Matters defines restorative justice processes thus:

> 'Restorative process' means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

E.S.C. Res. 2002/12, UN Doc. E/2002/30, 24 July 2002, Annex para. 2. In the past few decades, such alternative processes as victim-perpetrator conferences and mediation have gained traction in various parts of the world including Canada, New Zealand and Australia. Luna, 2003, p. 229, *supra* note 64. Moreover, for many years before their adoption in Western countries, restorative justice practices were common in non-Western communities, including those in Rwanda and Uganda. Carrie Menkel-Meadow, "Restorative Justice: What Is It and Does It Work?", in *Annual Review of Law and Social Science*, 2007, vol. 3, p.164 (describing modern efforts as "variations on" Rwandan and Ugandan restorative processes). Generally, restorative justice practices are limited to crimes that are less serious than those under the ICC's jurisdictions. *See ibid.*, p. 175 (noting that in very serious cases (murder, rape, and serious assault) restorative justice is ancillary or supplemental, not substitutionary, to formal adjudication).

66 Combs, 2007, p. 140, *supra* note 17.

67 Kathleen Daly, "The Limits on Restorative Justice", in Dennis Sullivan and Larry Tifft (eds.), *Handbook of Restorative Justice: A Global Perspective*, Routledge, New York, 2006, p. 136.

68 Luna, 2003, pp. 228–229, *supra* note 64.

69 *See,* for example, Findlay and Henham, 2005, *supra* note 17; Combs, 2007, *supra* note 17.

International trials can be restorative in several ways. First, they can seek to restore the immediate victims of crimes by allowing them to participate in trials[70] and by awarding them reparations.[71] In fact, such efforts may serve not just to restore the victims but also to facilitate reconciliation between victims and offenders.[72] Moreover, beyond the immediate victims, international trials can serve to rehabilitate societies torn apart by conflict or systematic crimes.[73] In particular, international trials are said to promote societal rehabilitation through their truth-telling function and by establishing a historical record of crimes.[74] The suitability of international courts to this function is contested,[75] and the current prosecutor of the ICC has rejected historical record building as a goal of the court.[76] Nonetheless, many writers, including one important judge, cite historical record building as an important purpose of international prosecutions.[77]

---

70 *See* Brianne N. McGonigle, "Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court", in *Florida Journal of International Law*, 2009, vol. 21, no. 1, p. 96 ("This participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice.").

71 Mark Ellis, "The Statute of the International Criminal Court Protects against Sexual Crimes", Smart Library on Globalization, available at http://clg.portalxm.com/library/keytext.cfm?keytext_id=204, last accessed on 7 July 2011.

72 Some authors have expressed skepticism about this possibility. *See* for example, Miriam Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice", in *Harvard Human Rights Journal*, 2002, vol. 15, pp. 80–82.

73 William A. Schabas, *The UN International Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, Cambridge University Press, 2006, p. 68.

74 *See* Danner, 2001, p. 430, *supra* note 22 (citing Madeleine Albright statement that the ICTY's primary purpose was to establish the historical record); Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation", in *Human Rights Quarterly*, 2002, vol. 24, no. 3, pp. 586–589 (discussing truth-telling function).

75 Damaška, 2008, *supra* note 18.

76 The Office of the Prosecutor of the International Criminal Court, "Report of Prosecutorial Strategy: 2009–2012", 1 February 2010, p. 6, available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf, last accessed on 7 July 2011.

77 Antonio Cassese, "On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, 1998, vol. 9, no. 1, p. 5.

Restorative justice goals provide several reasons to give priority to sex crime prosecutions over crimes involving killing. First, with regard to societal restoration, it is important for all major types of criminality in a given conflict to be represented in the prosecutions. Such representation is necessary for the truth of what happened to emerge and for a complete historical record to be created. Representative prosecutions will often require sex crimes to be selected for prosecution over crimes involving killing. Furthermore, prosecutions may be more necessary to restore perpetrators and victims of sex crimes than those affected by killing crimes. In light of the stigma associated with sex crime, they often remain invisible. Without prosecutions, the segments of society that suffered from and perpetrated sex crimes may therefore be left without restorative recourse. Second, individual restoration of the immediate victims of sex crimes is at least possible with regard to victims of sex crimes whereas it is impossible for those who have been killed.

In sum, retribution, deterrence, and restorative justice goals not only fail to mitigate against thematic sex crime prosecutions, but even support such resource allocation strategies at least some of the time.

2.3. The Expressive Rationale for Thematic Sex Crime Prosecutions

While each of the rationales discussed above can serve to justify the work of international criminal courts, such courts are hampered in their ability to achieve these goals by their very limited resources. International courts can only inflict retribution on a small number of those who deserve it and have a limited reach in terms of deterrence and restorative justice. In contrast, international courts are uniquely well-placed to pursue the goal of norm expression.

Expressive theories of law are relatively new and complex,[78] but essentially center around law's ability to express states of mind – beliefs, attitudes, *et cetera* – of the governments or other collectives that promulgate and implement them.[79] The meaning of a legal act need not emanate from the cognitive efforts of any individual or group of individuals, but is

[78] Amann, 2002, p. 118, *supra* note 18.

[79] Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement", in *University of Pennsylvania Law Review*, 2000, vol. 148, no. 5, p. 1506; Dan M. Kahan, "What do Alternative Sanctions Mean?", in *University of Chicago Law Review*, 1996, vol. 63, no. 2, p. 597.

instead socially constructed.[80] Law is thus considered to have "social meaning". The social meaning of a legal act depends not on the intention of the actor, but rather on how the act is understood by the relevant audience.[81] An expressivist's normative agenda therefore includes both crafting law to express valued social messages and employing law as a mechanism for altering social norms.[82]

Although all law can be viewed as expression, criminal law is a particularly potent form of expression in light of the severe sanctions it imposes. Moreover, not only is criminal law expressive, so too is the criminal act it addresses.[83] For theorists such as Dan Kahan, therefore, criminal punishment is justified by its ability to counter the wrongful message inherent in the criminal act.[84] In fact, Professor Kahan maintains that punishment is not merely justified but necessary when the relevant community would interpret other forms of expression as inadequate.[85]

An expressive approach to international criminal law posits that a primary purpose of international trials is to express global norms.[86] The necessary selectivity of international courts does not impede them in pursuing an expressive agenda to the same extent as it does with respect to the other potential goals of such courts. Norm expression does not require that all or even most perpetrators be punished – a small number of sym-

---

80 Anderson and Pildes, 2000, p. 1525, *supra* note 79.

81 Amann, 2002, p. 118, *supra* note 18. Anderson and Pildes go so far as to say that the social meanings of an act "do not actually have to be recognized by the community, they have to be recognizable by it, if people were to exercise enough interpretive self-scrutiny". Anderson and Pildes, 2000, p. 1525, *supra* note 79.

82 Cass R. Sunstein, "On the Expressive Function of Law", in *University of Pennsylvania Law Review*, 1996, vol. 144, no. 5, pp. 2022–2024.

83 *See generally* Dan M. Kahan, "The Secret Ambition of Deterrence", in *Harvard Law Review*, 1999, vol. 113, no. 2, p. 413; Joel Feinberg, "The Expressive Function of Punishment", in *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, 1970, p. 95.

84 *See* Dan M. Kahan, "'The Anatomy of Disgust' in Criminal Law", in *Michigan Law Review*, 1998, vol. 96, no. 6, p. 1641 (claiming that "an expressively effective punishment must make clear that we are in fact disgusted with what the offender has done.").

85 Kahan, 1996, p. 600, *supra* note 79; Dan M. Kahan, "What's Really Wrong with Shaming Sanctions", in *Texas Law Review*, 2006, vol. 84, pp. 2075–2076 (acknowledging that shaming sanctions are an inferior alternative to punishment).

86 Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, forthcoming 2012.

bolic prosecutions can suffice to convey the necessary message. Moreover, international courts are particularly well-suited to expressing global norms. Such courts not only promote norms through their own indictments, investigations, and trials, they also do so by encouraging national prosecutions, which in turn express norms at the local level.

The ICC has the potential to be an especially powerful vehicle for norm expression. When the ICC chooses to prosecute a particular case, it implictly declares the crimes involved to be among the most serious crimes of concern to the international community as a whole.[87] The ICC's actions are widely covered by the international news media. Furthermore, the ICC operates according to a system of complementarity whereby the Court may not exercise its jurisdiction when national courts are already investigating or prosecuting in good faith.[88] Even the suggestion that the ICC may take action can therefore stimulate national investigations and prosecutions. In addition, the ICC Prosecutor has interpreted his mandate to include pursuing 'positive complementarity', that is, the active encouragement and facilitation of national prosecutions.[89] By assisting national prosecutions, the ICC can therefore promote norms even in cases where it takes no active part in prosecuting defendants.

In light of the special ability of international criminal courts to express global norms, it is unsurprising that a growing number of scholars, including this author, have espoused expressive theories as a central purpose – perhaps the central purpose – of international criminal adjudication.[90] Some international prosecutors have also adopted expressive ra-

---

87 Rome Statute of the International Criminal Court, 1 July 2002, Preamble, available at http://untreaty.un.org/cod/icc/statute/romefra.htm, last accessed on 25 March 2012 ('Rome Statute').

88 *Ibid.*, Art. 17.

89 Press Release, "Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation", International Criminal Court, 3 June 2010, available at http://www.icc-cpi.int/Menus/Go?id=a356ed0c-b98a-4e09-be4c-b54c6014899b&lan=en-GB, last accessed on 8 July 2011.

90 Amann, 2002, p. 117, *supra* note 18 ("Justification […] for the larger goal of pursuing international criminal justice may be found, however, in a newer concept, expressivism."); Sloane, 2006, p. 85, *supra* note 14 ("Over time, punishment by international criminal tribunals can shape as well as express social norms."); Damaška, 2008, p. 339, *supra* note 18 ("Among other proclaimed goals specific to international criminal courts, […] the didactic objective of improving respect for human rights by expressing outrage for their violation are most frequently singled out for emphasis.") (citation omitted); Drumbl, 2007, p. 175, *supra* note 14 (noting that "international trials reach a

tionales for their actions. For example, in explaining the decision to bring charges of recruiting child soldiers in the ICC's first case, the Court's Prosecutor and Deputy Prosecutor have highlighted the need to "draw the attention of the world"[91] and "shine a spotlight"[92] on crimes against children. International judges have invoked expressive goals in justifying the sentences they impose. In the sentencing judgment in the ICTY's *Erdemović* case for example, the judges wrote that:

> [T]he International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.[93]

Similarly, ICTR judges opined in the *Kamabanda* judgment that the sentence would express that "the international community was not ready to tolerate the serious violations of international humanitarian law and human rights".[94]

Although numerous scholars and practitioners have thus endorsed international criminal law expressivism – either explicitly or implicitly –

global audience"); Luban, 2010, p. 576, *supra* note 14 ("the most promising justification for international tribunals is their role in *norm projection*: trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes […].") (emphasis in original); Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, 2001, p. 13 (international criminal law's ability to contribute to the lofty objectives ascribed to it depends far more on enhancing its value as authoritative expression than on ill-fated efforts to identify the "right" punishment, whatever that could mean, for often unconscionable crimes); deGuzman, forthcoming 2012, *supra* note 86 (arguing for an expressive approach to selection decisions). *But see* Turner, 2005, p. 17, *supra* note 16 (arguing that international criminal low does not promote norms, but rather stirs up local backlash).

91 Luis Moreno Ocampo, "A Word From the Prosecutor", International Criminal Court Newsletter no. 10, November 2006, p. 2, available at http://www.icc-cpi.int/Menus/Go?id=2ad04dd6-6e18-4b9b-9477-4dfcd8d607a4&lan=en-GB, last accessed on 15 July 2011.

92 Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, Statement at the OTP monthly media briefing, 28 August 2006, p. 3, available at http://www.icc-cpi.int/NR/rdonlyres/53FB2CF6-B86C-4026-A8DC-FA2FC2450BCA/277236/FB_20060828_en5.pdf, last accessed on 15 July 2011.

93 International Criminal Tribunal for the Former Yugoslavia*, Prosecutor v. Erdemović*, Sentencing Judgment, 29 November 1996, para. 65.

94 International Criminal Tribunal for Rwanda, *Prosecutor v. Kambanda*, Judgment and Sentence, 4 September 1998, para. 28.

there has been little discussion of an important underlying normative question: Why is it appropriate for the international community – or at least participating states – to employ criminal processes to express norms? There are several plausible answers. First, norm expression can function as a method of crime prevention. Unlike deterrence, which is intended to affect the calculus of individuals disposed to criminal conduct, norm promulgation seeks to ensure that community members never even consider committing crimes. Second, norm expression can serve to restore victims – both the immediate victims of the crimes at issue and victims of similar crimes – by affirming the wrongness of the acts perpetrated against them.[95] Finally, assuming the international community is a 'community' in a meaningful sense – a debate that is beyond the scope of this chapter – that community may have an integrity interest in countering normative expression that conflicts with the community's vision of its identity.[96] Particular kinds of crimes, such as genocide and crimes against humanity, may threaten the international community's identity in a manner that requires contrary expression. The community may therefore wish to engage in such expression even if there is little or no associated utility.[97]

Assuming that international courts should pursue an expressive agenda for one or more these reasons, the question becomes whether such courts should give priority to expressing the norms prohibiting sex crimes at the expense of expressing other important norms such as those against illegal killing. Expressive theories are no more able to provide a definitive guide to case selection than are the other theories discussed above. While expressivism suggests courts should pay attention to the messages their actions send, it does not dictate which messages should be given priority. In the remainder of this essay, I argue that international courts are justified in giving priority to sex crime prosecutions because the norms prohibiting such crimes are in greater need of expression than the norms against illegal killing. This heightened need for expression has two sources. First, the history of under-enforcement of the norms prohibiting sex crimes has left them weaker than the norms outlawing killing. Second, sex crimes, unlike killing crimes, virtually always convey a message of

[95] I am indebted to Valerie Oosterveld for this observation.
[96] Sunstein, 1996, pp. 2026–2027, *supra* note 82.
[97] *Ibid.*, p. 2026.

discrimination that the international community has a particular interest in countering.

2.3.1. Sex Crimes as Under-Enforced Norms

The prohibitions against sex crimes have a long history of under-enforcement at both the national and international levels.[98] In many, if not most national criminal law systems, sex crimes are given significantly less attention than are crimes involving killing. While all national systems treat murder as a serious crime – probably the most serious – sex crimes are often viewed as unworthy of official or judicial attention.[99] Studies in the United States and Europe, for example, show that impunity for rape is significantly more prevalent than for murder.[100] Catharine MacKinnon,

---

[98] Goldstone, 2002, p. 280, *supra* note 5 ("[F]or many centuries domestic and international legal systems had ignored gender-related crimes.").

[99] Sudan provides an extreme example. There, it is more likely for a rape victim to receive lashes or death by stoning than for the rapist to be prosecuted. Amber Henshaw, "Sudan Rape Laws Need Overhaul", BBC News, 29 June 2007, available at http://news.bbc.co.uk/1/hi/world/africa/6252620.stm, last accessed on 7 July 2011.

[100] *See,* for example, Armen Keteyia, "Rape in America: Justice Denied", CBS News, 9 November 2009, available at http://www.cbsnews.com/stories/2009/11/09/cbsnews_investigates/main5590118.shtml, last accessed on 8 July 2011 ("Rape in this country is surprisingly easy to get away with. The arrest rate last year was just 25 percent – a fraction of the rate for murder – 79 percent, and aggravated assault – 51 percent."); Morgan O. Reynolds, "Crime and Punishment in America: 1999", National Center for Policy Analysis, October 1999, available at http://www.ncpa.org/pdfs/st229.pdf, last accessed on 8 July 2011 ("In 1997, the latest year for which prison data are available, the probability of going to prison for murder rose 13 percent from 1996, for rape 1 percent, for robbery 7 percent and for aggravated assault 11 percent."); "Conference hears of low rape conviction rate", RTE News, 16 January 2010, available at http://www.rte.ie/news/2010/0116/rape.html, last accessed on 8 July 2011 (Research revealed that the accused was convicted in just under one third of rape cases.); Jo Lovett and Liz Kelly, "Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe", Child and Woman Abuse Studies Unit at London Metropolitan University, 2009, p. 111, available at http://www.cwasu.org/filedown.asp?file=different_systems_03_web(2).pdf, last accessed on 11 July 2011:

> [T]he classic attrition pattern – of increased reporting and falling rates of prosecution and conviction – is now predominant in Europe across both adversarial and investigative legal systems. The range of reporting rates, from a low of 2 per 100,000 to the high of 46, raises questions about the extent to which states have enabled women to report sexual violence […]. The widespread falling conviction rates also suggest that states are failing the due diligence

Special Gender Advisor to the ICC Prosecutor, cites a "prevalent […] norm of denying [the] existence [of gender crimes], ignoring them, shaming their victims, and or defining them in legally unproveable ways".[101]

This enforcement failure has long been reflected in the international system as well. First, the law applicable to international courts has long been inadequate with regard to sex crimes. In Richard Goldstone's words, "Men [wrote] the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war".[102] The Geneva Conventions do not list rape as a grave breach subject to criminal sanctions, nor was rape included as a war crime or a crime against humanity in the Charters of the International Military Tribunals at Nuremberg and Tokyo. Second, international prosecutors have often failed to make appropriate use of the law that is available. The Nuremberg prosecutors omitted to charge rape at all, and the Tokyo Tribunal prosecutors only charged sex crimes under such euphemistic rubrics as "inhumane treatment" and "failure to respect family honour and rights".[103] Even modern prosecutors sometimes neglect to allocate sufficient resources to sex crime prosecutions.[104]

Certainly, the advent of the modern international criminal tribunals has brought important advances in the prosecution of sex crimes. When the statutes of the ICTY and ICTR were drafted in the early 1990s, for example, they included rape as an enumerated crime against humanity.

responsibilities they have under international law, both in protecting women from violence and providing redress and justice if they are a victim of it.

[101] Catharine MacKinnon, Special Gender Adviser to the Prosecutor of the International Criminal Court, "The International Criminal Court and Gender Crimes", presented at the Consultative Conference on International Criminal Justice in New York on 11 September 2009, p. 6, available at http://www.icc-cpi.int/NR/rdonlyres/2B344A20-EBDC-406C-8837-3973274F4501/280839/speech110909.pdf, last accessed on 15 July 2011.

[102] Goldstone, 2002, p. 279, *supra* note 5.

[103] *See,* for example, Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, Antwerpen, 2005, pp. 7–8.

[104] *Cf.* 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 *South Illinois Law Journal*, 2009, vol. 33, no. 2, pp. 188–189 (asserting that the prosecution in international cases has "historically neglected the special needs of victimized women and failed to give their cases adequate attention.").

Nonetheless, there was again initial resistance to investigating and prosecuting sex crimes. Investigators at the ICTY and ICTR believed or were instructed that sex crimes were less serious than crimes involving killing and should not be pursued.[105] Investigators were heard to make such comments as: "I've got ten dead bodies, how do I have time for rape?" and "So a bunch of guys got riled up after a day of war, what's the big deal?".[106] Defense counsel even questioned the appropriateness of international jurisdiction over sex crimes, arguing that they are insufficiently serious.[107]

Feminists have worked hard to change such attitudes, with some success.[108] In the very first case before the ICTY, feminists filed an amicus brief challenging the prosecutor's under-emphasis on sex crimes and received a prompt positive response.[109] Similarly, at the ICTR, an early case omitted sex crime charges until an amicus brief prompted the prose-

[105] *See* Peggy Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal", in *Case Western Reserve Journal of International Law,* 2002, vol. 35, pp. 310–311; IWPR Staff, 2010, *supra* note 56 (quoting ICTR Judge Navi Pillay as reporting that female investigators told her they were instructed "to just concentrate on the killings, because these were seen as more serious.").

[106] Kuo, 2002, pp. 310–311, *supra* note 105.

[107] Julie Mertus, "When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia", in *Seton Hall Law Review*, 2008, vol.38, p. 1307 (citing interview with former ICTY judge Patricia Wald).

[108] Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law", in *Michigan Journal of International Law*, 2008, vol. 30, no. 1, pp. 5–6 (discussing a feminist agenda in the 1990s to ensure vigorous prosecution of rape).

[109] *See ibid.*, pp. 14–15 (discussing feminist advocacy in *Tadić* case); See also Jennifer Green *et al.*, "Affecting the Rules for the Prosecution of Rape and other Gender Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique", in *Hastings Women's Law Journal,*1994, vol. 5, pp. 173–174. The ICTY's first prosecutor, Richard Goldstone, has confirmed that non-governmental organizations were instrumental in ensuring the prosecution of sex crimes at that tribunal in the face of resistant investigators. Goldstone, 2002, p. 280, *supra* note 5.

cution to amend the indictment.[110] The case led to the first international conviction for rape and other forms of sexual violence.[111]

The Rome Statute of the ICC also made significant strides in ensuring an adequate legal basis for the prosecution of sex crimes. In what several scholars have termed 'governance feminism', feminists were again extremely active in the Statute's negotiations.[112] Their efforts ensured for example, that despite opposition from The Holy See and the Arab League, among others, the Statute included a broad definition of the term 'gender'.[113] The Rome Statute also mandates that in exercising the Prosecutor's duties, he or she must consider "the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children […]".[114] The Statute further requires that hiring decisions at the court take into account the need to include personnel with expertise in sexual and gender violence.[115]

Despite these successes, many commentators agree that sex crimes remain under-enforced at the international level.[116] For example, the

[110] For discussion of feminist advocacy in the *Akayesu* case, *see* Halley, 2008, pp. 15–17, *supra* note 107; and Galina Neleava, "The Impact of Transnational Advocacy Networks on the Prosecution of Wartime Rape and Sexual Violence: The Case of the ICTR", in *International Social Science Review,* 2010, vol. 85, pp. 10–11.

[111] International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Judgment, 2 September 1998.

[112] Halley, 2008, pp. 101–115, *supra* note 108.

[113] *Ibid.*, pp. 105–107.

[114] Rome Statute, Art. 54(1)(b), *supra* note 87. While the ICC prosecutor initially justified crime selection in the *Lubanga* case by invoking practical considerations involving timing and evidence availability, more recently he has highlighted the case's role in showcasing the sexual abuse of child soldiers. Luis Moreno Ocampo, "Keynote Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence", in *Law and Social Inquiry*, 2010, vol. 35, pp. 845–846.

[115] Rome Statute, Art. 36(8)(b), *supra* note 87 (providing that in selecting judges, "States Parties shall consider the need for legal expertise on violence against women"); Art. 42(9) (requiring prosecutor to "appoint advisors with legal expertise on [...] sexual and gender violence"); Art. 43(6) (mandating that the Registrar's Victims and Witness Unit "include staff with expertise in […] trauma related to sexual violence").

[116] *See,* for example, Binaifer Nowrojee, "We Can do Better Investigating and Prosecuting International Crimes of Sexual Violence", Presented at the Colloquium of Prosecutors of International Criminal Tribunals at Arusha, Tanzania, 25–27 November 2004, available at http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php, last accessed on 7 July 2011 ("Squandered opportunities, periods of

Women's Initiative for Gender Justice, the premier advocacy organization for women in international criminal law, has criticized the ICC for charging its first defendant, a militia leader from the Democratic Republic of Congo, solely with recruiting child soldiers even though the conflict is rife with sex crimes.[117] Even Hassan Jallow, Chief Prosecutor of the ICTR, has admitted that the prosecution of sex crimes at international tribunals could be improved.[118]

International judges have recognized this under-enforcement as a justification for a special focus on sex crimes at international courts. For example, in the ICTR's *Akayesu* judgment the trial chamber stated:

> [T]he Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war

neglect, and repeated mistakes have caused setbacks to effective investigations and prosecutions of sexual violence crimes by international courts."); Brigid Inder, "Statement to the General Debate of the Review Conference of the Rome Statute", Presented at the ICC Review Conference, 1 June 2010, available at http://www.coalitionfortheicc.org/documents/Womens_Initiatives_Statement_GeneralDebate.pdf, last accessed on 8 July 2011 ("It would appear the strategy underpinning these charges [of gender-based crimes] is still under development and not yet robust enough to sustain the charges and that perhaps modest judicial concepts of gendered violence are being applied in their interpretation."); "Women Accuse the ICC of Failing Them", Uganda Radio Network, 1 June 2010, available at http://ugandaradionetwork.com/a/story.php?s=27278&PHPSESSID=46cfb8c84835f34eeaea5772cc988320, last accessed on 8 July 2011 ("A group of activists has accused the International Criminal Court of failing to give prominence to women's issues in conflict…[claiming] the International Criminal Court (ICC) places more emphasis on dialogue with governments than it does in engaging victims of conflict […][and that] organizations independent of government and state control are being denied the opportunity to voice concerns of women, who are often the greatest victims of war."); IWPR Staff, 2010, *supra* note 56 (explaining that rape victims from Sierra Leone were largely disappointed that rape was not added to the CDF indictment, since they had taken a big risk to offer evidence in the first place).

[117] "Beni Declaration", in "Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court", June 2008, p. 17, available at http://www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf, last accessed on 7 July 2011.

[118] Hassan B. Jallow, "International Criminal Justice, Some Reflections on the Past and the Future", Presented at the Fifth Colloquium of Prosecutors of International Criminal Tribunals at Kigali, Rwanda, 11–13 November 2009, p. 8, available at http://www.unictr.org/Portals/0/english/news/events/nov2009/some-reflections-of-the-past-and-the-future_hb-jallow.pdf, last accessed on 7 July 2011.

> crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.[119]

Similarly, judges of the Special Court for Sierra Leone stated:

> The Chamber considers that the specific offences are designed to draw attention to serious crimes that have been historically overlooked and to recognise the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate and instill fear in victims, their families and communities during armed conflict.[120]

In contrast to sex crimes, crimes involving killing – even in conflict situations – have a stronger record of enforcement. The laws prohibiting such crimes, including the Geneva Conventions among others, have been in place longer, and their enforcement has not been resisted in the ways elaborated above for sex crimes. This relative under-enforcement of sex crimes thus provides a strong basis to give priority to such crimes in determining which norms international criminal courts should seek to promote. In fact, Richard Goldstone invoked this justification in explaining the thematic *Foča* prosecution, stating: "We have always regarded it as an important part of our mission to redefine and consolidate the place of [sex crimes] in humanitarian law".[121]

2.3.2. The Discriminatory Message of Sex Crimes

The second basis to give priority to sex crimes in setting the expressive agenda of international courts is that, unlike killing crimes, sex crimes virtually always involve the perpetrator's discriminatory valuation of a group – usually women. Although sex crimes against men are more common

---

[119] International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para. 417.

[120] Special Court for Sierra Leone, *Prosecutor v. Sesay et al.* ("RUF case"), Judgment, 2 March 2009, para. 156 (citations omitted).

[121] Press Release, "Gang rape, torture and enslavement of Muslim women charged in ICTY's first indictment dealing specifically with sexual offences", International Criminal Tribunal for Rwanda, 27 June 1996, available at http://www.icty.org /sid/7334, last accessed on 7 July 2011. See also Special Court for Sierra Leone, *Prosecutor v. Brima, et al.* ("AFRC case"), Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para. 34 (identifying a need to "highlight the high profile nature of the emerging domain of gender offences").

than frequently believed and are also under-prosecuted,[122] most sex crimes are perpetrated against women. Male perpetrators select female victims for harm because they are women. The expression inherent in such crimes is not just that the perpetrator undervalues the particular victim but that he disrespects women in general. As ICTY Judge Florence Mumba stated in sentencing one of the defendants in the *Foča* case:

> By the totality of these acts [of sexual violence] you have shown the most glaring disrespect for the women's dignity and their fundamental human right to sexual self-determi-nation […].[123]

Whether one views the purpose of international criminal law expression as prevention or identity affirmation, it is more important to address crimes motivated by discrimination than comparable crimes committed without discrimination. First, discriminatory crimes are in greater need of prevention because they express the perpetrator's view that not just the victim, but an entire class of people, is less valuable and thus deserving of ill treatment. In explaining the traditional justification for increased penalties for hate crimes, the U.S. Supreme Court noted that such conduct "is thought to inflict greater individual and societal harm"[124] than crimes committed without such motivation. Left unpunished, the perpetrator and those who agree with his valuation of the victim class are likely to continue harming people belonging to that class. In other words, crimes based on discrimination threaten the security of an entire group.

Imagine for a moment that a soldier uses a weapon incapable of adequately distinguishing combatants from civilians and thus kills several civilians. He then rapes several women. The first crime sends the message: "I am committed to winning the war even if it means violating the rules of armed conflict". This is certainly a dangerous message and countering it through prosecution may help prevent similar rule violations in the future. The rapes, however, send a broader message about the value of women. Prosecuting the rapes not only has the potential to prevent future

---

[122] Dustin A. Lewis, "Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law", in *Wisconsin International Law Journal*, 2009, vol. 27, pp. 1–4.

[123] Press Release, "Judgment of Trial Chamber II in the Kunarac, Kovač and Vuković Case", International Criminal Tribunal for the Former Yugoslavia, 22 February 2001, p. 5, available at http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_ Kovac_Vuković_summary_en.pdf, last accessed on 7 July 2011.

[124] Supreme Court of the United States, *Wisconsin v. Mitchell*, Judgment, 13 June 1993, 508 U.S. 476, pp. 487–488.

violations of the rules against rape in armed conflict but also to prevent other crimes that result from the devaluation of women's lives – whether in times of conflict or peace. Thus, an ICTR prosecutor has asserted that:

> [...] the dialogue between international and national prosecutors must include specialized consideration of crimes of sexual violence [because] prosecution of these crimes [is] a key component to stopping the global violence against women.[125]

Furthermore, if the purpose of international prosecution is to reaffirm the values and identity of the international community, that identity is more seriously threatened by crimes involving discrimination than by non-discriminatory crimes. A crime that conveys the perpetrator's devaluation of a particular class of people is more worthy of condemnation than a comparable act that does not.[126] If our hypothetical war criminal goes unpunished for killing civilians, the international community will have failed to counter his assertion that the rules of armed conflict are optional. If he goes unpunished for the rapes, however, he will not only have successfully expressed disdain for the rules, he will have flouted a norm even more fundamental to the identity of the international community – the fundamental human rights norm of equality between men and women. As such, Catharine MacKinnon has asserted that the ICC's emphasis on sex crimes aims to "signal […] to the world" that the norm of ignoring sex crimes is no longer accepted.[127]

Thus, whether one views the purpose of international criminal law expressivism as prevention or identity affirmation, there will often be

---

[125] Linda Bianchi, "The Investigation and Presentation of Evidence Relating to Sexual Violence", Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities Arusha, 26 to 28 November 2008, paras. 1–2, *supra* note 56. See also Inder, 2010, *supra* note 116:

> The prosecution of rape and other forms of violence against women by the ICC in these situations would be particularly significant because it would demonstrate that the Court recognises the legal rights of women even when they are denied by the laws and practices of their own country and it would also assist with future domestic prosecutions of non-conflict related rape and other forms of violence.

[126] Dan M. Kahan, 1996, p. 598, *supra* note 79 (stating that a racist killing "is more worthy of condemnation" than a mother's revenge killing "because hatred express a more reprehensible valuation."); Pendo, 1994, *supra* note 38.

[127] MacKinnon, 2009, p. 6, *supra* note 101.

compelling reasons to engage in thematic prosecutions or otherwise give priority to sex crimes even at the expense of prosecuting some killings.

2.4. Conclusion

In deciding how to allocate their scarce investigative and prosecutorial resources, some international criminal courts have engaged in thematic prosecutions of sex crimes, and many others have at times chosen to prioritize sex crimes over killing crimes. This essay has sought to demonstrate that despite the common wisdom that prosecutors should give priority to the most serious crimes and that killing is more serious than rape, thematic sex crime prosecutions are justified by the goals of international criminal adjudication. Sex crimes sometimes inflict greater harms than killing crimes, increasing the value of deterring them as well as the importance of inflicting retribution on their perpetrators. Restorative justice will also sometimes be better promoted by prosecuting sex crimes than killing crimes. Most importantly, the goal of expressing global norms, which some identify as the central task of international criminal law, suggests that sex crimes should often be given priority over other serious crimes when international courts decide whom to prosecute and what charges to bring.

3

'Those Most Responsible' *versus* International Sex Crimes: Competing Prosecution Themes?

Fabricio Guariglia*

3.1. Introduction

In his provocative play "Death and the Maiden" the Chilean writer Ariel Dorfman describes the ordeal of Paulina, a former political detainee who recognizes her torturer and rapist as the driver that has helped her husband with a flat tire and drove him home. The play poses a number of fundamental questions around the thorny issues of accountability, coming to terms with the past and "own hand justice". For the purposes of this contribution, however, the most important aspects of the play are: first, the shock and trauma of the victim, who suddenly encounters the man who repeatedly raped her to the music of a Schubert string quartet (from which the play borrows its title) during her captivity. Second, the fierce hunger for redress that this encounter triggers: Paulina captures her alleged rapist at gunpoint and submits him to a makeshift "trial", assigning to her shocked husband the task of defending the accused against her charges.

The drama at the centre of the play is a familiar one in the aftermath of mass violations of human rights and international humanitarian law ('IHL'). From Chile and Argentina to South Africa, and from Rwanda to Bosnia, hundreds of victims of sexual offences must have seen their perpetrators walking around in a free and unconcerned manner. Some of these victims may have reacted to that situation by seeking justice through whatever means available, like Paulina in Dorfman's play. Others may have simply walked away in fear and shame. All, I assume, must have been profoundly affected by the encounter and the memories ignited.

What can international justice do for these victims? Is it capable of adequately addressing this human drama? Can it provide meaningful and

* **Fabricio Guariglia**, Senior Appeals Counsel, Office of the Prosecutor, International Criminal Court. The views expressed herein are solely the author's and should not be attributed to the Office of the Prosecutor or the International Criminal Court. The author thanks Helen Duffy for her helpful comments and suggestions.

satisfying answers to them? What would Dorfman's victim have to say about the manner in which international prosecutors have identified, selected and brought to justice sexual violence cases to date? These are all questions that probably we cannot fully answer. But what we can do, and what I intend to do in this chapter, is to explore some of the identifiable tensions between the apparent limitations of international prosecutions and the undeniable right of every victim of rape to have her suffering properly addressed by a court of law, national or international. In particular, I will focus on the ICC Office of the Prosecutor's formulated policy of focusing its limited resources on the prosecution of those "most responsible" for the commission of crimes within the jurisdiction of the Court, and some of its potential consequences for the prosecution of sexual crimes.

3.2. Selectivity and International Prosecutions

The complex issue of selectivity in the conduct of criminal prosecutions and in particular the tensions between the exercise of prosecutorial discretion, on the one hand, and the victim's expectations, on the other, are familiar to domestic jurisdictions. All national systems are in one way or another selective, and gate-keeping decisions based on criteria such as strength of the evidence, credibility of the victim's account of events, likelihood of a conviction, *et cetera*, are made on a daily basis. This also happens in the particularly sensitive area of sexual violence, and the manner in which these decisions are made has an unavoidable impact on the victims.[1]

In the context of international prosecutorial bodies, which face the challenge of dealing with massive crimes with very limited resources, selectivity has to be assumed as a fact: the question is not whether to select, but *how* to select.[2] As one commentator aptly puts it, the issue is not

[1] See, for instance, *Responding to sexual assault: the way forward*, Attorney General's Criminal Justice Sexual Offences Taskforce, Department of New South Wales, Australia, pp. 11–17 *inter alia*, available at http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/CJSOT%20Report.pdf/$file/CJSOT%20Report.pdf, last accessed on 25 March 2012.

[2] On the issue of selection generally, see Fabricio Guariglia, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court", in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 2009, pp. 209, *et seq*. An expert discussion on the criteria for selecting international criminal cases was held by the Forum for International Criminal and Humanitarian

"whether selective prosecution should occur, as it is essentially impossible that it does not, but when selective prosecution is unacceptable".[3] Some interesting developmental stages in this area can be identified: international justice appears to have moved from a rather anarchic approach to selection of cases – at times based on contingent criteria, such as arrest feasibility – to the formulation of some minimal criteria governing selection,[4] and then to the adoption a more defined policy focusing on those persons holding leadership positions.[5] The last step in this development is the adoption, by the ICC's Office of the Prosecutor ('OTP'), of the so-called "most responsible" prosecutorial policy – a policy whereby the OTP focuses "its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes".[6] This horizontal cut in the chain of individuals involved in the commission of massive crimes obviously leaves a very high number of alleged perpetrators outside of the scope of international prosecutions. What are then the implications of this policy for the effective prosecution of sexual violence? This issue will be discussed in the following pages.

3.3. Who "Commits" Rape?

One conceivable negative consequence of focusing prosecutorial efforts in those individuals located at the highest echelons of the chain of command would be the effective reduction of the available modes of liability for cases of rape and other forms of sexual violence. An interesting example of this is provided by the landmark ICTY *Furundžija* case, where the Trial Chamber was faced with the following factual scenario: one accused

Law in 2007. See Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Cases*, Torkel Opsahl Academic EPublisher, 2010.

3 Robert Cryer, *Prosecuting International Crimes*, 2005, p. 192.

4 The October 1995 ICTY-OTP criteria provide for a first attempt to define at the international level a set of principles governing case selection. See Claudia Angermaier, "Case Selection and Prioritization in the Work of the ICTY", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Cases*, Torkel Opsahl Academic EPublisher, 2010, p. 31.

5 A first step in this direction is the 1998 review of cases by the ICTY Prosecutor Louise Arbour. See Angermaier, 2010, *supra* note 4, p. 34.

6 *Paper on Some Policy Issues before the Office of the Prosecutor*, September 2003, available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf, last accessed on 25 March 2012.

(Furundžija, a local commander) interrogated the victim (Witness A), while other person (Accused B, Furundžija's subordinate) raped her. As the intensity of the questioning increased, so did that of the rape. This led the Trial Chamber to conclude that the questioning and the rape were part of a single process conducted by both accused.[7] When it came to defining the applicable modes of liability, however, Furundžija was held to be a co-perpetrator of the crime of torture, but only an aider and abettor of the crime of rape. The Chamber concluded that while Furundžija had played a central role in the entire process, he "did not personally rape Witness A, nor can he be considered under the circumstances of this case, to be a co-perpetrator"; however, since his presence and continued interrogation "encouraged Accused B and substantially contributed to the criminal acts committed by him", he did satisfy the requirements of aiding and abetting.[8] Worthy of note is that in an earlier finding made in relation to the crime of torture, the Chamber had concluded that in order to be a co-perpetrator of that crime it was necessary to perform "an integral part" of the torture.[9]

This particular aspect of the *Furundžija* Judgment resonates with some rather dated notions of perpetration, whereby the perpetrator (or co-perpetrator) of a crime can only be the person who physically performs at least some of the elements of the crime.[10] It also seems to endorse a view that used to be the prevailing one in civil law jurisdictions whereby even if one accepts a broader concept of perpetration, in the case of rape, only the person who personally rapes the victim can be held liable as a perpetrator. This is because rape belongs to the category of the so-called "own hand crimes", that is, crimes that require a direct personal perpetration by the accused.[11] If this position was to be accepted, then focusing on those persons located at the highest echelons of the groups or apparatuses in-

---

7 *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, paras. 129, 130 and 264 (*Furundžija* Judgment).

8 *Furundžija* Judgment, paras. 273–275*, supra* note 7.

9 *Ibid.*, para. 257.

10 Scholars from Civil Law jurisdictions have referred to this particular approach (now abandoned) as the "formal-objective theory" of modes of liability (*Formal-Objektive Theorie*). See Claus Roxin, *Täterschaft und Tatherrschaft*, 1994, pp. 34 *et seq*.

11 See, among others, Juan J. Bustos Ramírez and Hernán Hormazábal Malarée, *Lecciones de Derecho Penal*, vol. II, 1999, pp. 293–294; Hans-Heinrich Jesheck and Thomas Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 1996, pp. 266–267, *inter alia*.

volved in the crimes would have as an indirect and undesirable consequence – that even in situations of mass sexual violence, it would be extremely rare to secure a conviction for "committing" rape, either as a perpetrator or co-perpetrator (direct or indirect), since it is not often the case that leaders get personally involved in the type of crimes that the subordinates commit in the field. A system that is in charge of the prosecution of episodes of massive sexual violence but that does not produce convictions for the actual commission of rape would be, at best, an anomaly. Moreover, in cases where rape is verified as occurring but in relation to which nobody can be clearly identified as being responsible for its commission, such a system could also send a confusing message, whereby rape becomes something closer to a natural catastrophe than to human conduct. This would defeat one of the goals of accountability, which is to decipher and explain the complex network of causation and attribution inherent to the commission of international crimes[12], in the aftermath of mass violations of human rights and IHL.

Fortunately, post-*Furundžija* developments in this area of the law may avert these fears: first, ICTY jurisprudence has clarified that in order to "commit" a crime as member of a Joint Criminal Enterprise (the theory of liability most frequently used by the ICTY to deal with situations of crimes involving a plurality of persons), the accused's participation need not involve the actual perpetration of a crime, including rape. Rather, that participation "may take the form of assistance in, or contribution to, the execution of the common purpose".[13] This initial expansion would already allow for convictions of high-level accused based on the commission of the crime of rape, even if those accused remained at all times removed from the physical perpetration of the crime.[14] The second important de-

[12] Herbert Jäger, "Betrachtungen zum Eichmann-Prozeß", in *Monatschrift für Kriminologie und Strafrechtsreform*, vol. 45, 1962, pp. 73–83.

[13] *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 24 February 2004, para. 100.

[14] It is worthy of note that even in jurisdictions where the notion that rape is an "own-hand crime" prevailed there is an increasing resistance to it. For instance, in Argentina the unit in the Attorney General's office in charge of coordinating the federal prosecutions of past human rights violations has just issued a legal opinion which states that the notion of rape as an "own-hand crime" should not be adopted by federal prosecutors. The opinion notes that the historical rationale behind this restrictive approach to the perpetration of rape, namely that "rapist" could only be the person who obtains sexual satisfaction through the act of rape, is a deeply flawed proposition. Rather, the relevant consideration should be: who exercised control over the act and is therefore

velopment is represented by the use of theories of indirect perpetration or indirect co-perpetration (that is (co)perpetration by means) in the ICC pre-trial decisions that include charges of rape against persons who have not been personally involved in acts of rape. While these rulings stem from Pre-Trial Chambers and are by their nature provisional, they do provide further support to the position that a person removed from the actual perpetration of the acts of rape can be held liable for "committing" the crime of rape.[15]

3.4. Bridging the Distance between a "Most Responsible" Policy and the Victim's Individual Story

3.4.1. The "Notorious Perpetrator"

While the aspects of the *Furundžija* judgments discussed above do not pose a *legal* problem today, they do remind us of the fact that the higher up we go in the chain of command, the further away we move from the individual episode of sexual violence and the particular victim. And as we venture into a terrain of culpability that is indeed more comprehensive, we also become less involved with that particular instance of victimization: we tell a "broader story" about the decision-making processes that set the criminal machinery in motion,[16] but we also say less about the human drama lying at the heart of the charges against the accused.

---

responsible for the crime of rape. See Unidad Fiscal de Coordinación y Seguimiento de las Causas por Violaciones a los Derechos Humanos Cometidas Durante el Terrorismo de Estado, *Consideraciones sobre el Juzagamiento de los Abusos Sexuales Cometidos en el Marco del Terrorismo de Estado*, October 2011, pp. 19–20 (quoting further authorities), available at http://www.mpf.gov.ar/ics-wpd/DocumentosWeb/LinksNoticias/Delitos_sexuales_terrorismo_de_Estado.pdf, last accessed on 25 March 2012.

15 See, for instance, the first Warrant of Arrest issued against the Sudanese President Omar Al Bashir, stating that there are reasonable grounds to believe that he was responsible, as indirect perpetrator or as an indirect co-perpetrator of the crime of rape as a crime against humanity, among other crimes (ICC-02/05-01/09-1, 4 March 2009, available at http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf, last accessed on 25 March 2012).

16 When analyzing the so-called "big fish v. small fish" debate in the context of the ICTY, Payam Akhavan notes that "[t]he prosecution of the leader of a particular region promises to tell a more complete story of a conflict than the trial of a low-ranking perpetrator. In other words, the overall contextual facts relevant to establishing the criminal liability of a low-ranking accused such as Tadić or Erdemović are necessarily

While this limitation is, to some extent, an unavoidable by-product of a prosecutorial policy focused on those persons located at the highest echelons of responsibility, and as such should be addressed as part of the so-called "impunity gap" through resort to other available mechanisms,[17] there are still some things that can be done within a "most responsible" policy to mitigate these concerns. First, it is important to know when to accommodate exceptions to the policy, for instance, in order to deal with the so-called "notorious perpetrators", even if this means going down the chain of command. Let us go back to the *Furundžija* case and put a name to the anonymous "Accused B", the one that physically perpetrates the rape on Witness A: Accused B was called Miroslav Bralo. He was a member of the *Jokers*, a special unit within the HVO (Bosnian Croat army), which was involved in the most serious crimes committed in central Bosnia in 1993. Bralo had a particularly brutal record of violence. He was in prison for the killing of a Muslim man, and while in prison he was allowed to terrorize Muslim fellow inmates at his will.[18] He was released from prison in order to join the attack on the village of Ahmići, where Bosnian Croat forces massacred the Muslim inhabitants. He was convicted of personally committing at least five murders and assisting in the killing of 14 Bosnian Muslim civilians, nine of whom were children. His conviction also covers the brutal rape and torture of Witness A (whom he later imprisoned for two months so she could be further raped by her captors), his involvement in the unlawful confinement and inhuman treatment of Bosnian Muslim civilians, including forced labor and use of civilians as "human shields", setting on fire numerous houses, and blowing up a mosque in Ahmići.[19] Bralo was known and feared.[20] He certainly was a

more limited in scope than the corresponding facts that would establish participation in a widespread or systematic attack on the part of persons in positions of power" (See "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", in *Human Rights Quarterly*, vol. 20, no. 737, 1998, p. 777)

17 See, *inter alia*, Michael Gibbs, *The ICC Alone Cannot End the Era of Impunity*, The Guardian, 12 June 2010.

18 See *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, paras. 77 and 115.

19 See *Prosecutor v. Bralo*, Case No. IT-95-17-S, Sentencing Judgement, 7 December 2005.

20 One witness from the Ahmići area whom I met in the context of a separate, but related, ICTY case explained to me the fear with which he received the news that Bralo had been released from prison.

minor player in the persecutory campaign launched in central Bosnia in April 1993, yet his crimes gained prominence in the area.

A prosecutorial strategy focused on those individuals "most responsible" for the crimes should not lose sight of those persons who commit particularly shocking crimes and acquire a level of notoriety that distinguishes their conduct from that of other perpetrators.[21] The ICC-OTP's June 2006 draft Policy Paper on Criteria for Selection of Cases recognized this, and included within the circle of persons who could be singled out for prosecution, "[n]otorious perpetrators who distinguish themselves by their direct responsibility for particularly serious crimes".[22] Including such persons in any prosecutorial program has clear benefits: first, you prosecute someone whose impunity could seriously disturb the community where the crimes occurred and the victims who suffered them. Second, you simultaneously bring down to earth what has been described as the "abstract narrative" of crimes against humanity and war crimes.[23] You depict the brutality of the crimes committed in the field and you describe how an otherwise normal person – a soldier, a neighbour, a political activist, engaged in this brutality. In the case of Bralo, this exercise meant narrating a particularly shocking story of sexual violence in Central Bosnia, which illustrated the scope and impact of such violence in the context of the armed conflict in the former Yugoslavia. The narrative exercise also explains how this type of crimes happened in the field at the "micro" level[24], and enhances the symbolic or expressive function of criminal prosecutions, thereby sending the message that the values harmed by those in-

[21] Examples of this category of perpetrators can be Goran Jelisić, who committed shocking atrocities against Bosnian Muslims in the enclave of Brčko, introducing himself to his victims as the "Serbian Adolf" (See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1999, paras. 102–103, *inter alia*) and Alfredo Astiz in Argentina, who was responsible for the disappearance of the founder member of Madres de Plaza de Mayo Azuzena Villaflor, among other crimes.

[22] Paragraph 38.

[23] Akhavan states that "in their own way, the trials of Tadić, Erdemović, and other small fish may bring home the daily aspect of the abstract narrative of ethnic cleansing, explaining how ordinary people participated in killing and brutalizing their fellow human beings", Akhavan, 1998, *supra* note 16, p. 780.

[24] To put it in Arendt's terms, the prosecution of these cases fosters the transformation of a cog in the wheel back into a human being; see Hannah Arendt, *Eichmann in Jerusalem*, 1992, p. 289.

dividual crimes were ones dear to the international community, and which would be upheld and defended at all times.[25]

One difficulty for performing this operation, however, is the scope of the analysis, and in particular, whether the prosecutorial body is using a panoramic lens or a magnifying glass to examine the situation and the actors involved. For example, through a panoramic lens, one can get a wider picture of the victimization taking place in the field, detect the patterns, the *modus operandi*, the movement of the troops across the territory, and the functional networks that connect all the pieces. However, it is unlikely that one will be able to detect the individual actors that are causing that victimization at the grassroots level. On the other hand, through a magnifying glass, one loses sight of the wider picture, but may be in a position to put a name to the otherwise anonymous perpetrator that is engaging in sexual violence in the field.

In this sense, it is important to note the differences between the ICC and its predecessors, such as the *ad hoc* tribunals, which were all created to deal with a single situation through a prolonged period of time. For instance, everyone in the ICTY-OTP involved in the investigation and prosecution of the crimes committed by the HVO in central Bosnia in 1993 knew who Miroslav Bralo was, and what his role in those crimes had been, starting with the sexual violence that he had inflicted on defenceless

[25] It is also worthy of note that Bralo not only pleaded guilty, but also expressed genuine remorse for the crimes committed and apologized to the victims, among other efforts to atone for his crimes. In sentencing him, the Trial Chamber stated that the following:

> [t]he Trial Chamber further recognises that Bralo's guilty plea, combined with his genuine remorse, is likely to have a positive effect on the rehabilitation of the victims of his crimes, and their communities. As stated by Mehmed Ahmic, the current President of the Ahmići Municipality Council, Bralo is the first person charged by the Tribunal with crimes committed in that area who has admitted his criminal conduct. It accepts his view that this acknowledgement of wrongdoing is extremely important for the entire community in its continuing process of recovery and reconciliation noted (*Bralo* Sentencing Judgement, *supra* note 19, para. 71).

Although, as the Biljana Plavsić guilty plea before the ICTY shows, leaders can also admit to the crimes charged, this type of episodes of remorse and contrition are more likely to take place and have an impact among those who have been personally involved in the commission of the crimes than among leaders who have directed the crimes from the comfortable distance of their offices.

victims. This is normal: if you have one or more teams that are solely devoted to exploring crimes committed in one confined area during a given period of time, you can put your eye to the microscope and analyze the "grassroots" criminality that forms the fabric of crimes against humanity and war crimes, and in that way learn about the stories of individual victims and perpetrators. However, in the context of the ICC, this type of "micro-analysis" will seldom be possible. This is because the ICC has limited resources to perform the huge task of dealing with multiple situations, each of them comprising hundreds of incidents that may constitute crimes within the jurisdiction of the Court. This does not mean, however, that ICC investigators and prosecutors should give up from the outset, any hope of identifying the Bralos or the Jelisics or the conflict they are mapping, with a view to selecting the gravest incidents and the groups involved. With the unavoidable limitations that the ICC faces in this respect, efforts should still be made to understand as much as possible, the details of the incidents that have been singled-out as most representative, for in-depth investigation and prosecution. Information about persons involved in them should also be adequately processed and analyzed. This is also important for the purposes of making adequately informed decisions on all aspects of the strategy, for the development and presentation of the case: it is not only about not missing Miroslav Bralo as a potential target; it is also about avoiding the risk of ending up interviewing Miroslav Bralo as a potential insider witness due to insufficient information about the person and his role in the crimes, a decision that would negatively impact on the credibility and legitimacy of the prosecution in the eyes of the victims and communities affected.[26]

3.4.2. Other Possible Ways to Bring a "Most Responsible" Policy Closer to the Individual Victims

As mentioned earlier, even though a "leaders only" (or even "mainly") policy will normally lead to the selected cases telling a broader story, such a policy will also move away from the individual episode of victimization. The questions are then, on the one hand, whether anything can be done to ensure that the story of the individual victim of sexual violence does not disappear within the wave of crimes attributed to the accused, and on the other, whether we can ensure that the individual victim feels a

[26] To my knowledge, this scenario has not taken place to date.

personal connection to the case brought by the prosecution, even if it is not "her" case.[27]

One way to do this is to ensure that the episodes selected for prosecution at trial are clear and illustrative examples of the type of victimization that has taken place in the field. In this way, the victim of sexual violence, whose individual victimization has not been included in the prosecution's charges, may still feel that her suffering is nonetheless being addressed, even if in an indirect fashion, through the prosecution of instances of sexual violence similar to the one she suffered. The ICC-OTP has established for these purposes, the notion of "representative sample", whereby incidents are selected "to provide a sample that is reflective of the gravest incidents and the main types of victimization".[28] For instance, in the *Bemba* case, one of the criteria to select the individual incidents of sexual violence that are presented by the prosecution, was the extent to which those incidents were representative of the victimization inflicted on women, children and men by the militia group involved in the crimes during the rampage of sexual violence in the Central African Republic between October 2002 and March 2003. This poses the challenge to identify and collect the evidence that provides for the best sample of the crimes, and to be able to put together a comprehensive sample in instances of extended and multiple forms of victimization. In the *Bemba* case, there is proximity between the sample and totality, to the extent that the victimization inflicted was more or less uniform and concentrated in confined areas. However, this will often not be the case. In such situations, resort to other supplementary tools may be needed in order to enhance the representation of the crimes in the Prosecution's case.

---

[27] Connecting the individual victim with the prosecution of the person holding a leadership position is an important challenge for any international tribunal:

> [i]n terms of truth telling and vindicating the suffering of victims, will prosecuting Karadic and Mladic more readily satisfy someone whose neighbor killed members of her family? Can a leader become a symbol for all that happened or do victims of a particular incident need to see someone in the dock with greater proximity to the crime from which they directly suffered? (Akhavan, 1998, *supra* note 16, p. 779).

[28] ICC Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, p. 5, available at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf, last accessed on 25 March 2012.

The use of overview evidence may be one of such tools, that is, the use of evidence that can put the episodes of sexual violence chosen by the prosecution into a wider context (for example, the head of a humanitarian mission which documented cases of sexual violence throughout the territory where the crimes charged took place) and expand the narrative of sexual violence at trial. Another avenue is to use the contextual element of crimes against humanity to narrate the story of uncharged instances of sexual violence that still form part of the widespread or systematic attack on the civilian population. This, again, provides an opportunity to broaden the discussion of sexual violence at trial and to provide further illustration of the true scope of victimization in the field. Finally, even in cases where the prosecution ultimately decided not to focus on sexual violence for the purposes of the charges, it is still possible to explore instances of such violence during the sentencing stage, as part of the impact of the crimes in the victims and their lives. This is what the ICC-OTP has attempted to do in the *Lubanga* case, where even though the prosecution focused solely on the enlistment, conscription and use in hostilities of child soldiers, instances of sexual violence have been portrayed during the proceedings as part of the children's ordeal once brought into the militia groups.

One final point touches on the rubric under which crimes of sexual violence should be charged, that is, which legal characterization can best portray the suffering inflicted on the victims? This is a frequent challenge in the context of international criminal jurisdictions, which are equipped with overlapping crimes that at times have uncertain borders for the complex task of putting a legal name to the incidents being prosecuted. In this context, the quest for the most comprehensive legal characterization can be a particularly hard one, plagued with unpredicted difficulties. For instance, the SCSL's choice to prosecute charges of "forced marriage" as "other inhumane acts" under crimes against humanity was, on the one hand, greeted with enthusiasm as a substantial development in the prosecution of gender crimes, and on the other, strongly criticized on the basis that the indicators chosen to distinguish the crime of forced marriage from that of sexual slavery (cooking, cleaning, washing clothes) ultimately reproduced sexist stereotypes of "marriage".[29] At the opposite end of the

[29] See the thought-provoking article of Jennifer Gong-Gerschovitz, "Forced Marriage: A "New" Crime Against Humanity?", in *Northwestern Journal of International Human Rights*, vol. 8, issue 1, Fall 2009, pp. 53 *et seq*. The author considers that "[a]lthough the perpetrators of violence used the pretext of marriage quite possibly to avoid

spectrum we have the overly simplistic – and legally questionable – decision from an ICC Pre-Trial Chamber in the *Bemba* case, rejecting the charge of torture as a crime against humanity brought by the prosecution on the basis that it was cumulative of rape charges.[30] If this decision is followed, then even in situations such as that of the *Furundžija* case, prosecutors would be forced to bring charges that cover only one aspect of the victimization suffered, depriving the victim of a finding that she was also subject to torture, not only rape, and diminishing the expressive value of a conviction.

3.5. Concluding Remarks

At the end of "Death and the Maiden", Paulina, having obtained a confession from her former captor, has a dialogue with her husband, who has just heard for the first time the full story of his wife's ordeal during captivity. Paulina explains that she wants to exorcise the ghosts from their lives. She tells her husband, among other things, that she wants him to do his work in the truth commission (which she had previously rejected as window-dressing) and that she wants to start listening to Schubert's music

charges of rape and sexual slavery, a conviction on these grounds provides the most faithful accounting of the crimes of inflicted against thousands of women and girls in Sierra Leone and in other conflicts throughout the world" (p. 63). The importance of developing an adequate, impartial and objective methodology for the investigation and prosecution of sexual violence, free of any stereotypes or predetermined positions, has been stressed by Xabier Agirre in his comprehensive article *Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases*, Leiden Journal of International Law, vol. 23, 2010, pp. 609–627.

30 *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gomo, 15 June 2009, paras. 307–312, *inter alia*. The Chamber appears to acknowledge that the practice of cumulative charging is allowed in international criminal jurisdictions, and even to endorse the "additional element" test developed by the ICTY Appeals Chamber in the *Celebići* case. However, it subsequently concludes that the torture charges should be displaced by the rape ones, since the latter crime contains all elements of the former, an assertion that a plain reading of the Elements of Crimes proves to be incorrect (*inter alia*, torture under Art. 7(1)(f) includes requirements of severe physical or mental pain or suffering and of custody or control over the victim, which are nowhere to be found in relation to the crime of rape under Art. 7(1)(g)(1); rape only requires penetration, and force, threat of force or coercion, or taking advantage of coercive circumstances). Thus, and probably inadvertently, by concluding that rape contains all elements of torture plus the distinct element of penetration, the Chamber heightens the legal requirements of the crime of rape, against the express will of the legislator.

again, which her rapist had also taken away from her. Paulina's makeshift trial has re-sensitized her, restored her autonomy and given her new strength. Could a trial before the ICC produce a similar transformation on the victims of sexual violence in the situation being handled by the Court?

Obviously this question will not have a single answer. However, in relation to those victims involved in the Court's process, either as witnesses and/or as participants, producing positive effects should be at least one goal that the Court sets for itself. Indeed, restoring the victim's sense of self-respect and producing an authoritative finding that she is not responsible for her own tragedy are aims that should guide any justice initiative after massive violations of human rights law and IHL.[31] In relation to other victims, the question becomes even more complex and the impact, if it exists, will be very difficult to quantify. But the Court can produce substantial effects in the communities where the crimes occurred, which in turn may provide avenues for the victims to have their suffering addressed. For instance, the Court's intervention may shake the culture of impunity that frequently surrounds the commission of international crimes. It can create momentum for accountability by maximizing the symbolic and expressive values of its prosecutions of sexual crimes, and can also support nascent or ongoing national efforts through positive complementarity mechanisms. The recent rape verdicts of the Fizi mobile court in the DRC, a mechanism created to complement the work of the ICC, provide a good example of this.[32]

If this happens, if the states of denial[33] accompanying the crimes are perforated by national and international accountability efforts, if the feeling of pervasive impunity starts fading away and a sense of outrage for the crimes committed and a demand for justice takes its place, then perhaps by the next encounter, the one that walks away in fear and shame is the rapist, not the victim.

---

[31] I borrow these concepts from Jaime Malamud Goti. For a discussion of these notions, see his book *Game Without End*, 1996, pp. 14–17, *inter alia*, with additional references.

[32] See Kelly Askin, "Fizi mobile court: rape verdicts", in *International Justice Tribune*, no. 123, March 2011.

[33] The term belongs to Stanley Cohen. See *States of Denial: Knowing about Atrocities and Suffering*, Polity, 2001, Chapter I ("The Elementary Forms of Denial"), discussing collective defence mechanisms created to cope with guilt through the negation of the very existence of the crimes.

4

Prioritising International Sex Crimes before the Special Court for Sierra Leone: One More Instrument of Political Manipulation?

Christopher Mahony*

4.1. Introduction

Over the past two decades the prosecution of international crimes[1] has become increasingly common, with international organisations and individual States taking political positions over their legitimacy and conduct. Efforts to ensure impartiality and independence in the selection of cases prosecuted however, have largely failed. Independent case selection has been compromised because States have sought to impede prosecution where they view doing so as antithetical to their interests. Unsurprisingly, States have been happy to allow prosecutions where they view them as furthering their interests. The power to impede, to allow and to shape case selection has therefore become a useful instrument of foreign policy for States.

Historically prosecution of international crimes has not provided proportionate case selection attention to sex crimes. Advocacy groups have rightly sought to ensure that sex crimes are represented amongst cas-

* **Christopher Mahony**, Deputy Director, New Zealand Centre for Human Rights Law, Policy and Practice, Faculty of Law, University of Auckland; M.Sc. in African Studies, University of Oxford; Candidate for D.Phil. in Politics, University of Oxford; Consultant at International Centre for Transitional Justice; Consultant at Institute for Security Studies, Africa.

1 International crimes include crimes against the peace (the 'crime of aggression'), genocide, war crimes, crimes against humanity and other serious violations of international humanitarian law. International crimes are generally considered under customary international law to be those for which individual criminal responsibility may be applied. For an examination of these crimes, see Antonio Cassese, *International Criminal Law* (Second Edition), Oxford University Press, New York, 2008; Dapo Akande *et al.* (eds.), *Oxford Companion to International Criminal Justice*, Oxford University Press, New York, 2009; and M. Cherif Bassiouni *Introduction to International Criminal Law*, Transnational Publishers, New York, 2003.

es selected for prosecution. However, the prioritisation of sex crimes cases for prosecution is a step further still and confronts an emerging norm of case selection prioritisation that applies greater gravity to murder than sex crimes or torture.[2]

This chapter employs the case of the Special Court for Sierra Leone to examine the efficacy of prioritising sex crimes in selection of international crimes cases. The empirical data supporting this material is drawn from over 100 interviews dating from April 2003 to January 2011 and experience working at both the Special Court and the Truth and Reconciliation Commission. The interviewees include Sierra Leonean victims, perpetrators, lawyers, politicians, civil society activists and of course practitioners working at the Court. Perhaps more important for the theme of this chapter, interviewees also included defence and prosecution counsel and investigators at the Court, a former British High Commissioner, State delegates to the Security Council, U.S. diplomats as well as Senators and Representatives, their staffers working on U.S. policy in West Africa and key personnel at the State Department working on transitional initiatives and U.S. policy in the region.

The chapter seeks to examine Special Court case selection and the nature of investigative practices within the context of the politics of the conflict's conclusion. I argue that the Court's creation was driven more by a politically expedient British narrative and a partisan shift in U.S. policy, than independent intent to address impunity. I also argue that pressure created by advocacy groups for prosecution of international crimes in the region was employed more because of its political utility rather than its perceived merit. In short, actors who designed the Court and controlled critical elements of its function, cherry picked and manipulated transitional justice discourse for their own interests. In the process of doing so, they undermined an authentic pursuit of justice for the victims of Sierra Leone's conflict. This chapter cautions against diversion from an emerging norm of case prioritisation criteria (that places murder as the most serious of crimes). To do so suggests that those creating and designing internationalised courts, and those creating local frameworks for prosecution of international crimes, would not employ or refuse to employ this policy based on political consideration, rather than a case's merit. It also suggests that prosecution personnel at the local and international level would

[2] Morten Bergsmo, Chapter 1 above.

not selectively employ thematic criteria based on considerations relating to current and future state co-operation. Circumstances lending greater scope for selective prosecution, I argue, undermine rather than further the need to ensure independent prosecution of sex crimes.

My argument is premised by the assumption that States, particularly powerful States best placed to affect negotiation of Court creation and design, employ a constructivist approach to courts trying international crimes. In order to interpret a constructivist approach in international law, we must employ "practical reason" in understanding the human agency's power in building social structures.[3] Brunnee and Toope argue that:

> [l]aw is persuasive when it is viewed as legitimate, largely in terms of internal process values, and when, as a result of the existence of basic social understandings, it can call upon reasoned argument, particularly analogy, to justify its processes and its broad substantive ends, thereby creating shared rhetorical knowledge.[4]

Furthermore, the authors argue that legitimacy is derived from rules and norms created by mutual construction via a wide range of participants.[5]

I argue that rules and norms relating to case selection bear little resemblance to those that might derive legitimacy according to Brunnee and Toope. I employ the succinctly stated summary of the constructivist explanation of international relations, that:

> Rules and norms constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred. In other words, norms do not cause a state to act in a particular way, but rather provide reasons for a state to do so.[6]

I will start off by examining the conflict, particularly its conclusion, before addressing the design of the court and the nature and impact of State co-operation on case selection. I will conclude by considering the nature and effect of key case selection norms inherent in court design and

---

[3] Jutta Brunnee and Stephen Toope, "International law and constructivism: Elements of an interactional theory of international law", in *Columbia Journal of Transnational Law*, vol. 39, 2000, pp. 19–74, 27.

[4] Brunnee and Toope, 2000, p. 72, *ibid*.

[5] Brunnee and Toope, 2000, p. 74, *ibid*.

[6] Ngaire Woods, *Explaining International Relations since 1945*, Oxford University Press, Oxford, 1996, p. 26.

function – what would a departure from an emerging norm that places murder as the most serious crime before torture and sex crimes mean for retributive, deterrent and expressivist goals?[7]

Sierra Leone is a small coastal West African country and a former British colony. It is bordered by Guinea to the North and East and Liberia to the South. The causes and motivations behind the conflict are a point of scholarly contention. In West African, American, British, and French interests have commonly been aligned in attempting to solicit external commercial penetration and diplomatic and security influence. However, these States have historically competed amongst one another for the fruits external hegemony bear. This competition has been pursued through the development of regional allies such as Libya for the French and Nigeria for Britain and the United States. These two regional powers have often supported friendly parties in conflicts in the region in furtherance of their patron's interests. The Sierra Leonean civil conflict is a case study in the theory of external leveraging of regional power politics.

In March 1991, an armed insurgency called the Revolutionary United Front ('RUF') led by Foday Sankoh and supported by Charles Taylor's Liberian National Patriotic Front ('NPFL') entered eastern Sierra Leone from Liberia to try to overthrow the government of Joseph Momoh. Both the RUF and the NPFL leadership had received training and financial support from Libya and, according to western intelligence, held French third party tacit support *via* Burkina Faso and the Ivory Coast from which Taylor launched his Liberian rebellion.[8]

The war would cause tens of thousands of deaths, over a million displacements, and upwards of 400,000 amputations of one or more limbs. The number of victims of sex crimes is unknown. They constituted just 3.3 per cent of total crimes reported to the Truth and Reconciliation Commission.[9] Low reporting of sex crimes suggests more about the stigma experienced by victims than its prevalence during the conflict. The commission did not attempt to estimate the totality of these crimes. How-

---

7 Morten Bergsmo, Chapter 1 above.

8 *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 31441, 9 November 2009, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed on 28 April 2010.

9 Report of the Sierra Leone Truth and Reconciliation Commission, vol. 2, 2004, GPL Press, Accra, p. 35, available at http://www.sierra-leone.org/Other-Conflict/TRC Volume2.pdf, last accessed on 16 January 2007.

ever, it is commonly recognised that rape is widespread in Sierra Leone, particularly so during the conflict.[10] UN Special Rapporteur on the Elimination of Violence Against Women, Radhika Coomaraswamy, estimated that more than 50 per cent of Sierra Leonean women and girls were victims of sexual violence.[11]

In 1992, a group of Sierra Leone Army ('SLA') soldiers venting discontent at poor treatment by the government conducted a *coup*, establishing the National Provisional Ruling Council ('NPRC'). In power, the army were ineffective in countering the RUF. As a consequence many rural communities formed local Civil Defence Forces ('CDF') to defend themselves from both the RUF and an increasingly ill-disciplined army. The CDF would also end up committing numerous and egregious violations during the conflict but comparatively few crimes sexually oriented in nature.

In 1995, the NPRC's then greatest source of revenue, the SIERMCO and Sierra Rutile mines, were captured. With British personnel and commercial interests threatened, the British government helped secure a deal that provided diamond-mining concessions worth $2 billion and interests in Sierra Rutile to a British firm. In return for these commercial interests, the firm organised a mercenary force to capture the two sites, defend Freetown, and engage the RUF.[12]

---

[10] Amnesty International, *Sierra Leone: Rape and other forms of violence against girls and women,* 29 June 2000, AI Index: AFR 51/35/00, available at http://www.amnesty.org/en/library/asset/AFR51/035/2000/en/bf9f0ced-deed-11dd-b263-3d2ffbc55e1f/afr510352000en.pdf, last accessed on 10 January 2007.

[11] "Violence Against Women Rife During Sierra Leonean War", *Agence France-Presse*, 20 March 2002, cited in Stephanie H. Bald, "Searching for a Lost Childhood: Will the Special Court of Sierra Leone Find Justice for Its Children?", in *American University International Law Review*, vol. 18, no. 2, 2002, pp. 537-583, 546.

[12] Ian Douglas, "Fighting for diamonds – Private military companies in Sierra Leone", in J. Cilliers and P. Mason (eds.), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies*, Institute for Security Studies, Pretoria, 1999, pp. 179–180; EO deployed 150 to 200 men and a helicopter gunship. P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2003, p. 104; David Keen, *Conflict and Collusion in Sierra* Leone, James Currey, 2005, p. 151; David J. Francis, "Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation", in *Third World Quarterly*, 1999, vol. 20, no. 2, pp. 319–338; Report of the Sierra Leone Truth and Reconciliation Commission, vol. 3B, 2004, GSL Press, Accra, p. 68, available at http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf; E. Barlow, *Executive Outcomes:*

In 1996, dubious elections were held bringing NPRC advisor Ahmed Tejan Kabbah to the Presidency.[13] A failed attempt at peace led Kabbah to depend more heavily on the CDF for support. The SLA was viewed by the Kabbah government as commonly operating alongside the RUF.

Kabbah's perceived hostility towards the army prompted it to conduct a *coup* in May 1997.[14] At the army's request, RUF leader Foday Sankoh, then in detention in Nigeria, ordered the RUF to join the SLA in the government.[15] Kabbah fled to Guinea where, in close counsel with the United Kingdom, he established a government in exile. The U.K. then procured a large Nigerian force under the banner of regional peacekeeping to assist CDF efforts to force Kabbah's return.[16] The SLA marginalised the RUF from peace talks, fermenting distrust between the SLA and the RUF – something that former President Kabbah would later exploit.[17]

Next door in Liberia, Charles Taylor comprehensively won the Liberian presidency. The U.S., having previously viewed Taylor as an agent of Francophone encroachment in a historically U.S. sphere of influence, actively engaged the RUF's Liberian supporter in diplomacy. Taylor's strongest U.S. relationships were developed with U.S. Special Envoy for

Against All Odds Alberton, Galago Publishing, 1999, p. 325; Deborah D. Avant, *The Market of Force: the Consequences of Privatizing Security*, Cambridge University Press, Cambridge, 2005, p. 86; David Shearer, *Private Armies and Military Intervention*, Adelphi Paper 316 IISS, Oxford University Press, Oxford, 1998, p. 49; Sandline International, "Public Comment on Book Entitled 'Mercenaries – an African Security Dilemma'", 14 March 2000, available at http://www.privatemilitary.org/publications/Sandline-BookMercenariesAnAfricanSecurityDilemma.pdf, last accessed on 5 November 2011.

13 Southern irregularities included 345 per cent turn out in Pujehun, 155 per cent in Bonthe, 139 per cent in Kailahun, 117 per cent in Kenema, and 90 per cent in Bo. J.D. Kandeh , "Transition without Rupture: Sierra Leone's Transfer Election of 1996", in *African Studies Review*, 1998, vol. 41, no. 2, pp. 98, 105.

14 Keen, 2005, pp. 197–201, *supra* note 12; Sierra Leone Truth and Reconciliation Commission, vol. 3A, 2004, pp. 234–236.

15 Sierra Leone Truth and Reconciliation Commission, 2004, pp. 245–246, *supra* note 14.

16 Interview with a former Tunisian delegate to the UN Security Council, The Hague, 11 June 2009.

17 Conakry Peace Plan, "Agreement between the Armed Forces Revolutionary Council and ECOWAS", 23 October 1997, available at http://www.c-r.org/our-work/accord/sierra-leone/conakry-peace-plan.php, last accessed on 16 October 2011.

human rights and democracy in Africa, Jesse Jackson, and Black Congressional Caucus leader Donald Payne.[18] Despite rapprochement with the U.S., Taylor maintained close ties to France, visiting Paris in 1998 to declare Liberian plans for privatisation and for French business to spearhead the process.[19] French encroachment into the historically British sphere of influence in Sierra Leone posed a tremendous threat to British commercial, diplomatic and security interests.

The Kabbah government was returned to power by an Economic Community of West African States Monitoring Group ('ECOMOG') and CDF attack planned and co-ordinated by the British Mercenary group Sandline. British support of the CDF violated UN sanctions that Britain had proposed and lead.[20]

In March 1999, circumstances demanded a conciliatory British stance. At the time Nigeria sought to draw down ECOMOG forces in Sierra Leone[21] while the U.S. and France continued to support Taylor and the RUF. British Foreign Minister Robin Cook met with his French counterpart Hubert Vedrine in Abuja from where he instructed a reluctant Kabbah to pursue dialogue with the RUF.[22] U.S. Special Envoy Jesse Jackson confronted President Kabbah at a conference in Ghana and brought him to Togo to negotiate the Lome Peace Accord with the RUF.[23] President Kabbah and RUF leader Foday Sankoh eventually agreed a power sharing peace deal, amnesty for crimes committed and the replacement of ECOMOG with a UN force. Britain was isolated in its sup-

---

18 Timmerman, "Jesse, Liberia and Blood Diamonds", in *Insight Magazine*, 25 July 2003, available at http://www.frontpagemag.com/Articles/Read.aspx?GUID=D16F17D3-CD47-4443-913B-6667650D7014; Ismail Rashid, "The Lome peace negotiations, Conciliation Resources", September 2000, available at http://www.c-r.org/our-work/accord/sierra-leone/lome-negotiations.php, last accessed on 11 July 2006.

19 Star Radio, "Liberian Daily News Bulletin", in *All Africa.com*, 30 September 1998, available at http://allafrica.com/stories/199809300154.html, last accessed on 16 October 2011.

20 Lansana Gberie, "War and Tate Collapse: The Case of Sierra Leone", 1997, p. 166; Interview, *supra* note 16; BBC News, *Britain's Role in Sierra Leone*, 10 September 2000, available at http://news.bbc.co.uk/1/hi/uk/91060.stm, last accessed on 16 October 2011.

21 "IRIN Update 420 for 11 March 1999", University of Pennsylvania, African Studies Center, available at http://www.africa.upenn.edu/Newsletters/irinw420.html, last accessed on 16 October 2011.

22 Keen, 2005, p. 250, *supra* note 12.

23 Rashid, 2000, *supra* note 18.

port for Kabbah and antipathy towards Taylor and the RUF. Two key dynamics changed in Britain's favour in 1999 and 2000.

4.2. Local Security and External Politics Shift in Favour of Kabbah and the U.K.

The first change to occur in favour of the U.K. was the Kabbah government's rapprochement with the Sierra Leonean Army. The SLA/RUF alliance had been undermined by the SLA's exclusion from the Lome negotiations and Agreement by the RUF. This tension was exacerbated when RUF field commander Sam Bockarie briefly took captive SLA leader, Johnny Paul Koroma.[24] These events pushed the SLA away from the RUF and towards President Kabbah. This changed the security dynamics dramatically in favour of President Kabbah and his British supporters. President Kabbah now had the majority of the SLA (some SLA elements remained aligned to the RUF), a large ECOMOG force, and of course the CDF at his disposal.

Perhaps the most important swing of support came from the Republican-controlled U.S. Senate that sought to change Clinton administration policy in the region against the Liberian President Charles Taylor and the RUF. The foreign affairs appropriations committee chairman has the power to block money for foreign policy without hearings, debate or votes.[25] Then Republican chairman, Senator Judd Gregg, used that power to block funding of $96 million for the UN's Sierra Leone mission – money required for education and vocational programs promised to combatants under the Lome Accord. Senator Gregg, a fiscal conservative, was also impeding payment of $1.77 billion owed to the UN by the U.S.[26] Senator Gregg had argued that U.S. finance would be better spent domestically than on policy he viewed as ill-informed and unethical, citing Libe-

[24] Sierra Leone Truth and Reconciliation Commission, 2004, pp. 343, 344, *supra* note 14; Sierra Leone Web Archives, October 1999, available at http://www.sierra-leone.org/Archives /slnews1099.html, last accessed on 16 October 2011.

[25] Tim Weiner, Solitary Republican Senator Blocks Peacekeeping Funds, New York Times, 19 May 2000, available at http://www.nytimes.com/2000/05/19/world/solitary-republican-senator-blocks-peacekeeping-funds.html?scp=4&sq=juddgreggsierra leone&st=cse, last accessed on 20 November 2011.

[26] *Ibid*.

ria and Sierra Leone.[27] The Sierra Leone UN funding represented the only real incentives for ordinary RUF combatants to disarm. Emboldened by his emerging local security strength and by Republican support in the U.S., President Kabbah refused to grant many allocated RUF positions in government.[28] In congruence with the British government, President Kabbah continued to cite RUF reluctance to disarm as the sole driver of post-Lome instability. This narrative was adopted by the mass media. Little attention was drawn to the non-disarmament of the CDF or the refusal of the Kabbah government to fulfil its obligations under the peace agreement.

The pressure on combatants to disarm without any incentive to do so culminated in their May 2000 seizure of over 550 United Nations Mission in Sierra Leone ('UNAMSIL') peacekeepers. Four peacekeepers were killed and three injured.[29] In response, President Kabbah deployed the SLA alongside the CDF to arrest senior RUF figures in Freetown. This included a CDF and SLA attack, under cover of protest, on Foday Sankoh's house.[30] The government described the fracas as hostile RUF action against a democratic government, a narrative actively deployed by the British government and adopted by the mass media.[31] In response, the RUF marched on Freetown but were met and repelled by a coalition of SLA, CDF, ECOMOG and British troops (co-ordinated, armed and trained by the British).[32] The RUF had been effectively labelled the aggressors as Britain began to act without Security Council approval but with moral legitimacy derived from the narrative it had manufactured.

---

27 Interview with former staffer to United States Ambassador to the United Nations, Richard Holbrooke, 13 January 2011; see also *ibid*.

28 Sierra Leone Truth and Reconciliation Commission, 2004, p. 249, *supra* note 14; United Nations, *Fourth Report of the Secretary General on the United Nations Mission in Sierra Leone*, S/2000/455, 19 May 2000, p. 3, available at http://www.ess.uwe.ac.uk/SierraLeone/sierraleone7.htm, last accessed on 16 October 2011.

29 Sierra Leone Truth and Reconciliation Commission, 2004, p. 358, *supra* note 14.

30 *Ibid.*, pp. 415–421, 245–249.

31 *Ibid.*, pp. 405–406, 415–421, 233, 245–249, 393, 377.

32 Sierra Leone Truth and Reconciliation Commission, 2004, pp. 331, 457–458, *supra* note 14; International Crisis Group ('ICG'), "Liberia: The key to ending regional instability, in *Africa Report*, vol. 43, 24 April 2002, p. 4, available at http://www.crisisgroup.org/en/regions/africa/west-africa/liberia/043-liberia-the-key-to-ending-regional-instability.aspx, last accessed on 5 November 2011.

The British government was now working with U.S. Senator Judd Gregg to change U.S. policy against Charles Taylor. In response to the hostage taking, Gregg stated he would continue to block U.S. peacekeeping funds until Lome was abandoned and all feasible efforts were used to undermine Charles Taylor's rule in Liberia.[33] Gregg also called for "an international war crimes tribunal" to "investigate and punish atrocities committed by the RUF", the first time such a tribunal had been publicly proposed.[34]

Judd Gregg and his staffers had met with then U.S. Ambassador to the UN, Richard Holbrooke and his staffers to discuss U.S. policy towards Sierra Leone and Liberia.[35] Gregg made the case that the United States was using taxpayer dollars for ill-informed policy and that $368 million of overdue U.S. peacekeeping funding would remain withheld until U.S. policy changed.[36]

4.3. The Clinton Administration Concede

Indications of an Anglo-American compromise could be seen in a statement from the Kabbah government that private security firms from either the U.S. or Britain would be contracted to provide security in the diamond mining areas. Charles Taylor's pledge of 3,000 Liberian troops to an Economic Community of West African States ('ECOWAS') peacekeeping contingent in Sierra Leone, and his call for RUF leader, Foday Sankoh to be moved to a third country, indicated his acknowledgement of a change in Clinton administration policy.[37] Ambassador Holbrooke and Senator Gregg had agreed on a shift in policy against Charles Taylor, directed at the removal of his regime using a diversity of instruments.[38] These would include sponsoring an armed rebellion against Taylor's government, es-

[33] Judd Gregg, A Graveyard Peace, The Washington Post, 9 May 2000, available at http://www.highbeam.com/doc/1P2-525556.html, last accessed on 12 January 2009.

[34] *Ibid*.

[35] Interview, Holbrooke staffer, 2011, *supra* note 27; Interview with former staffer to Senator Judd Gregg, 13 December 2010, Washington D.C.

[36] Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35; Weiner, 2000, *supra* note 25.

[37] Sierra Leone Web Archive, June 2000, available at http://www.sierra-leone.org/Archives/slnews0600.html.

[38] Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35.

tablishing a tribunal that would indict him, placing sanctions on his government that would weaken his ability to repel a rebel force, and provide support to local political opponents.[39] Ambassador Holbrooke and Senator Gregg intended that one or a combination of these methods would force President Taylor from power.[40]

On 5 June 2000, the U.S. State department announced it was in consultation with the UN and the U.K. to bring perpetrators of crimes in Sierra Leone to justice, indicating that crimes committed since the Lome Amnesty were not covered by it.[41] This implied that the U.S. considered that crimes committed prior to Lome were. Jesse Jackson was fired as Special Envoy for the Promotion of Democracy and Human Rights in Africa. The next day U.S. senator Judd Gregg released $368 million in peacekeeping funds ($96 million for Sierra Leone) that he had been blocking.[42] Until this time, the Clinton administration had termed Senator Gregg's blockage of the funds "a grave mistake".[43] The Clinton administration had officially indicated its shift in policy in a letter to Senator Gregg from U.S. Ambassador to the UN Richard Holbrooke. The letter, the contents of which the two had negotiated, stated that Mr. Sankoh should have no political future, that the UN should try to disrupt the RUF's hold on diamonds, and that the U.S. should come up with a strategy to deal with Liberian President Charles Taylor.[44] On June 6, Senator Judd Gregg made the following statement:

> The United States will not turn a blind eye to the rape of the people and of the land of Sierra Leone. We will demand that brutal thugs are held accountable for their atrocities and regional troublemakers must look with fear to their own future.[45]

---

39 Interview, Gregg staffer, 2010, *supra* note 35.

40 *Ibid*.

41 Sierra Leone Web Archive, 2000, *supra* note 37.

42 *Ibid*; Weiner, 2000, *supra* note 25.

43 Tim Weiner, G.O.P. Senator frees millions for UN mission in Sierra Leone, New York Times, 7 June 2000, available at http://www.nytimes.com/2000/06/07/world/gop-senator-frees-millions-for-un-mission-in-sierra-leone.html, last accessed on 17 March 2012.

44 *Ibid*.

45 Sierra Leone Web Archive, 2000, *supra* note 37.

4.4. Negotiating a Tribunal

The U.S. and Britain began to negotiate the possibility of a tribunal at the Security Council. However, France, Russia and China viewed this move as an attempt to deal with Liberia through the back door.[46] The three permanent members of the Security Council concluded that any tribunal should be funded by the U.S. and Britain themselves unlike the Tribunals for the former Yugoslavia and Rwanda.[47] The U.S. and Britain also favoured a hybrid model funded by voluntary donations. They viewed the Court's hybridity as less costly than its predecessors while granting donor States greater fiscal control over the selection and behaviour of key court personnel.[48] British UN representative Jeremy Greenstock stated a comprehensive resolution was being proposed to expand the UNAMSIL force, to bring to justice those that had attacked peacekeepers and committed violations of international law and to address the illegal RUF trade of diamonds for arms.[49]

4.5. The Emergence of Regime Change Strategy for Liberia

Within a month of the meeting between Ambassador Holbrooke and Senator Gregg the proposed U.S. strategy was materialising for Charles Taylor's government in Liberia. The British government asked Kabbah to write a letter to the Security Council requesting it to establish an international criminal tribunal.[50] After a closed session, the Security Council found that the RUF had violated the Lome agreement and that those responsible for taking UN peacekeepers hostage should be "brought to justice".[51] An armed militia called the Liberians United for Reconciliation and Democracy ('LURD') that was in contact with military officers from

46 Interview, Tunisian delegate, 2009, *supra* note 16.

47 *Ibid.*; Interview with former U.S. Department of State, Deputy Ambassador at Large for War Crimes Issues, Michael Miklaucic, *via* telephone, 20 September 2011.

48 Interview, Tunisian delegate, 2009, *supra* note 16; Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35.

49 Sierra Leone Web Archive, 2000, *supra* note 37; Interview, Holbrooke staffer, 2011, *supra* note 27; Interview, Gregg staffer, 2010, *supra* note 35.

50 Interview, Tunisian delegate, 2009, *supra* note 16.

51 United Nations Official communiqué of the 4163rd meeting of the Security Council, S/PV.4163, 21 June 2000, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/492/44/PDF/N0049244.pdf?OpenElement, last accessed on 17 March 2012.

both the U.S. and Britain, attacked North Western Liberia from Guinea.[52] Guinean leader Lansana Conte had been a strong U.S. ally in the region. His forces were provided with increased U.S. military training and ammunition for their offensive against Taylor.[53]

The Liberian Government, with support from ECOWAS, France, China and Russia, appealed to the Security Council to lift sanctions placed on it. However, the U.K. and U.S. remained steadfastly opposed.[54] In the face of Anglo-American hostility, President Taylor attempted to appease the U.S. through diplomatic patrons in both the democratic and republican parties. However, all arms, as well as both parties of U.S. government now appeared unified in their opposition to Taylor's Liberian regime. In October 2000, the Clinton Administration banned entry to the U.S. to President Taylor and other senior Liberian officials.[55] In 2001, after meeting with George Bush on Taylor's behalf, prominent republican evangelist Pat Robertson told Taylor:

> [T]he only thing I can advise you to do, Mr President, is appeal to God, because what I'm hearing from George Bush, there's nothing that you can do about what America intends to do.[56]

---

52 ICG, 2002, p. 4, *supra* note 32.

53 *Ibid.*, p. 5; *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009, p. 31332–31333, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed on 17 March 2012); United States House of Representatives, Hearing before Subcommittee on Africa, global human rights and international relations, "*The impact of Liberia's election on West Africa*", 8 February 2006, pp. 61–62, available at http://commdocs.house.gov/committees/intlrel/hfa26015.000/hfa26015_0f.htm, last accessed on 29 April 2010; Interview, Gregg staffer, 2010, *supra* note 35.

54 Interview, Tunisian delegate, 2009, *supra* note 16; *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009, pp. 31338–31339, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed on 28 April 2010.

55 The White House Office of the Press Secretary (Philadelphia, Pennsylvania), "A Proclamation by the President of the United States of America: Suspension of Entry as Immigrants and Nonimmigrants of persons impeding the peace process in Sierra Leone", 11 October 2000, available at http://reliefweb.int/node/70495, last accessed on 10 October 2009.

56 *Prosecutor v. Charles Taylor*, SCSL-2003-01-T, Transcript, 9 November 2009, 31335, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=jV62eXBfZ4w=&tabid=160, last accessed on 28 April 2010.

56 Interview, Tunisian delegate, 2009, *supra* note 16.

4.6. Creating a Special Court as a Part of Strategy Aimed to Affect Liberian Regime Change

On 14 August 2000, the United Nations Security Council requested the UN Secretary General to create a "Special Court" for Sierra Leone by negotiating an agreement with the Government of Sierra Leone.[57] President Taylor hoped France would be able to push through sanctions on Guinea for its support of the LURD, since Liberia was under sanctions for supporting the RUF.[58] He had overestimated French clout.

The initial leanings of the Special Court were inherent in the empowering resolution that commended the efforts of the government of Sierra Leone and ECOWAS for bringing lasting peace to Sierra Leone.[59] In August 2001, the Security Council passed a resolution to create the Special Court and the White House asked Department of Defence ('DoD') lawyer David Crane to "help set up an experiment in West Africa".[60] Crane began utilising DoD intelligence information to formulate who he believed was most responsible for crimes committed during the conflict.[61]

The Security Council resolution made ambitious claims as to the impact a "Special Court" might have for Sierra Leone. It states that:

> In the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace […].[62]

Once Security Council consensus had been reached on the Court's creation and financial independence from UN coffers, Britain and the

---

57 United Nations, *Resolution 1315 (2000)*, 14 August 2000, S/RES/1315, available at http://daccessdds.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement; United Nations Security Council, *Liberia Diamond Ban and travel Ban come into Force*, Press Release, SC/7058, 7 May 2001, available at http://www.un.org/News/Press/docs/2001/sc7058.doc.htm.

58 ICG, 2002, p. 25, *supra* note 32.

59 United Nations, 2000, *supra* note 57.

60 David Crane, "The investigation, indictment, and arrest of Charles Taylor: A regional approach to justice", presented at *The Baldy Centre for Law and Social Policy*, University of Buffalo, 17 February 2010, available at http://www.youtube.com/watch?v=Vm7dyByqVpc, last accessed on 20 November 2010.

61 Crane, 2010, *ibid*.; Interview with David Crane, Former Chief Prosecutor, Special Court for Sierra Leone, *via* telephone, 17 August 2010.

62 United Nations, 2000, *supra* note 57.

United States largely controlled the Security Council's position towards the Court.[63]

Resolution 1314 proposed a tribunal which had, based upon conclusions it had already made, assumed non-culpability for crimes by the leadership of one party to the conflict. Further, in drafting and negotiating the resolution, permanent Security Council members either assumed non-culpability for their own financial, political or military role, or sought to impede investigation of that role. Resolution 1314 was widely lauded by rights groups as evidence of the international community's intent to address impunity no matter what office perpetrators hold.

4.7. The Statute

The Special Court Statute provides *ad hoc* amnesty to peacekeepers and government aligned private military contractors. It places those persons within the primary jurisdiction of their State and requires Security Council approval for the Court to investigate them.[64] This puts ECOMOG soldiers or British Military officers, beyond the reach of the Court. It may also have excluded from prosecution British diplomats and servicemen co-ordinating the military support of the CDF. British support for the CDF, in spite of sanctions, was documented by a British Parliamentary inquiry which found that the British High Commissioner had co-ordinated armaments supply and had briefed the Foreign Office of his doing so.[65] Whether or not the Article provides immunity to the CDF is an argument its counsel did not raise.

But the statute left President Kabbah's government open to indictment. The Kabbah government had made clear to the Secretary General's office its reluctance to agree to co-operate with a Special Court until the Court was established and the prosecutor had been appointed.[66] Article 2

---

63 Interview, Tunisian delegate, 2009.

64 Statute of the Special Court for Sierra Leone, 2002, Art. 1(2)–(3).

65 Legg and Ibbs, **"**Report of the Sierra Leone Arms Investigation", 27 July 1998, HC 1016, p. 28, available at http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Front%3Fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029395708; Keen, 2005, p. 218, *supra* note 12.

66 United Nations, "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone", 4 October 2000, S/2000/915, para. 8, available at http://www.afrol.com/Countries/Sierra_Leone/documents/un_sil_court_041000.htm, last accessed on 20 November 2011.

of the agreement between the UN and the Sierra Leonean government stipulates that the Secretary General and the President of Sierra Leone will appoint key Court personnel.[67]

4.8. Prosecution Case Selection

In the years within the jurisdiction of the Court (30 November 1996 onward), the Truth and Reconciliation Commission attributed 57 per cent of abuses to the RUF, 30 per cent to the SLA and 12 per cent to the CDF with a negligible percentage committed by ECOMOG forces.[68] Prosecution of ECOMOG personnel was, therefore, unwarranted, under the exercise of numeric gravity. Nonetheless, ECOMOG abuses were brought to the attention of prosecution personnel by investigators. They were not pursued because of the amnesty, not because of the comparatively lesser scale of ECOMOG offending.[69] More importantly the *ad hoc* amnesty protects any personnel in a peacekeeping role in an agreement with the government. This meant that British or British procured advisors coordinating pro-Kabbah forces against the RUF could not be held accountable.

Because the British and United States governments were responsible for funding the Court, they also recommended court appointments critical to case selection and could withhold funding where case selection fell or threatened to fall, outside expectation.[70] The United States recommended DoD lawyer David Crane to be the Court's first Chief Prosecutor. The Government of Sierra Leone appointed Desmond De Silva, a former colleague of President Kabbah's, as Crane's deputy.[71]

---

67 Statute of the Special Court for Sierra Leone, 14 August 2000, Freetown, Sierra Leone, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&, last accessed on 10 January 2007.

68 Report of the Sierra Leone Truth and Reconciliation Commission, 2004, p. 39, *supra* note 9.

69 Interview with former prosecution investigator for the Special Court for Sierra Leone ('SCSL'), *via* telephone, 26 August 2010.

70 Interview with Robin Vincent, former Registrar, Special Court for Sierra Leone, Cheltenham, United Kingdom, 19 April 2007.

71 United Kingdom Parliament, "Select Committee on Standards and Privileges", Minutes of Evidence, 19 July 2005, available at http://www.publications.parliament.uk/pa/cm200506/cmselect/cmstnprv/421/5071902.htm, last accessed on 17 March 2012.

Prosecutorial policy, empowered to target "those who bear the greatest responsibility", bore the hallmarks of preferencing British and U.S. interests from the outset.[72] The original prosecutor, David Crane, admits available intelligence at the DoD was critically instructive in formulating whom to target.[73] Since being informed he was likely to be appointed as prosecutor in September 2001, he had had almost a year to examine DoD information. He also stated that after seeking NGO corroboration of DoD information, he held "a four corners idea as to who bore the greatest responsibility" before going to Sierra Leone to begin investigations.[74]

In exercising his prosecutorial discretion, the Security Council had directed the prosecutor to use "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone" as a guiding philosophy.[75]

One investigator noted that upon the arrival of the prosecutor in Sierra Leone, it was already clear which persons were going to be investigated.[76] The prosecution's confidence in its case selection appeared to draw upon rigid, yet commonly adopted narratives that failed to reflect the offending of one party to the conflict. The Court's first prosecutor, David Crane, viewed the conflict as beginning because of individual criminal gain.[77] He viewed his case against the RUF as the "blood diamond story" – "the movie for real" in which the motives for the RUF insurgency "all boiled down to a commodity, generally diamonds" and the personal criminal gain of the RUF leadership.[78] He also viewed the conflict as "a good news story" because "the good guys (Kabbah and the British Government) won".[79]

---

72 Interview, Crane, 2010, *supra* note 61.

73 *Ibid*.

74 *Ibid*.; Interview, Miklaucic, 2011, *supra* note 47.

75 See http://www.sc-sl.org/LinkClick.aspx?fileticket=CR6ODLk2IfA=&tabid=157, last accessed on 20 November 2011.

76 Interview, former prosecution investigator for SCSL, 2010, *supra* note 69;

77 Crane, 2010, *supra* note 60.

78 *Ibid.*; House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, "Prosecuting the use of children in times of conflict", Testimony of David Crane, 8 April 2008, p. 40, available at http://judiciary.house.gov/hearings/printers/110th/41697.PDF, last accessed on 28 April 2010.

79 Crane, 2010, *supra* note 60.

British Intelligence officers from MI6 who met with Crane in Europe and West Africa reinforced Crane's DoD analysis.[80] British and American intelligence officers were sharing intelligence on RUF procurement of financial, military and logistical support that was passed to the prosecution.[81] President Kabbah had directed the British-provided Inspector General of police, Keith Biddle, to co-operate with the Special Court. Biddle co-operated by providing Sierra Leonean police investigators who were prominent in the investigation of the CDF.[82]

Between a month and 45 days after the prosecutor's arrival in Sierra Leone, the crimes and who was to be prosecuted for them was sufficiently clear to allow indictments to be drafted.[83] Every major appointing authority and as a consequence key prosecution appointees, excluding the Human Rights Watch-seconded advisers, had a historical or institutional conflict of interest stemming from professional experience aligned to a party to the conflict. These professional allegiances were exaggerated by reliance on information from interested institutions, and, by functional impediments of State co-operation provided by the Kabbah government.

The Prosecutor indicted the RUF leadership and Charles Taylor but neglected to pursue foreign supporters such as Ibrahim Bah the arms dealer, Blaise Compaore, the President of Burkina Faso, and Libyan leader Muammar Gaddafi. Former registrar, Robin Vincent cites political pressure on then chief prosecutor David Crane not to indict Gaddafi, despite his culpability; due to the appearance of a Gaddafi indictment by a U.S. funded tribunal.[84] David Crane admits he "found Gaddafi to bear the greatest responsibility", but viewed his indictment as too politically sensitive.[85] The Court's dependence on voluntary contributions from the U.S. and Britain was also critically instructive. Explaining his non-indictment as "a political decision", Crane stated, "[i]f I had indicted Gaddafi and Compaore then we would have been shut down".[86] Mr. Crane visited the

[80] Interview, Crane, 2010, *supra* note 61.

[81] *Prosecutor v. Charles Taylor*, 2009, p. 31446, *supra* note 8.

[82] Interview, Crane, 2010, *supra* note 61; Interview, former prosecution investigator for SCSL, 2010, *supra* note 69.

[83] Interview, Crane, 2010, *supra* note 61.

[84] Interview, Vincent, 2007, *supra* note 70.

[85] Interview with David Crane, former Chief Prosecutor, Special Court for Sierra Leone, *via* telephone, 17 May 2007.

[86] *Ibid*.; Interview, Crane, 2010, *supra* note 61.

U.S. State Department approximately four times annually where he sought the War Crimes Office view as to who was to be prosecuted.[87] Crane has cited Gaddafi's oil oriented clout at the Security Council, particularly with the United Kingdom as driving the sensitivity surrounding his potential indictment.[88] In response, former Foreign Secretary Jack Straw stated he "had no recollection of knowing any involvement by the U.K. in influencing investigations".[89] The U.K. Foreign Office stated that "the issue of indictments is a matter for the Prosecutor" and that "it is committed to ensuring there is no impunity for those alleged to have committed the most serious crimes".[90] In November 2002 a decision was therefore taken to pursue only one of the three heads of State allegedly involved in the RUF joint criminal enterprise.[91]

President Compaore and the weapons trader, Ibrahim Bah, who organised the facilitation of arms through Burkina Faso to the RUF, were originally thought to be within the political parameters of indictment. Their co-operation with the U.S. government on terrorism (Bah was on the payroll of U.S. intelligence), as well as the anticipated political and diplomatic fallout of indicting more than one head of state, outweighed the good of holding them accountable.[92]

The original list of potential accused was larger than the final number prosecuted. It did include Blaise Compaore, but on the side of the CDF, Hinga Norman was as high as the chain of command went. However, Norman's position as Deputy Minister of Defence meant he reported to the Defence Minister, a position also held by President Kabbah.[93] The Court and many of its proponents have cited the prosecution of the CDF accused as demonstrating Kabbah's willingness to allow impartial inves-

87 Interview, Miklaucic, 2011, *supra* note 47.

88 David Crane, "Gaddafi Instrumental in Sierra Leone Conflict", in *Awoko*, 6 March 2011, available at http://www.awoko.org/2011/02/28/gaddafi-instrumental-in-sierra-leone-conflict-david-crane/, last accessed on 6 March 2011.

89 *Ibid*.

90 *Ibid.*

91 Interview, Crane, 2010, *supra* note 61.

92 Interview, former prosecution investigator for SCSL, 2010, *supra* note 69. According to intelligence reports, Bah had been given $10,000 by U.S. officials who also bought him a plane ticket to Abidjan where he spoke to U.S. officials in January 2002 as well as in Ouagadougou in February. See *Prosecutor v. Charles Taylor*, 2009, pp. 31451–31453, *supra* note 8.

93 Interview, former prosecution investigator for SCSL, 2010, *supra* note 8.

tigation of all parties. Since 1997, however, the relationship between Hinga Norman and President Kabbah had been one of deep mistrust.[94] Many observers believed Norman sought to usurp Kabbah as leader of the Sierra Leone People's Party and that Kabbah and those close to him, particularly Vice President Solomon Berewa, viewed Norman as a political threat.[95]

The security threat the CDF posed was also diminished through the stigmatisation associated with the prosecution's labelling of the organisation as criminal.[96] From the time of the prosecution's arrival in October 2002, there was no suggestion of investigating anyone in the CDF chain of command higher than Hinga Norman. Some elements of the prosecution provided leads for investigation of the political and military supporters of the CDF. Those sources did not believe the information was actively pursued.[97]

The first apparent impediment to the pursuit of President Kabbah appeared to be Court dependency upon local co-operation with security forces. Prosecution personnel were conscious that the investigation and prosecution of accused depended on Sierra Leonean state co-operation. They were particularly cognisant of the experience of Carla Del Ponte at the ICTR who was forced from her post after investigating elements of the Rwandan government's culpability.[98] Attempts to vigorously pursue incriminating information relating to President Kabbah, other senior elements of the Sierra Leone People's Party or elements of the British government, may have caused a cessation of co-operation similar to that experienced at the ICTR. However, David Crane insists there was no evi-

---

94 Report of the Sierra Leone Truth and Reconciliation Commission, 2004, *supra* note 14.

95 Interview with Sierra Leone Law Reform Commissioner, Peter Tucker, 5 April 2007, Freetown; Interview with Campaign for Good Governance director, Olayinka Creighton-Randall, Freetown, 3 April 2007; Interview with Truth and Reconciliation Commission "Military and political history of the conflict" chapter author, Gavin Simpson, Freetown, 30 March 2007; Interview with Alhaji Ibrahim Ben Kargbo, President of the Sierra Leone Association of Journalists, Freetown, 4 April 2007.

96 Danny Hoffman, "Citizens and Soldiers: Community Defence in Sierra Leone Before and After the Special Court", in *Rescuing a Fragile State: Sierra Leone 2002–2008*, Lansana Gberie (ed.), Wilfrid Laurier University Press, Ontario, 2009, pp. 119–127.

97 Interview, former prosecution investigator for SCSL, 2010, *supra* note 69.

98 Interview with former adviser to the prosecutor, Special Court for Sierra Leone, Washington D.C., 23 July 2010.

dence available to the prosecution implicating either Kabbah or Berewa.[99] To what extent, British, American or Sierra Leonean intelligence would or did make such information available, is unclear.

The government's posturing towards potential deviation from politically expedient case selection was evident when Sierra Leone's Attorney General responded to a defence request to subpoena President Kabbah to appear as a witness. The Attorney General told the Court it should not act "in vain" because the non-enforcement of the subpoena by the Sierra Leonean government would "diminish" the Court's authority.[100] The Court ate humble pie and refused to subpoena President Kabbah.[101]

In his concurring but separate opinion, Justice Itoe exuded the kind of judicial subordination to politics that fed discontent amongst many combatants who took up arms against the State. Itoe stated that the President's position as one of "the princes who govern us" requires:

> […] an environment, an atmosphere, and an institutional framework for them to perform their duties in all tranquillity and without any unnecessary interferences which could result from the issuance of a Subpoena.[102]

Prosecution case selection was also reinforced by the Court's functional characteristics that severely compromised the right to a fair trial.

---

99 Interview, Crane, 2010, *supra* note 61.

100 *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-T, Transcript, 14 February 2006, p. 74, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=j0IL5eouGEQ=&tabid=154, last accessed on 6 June 2010.

101 *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H. E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, Justice Thompson dissenting, available at http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberDecisions/tabid/153/Default.aspx, last accessed on 29 April 2010; *Prosecutor v. Norman*, Fofana and Kondewa, SCSL-2004-14-T, Appeals Chamber, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, 11 September 2006, Justice Robertson dissenting, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=mva0C3kA94E=&tabid=193, last accessed on 29 April 2010.

102 *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber, Decision on motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H. E. Alhaji Dr. Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, p. 42, available at http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/TrialChamberDecisions/tabid/153/Default.aspx, last accessed on 29 April 2010.

Because donors had a vested interest in successful prosecutions, the prosecutor's office was provided totally disproportionate funding. The prosecutor was able to appeal directly to donors for funding, but the defence was reliant upon the Registrar to make its case.

The most prominent compromise of the defendant's rights was the prosecution's jurisdiction over witness protection. The location of the Special Court's Witness and Victims Section, in the secure prosecution area, is inaccessible to other court organs including the defence. Further, the prosecution had its own witness protection program supplementary to the court program.[103] Egregious prosecution practices such as leisure trips for insider witnesses to one of Sierra Leone's premier beach resorts severely undermined witness legitimacy.[104]

Prosecution witness engagement, finance and jurisdiction create a conflict of interest and potential witness inducement. The trial chamber refused to examine these practices-citing the need for an expedient trial.[105] Tim Kelsall best describes the impact of inauthentic and evasive witness narratives in his book "Culture Under Cross-Examination". Kelsall describes SCSL counsel's difficulties in extrapolating truth from witness testimony and the tendency of some members of the bench to extract selectively.[106]

4.9. Conclusion

The Special Court's design and function had serious consequences for case selection and for the Sierra Leonean transitional justice experience. The Security Council, referring to a potential Special Court, described how "a credible system of justice and accountability would end impunity

[103] Chris Mahony, *The Justice Sector Afterthought: Witness protection in Africa*, Institute for Security Studies, Pretoria, 2010, pp. 84–86.

[104] Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Transcript, Trial Chamber I, SCSL-2004-15-T, 20 June 2007, pp. 48–52, available at http://www.sc-sl.org/LinkClick.aspx?fileticket=NNGbAcOFbQI=&tabid=156, last accessed on 13 June 2009; Mahony, 2010, pp. 84–86, *supra* note 103.

[105] *Ibid*., pp. 52–59, 61.

[106] See Tim Kelsall, *Culture under cross-examination: International justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2009.

and contribute to the process of national reconciliation and to the restoration and maintenance of peace".[107]

A credible system of justice might have contributed to addressing impunity in Sierra Leone, and the region. However, my findings indicate that the Special Court was more about prosecuting 'Victor's Justice' and administering Liberian regime change than conducting an impartial investigation of all parties to the conflict. The absence of quantitative or qualitative criteria instructing case selection reinforced this. The primary concerns behind the Court's creation were to assist regime change in Liberia and regime consolidation in Sierra Leone. Mitigating the threat the CDF posed to President Kabbah, by prosecuting its military leadership, served the latter of these concerns. Case selection criteria that prioritise sexually oriented offending may have justified non-prosecution of CDF crimes because CDF offending in this area was particularly reduced.

If preference for thematic prioritisation of sex crimes were employed in the future, it would serve to deconstruct the emerging norm of prioritising murder first.[108] A constructivist perspective argues, "[…] norms do not cause a State to act in a particular way, but rather provide reasons for a State to do so".[109] This tells us that real politic would first instruct who was to be prosecuted and who was not. Thematic prioritisation criteria reinforcing expedient case selection would then be selected. In the case of the Special Court, thematic prioritisation of murder, particularly where cannibalism was employed, would promote CDF prosecution. Cannibalism was committed by the CDF at a similar rate to the RUF.[110] It formed a prominent part of CDF member initiation, an element brought to the attention of President Kabbah without response.[111] Spiritual and moral undertakings not to commit rape also formed a prominent part of CDF initiation. The CDF believed pre-battle sexual relations or sexual contact would diminish their powers of immunity to withstand attacks or wounds. According to the TRC database, the CDF committed only six per cent of

[107] United Nations, 2000, *supra* note 57.
[108] Bergsmo, 2011, Chapter 1 above.
[109] Ngaire Woods, "Explaining International Relations since 1945", Oxford University Press, Oxford, 1996, p. 26.
[110] Report of the Sierra Leone Truth and Reconciliation Commission, 2004, pp. 478, 496, *supra* note 14.
[111] *Ibid*., p. 479.

sexually oriented violations during the conflict.[112] This statistic could have justified non-selection of CDF for prosecution under a policy of thematic prioritisation of sex crimes. In future prosecution of international crimes, it is important that genuine proponents of international criminal justice recognise and act to mitigate selective use of thematic prosecution. Consolidating adoption of contemporary norms is critical. Continuing to place decisive emphasis on gravity and prioritising murder, followed by sex crimes and torture, may go some way toward preventing politically expedient preferencing of thematic prosecution.

States have clearly developed and employed methods of shaping prosecution case selection in cases involving international crimes. These methods include designing tribunal jurisdiction, structure and dependence on external actors as well as methods of co-operation including, funding, seconding of personnel, provision of information, granting of access to witnesses and territory, arrest and provision of suspects and co-operation on witness protection and investigation.

Academia and interest groups need to better assess the need not only to prioritise sex crimes, but also to prioritise other themes of offending as well as thematic prioritisation against other modes of prioritisation such as temporal prioritisation or prioritisation of intent. The merits of all potential avenues of prioritisation need to be weighed individually and against each other in order to warrant adjustment of the emerging norm (prioritising murder first). To focus attention on justification for prioritising one theme without weighing it against others and without forming broad consensus as to how emerging norms should be changed undermines the legitimacy of thematic prioritisation.

Structural and functional independence, as well as a certain level of familiarity are required for punitive justice processes to hold legitimacy. A critical component of independence is clear criteria instructing case selection. The ICC has a role to play in providing more specific guidance as to what criteria should be employed in order for States to meet the complementarity threshold of 'capacity' and 'willingness'. The scope for interpretation of those two words leaves too much discretion in the prosecutor's hands. It also leaves too much discretion in the hands of States constructing extraordinary criminal justice processes to prosecute international crimes. States are arguably better positioned to shape domestic criminal

[112] *Ibid*., p. 176.

justice processes for politically expedient outcomes than international criminal tribunals, where design is negotiated with other States. Co-operative methods employed by States to shape case selection may, where States wield inadequate clout, be overcome by a savvy prosecutor cognisant of the nuances of State/court interaction and diplomatic sensitivities. However, a savvy prosecutor may not simply overcome specific case prioritisation criteria, such as the Special Court's instructed focus on crimes undermining the peace process, or temporal or territorial limitations on jurisdiction, with a deft strategic diplomatic touch. Equitable and entrenched norms that bind States and other actors designing the jurisdiction and structure of courts prosecuting international crimes provide the only impediment to design-oriented manipulation.

I now turn to how a diffuse norm might affect retributive, deterrent and expressive goals of prosecution. Where shifting normative case selection to prioritise sex crimes over murder facilitates selective prosecution, retributive, deterrent and expressive goals of prosecution are undermined. Selective prosecution undermines retributive goals because retributive outcomes are provided to victims of politically expedient offending parties or individuals, but not victims of those wielding clout with designing and co-operating actors.[113]

Similarly, deterrent goals may be undermined because offending parties may not be deterred from engaging in sex crimes by selective prosecution. Instead, they may be deterred from losing a conflict, failing to ensure sufficient external patronage, or from negotiating sufficiently robust terms of amnesty or a manipulable transitional justice process.

Despite selective prosecution, expressivist goals may be retained where a culture is convinced of the stigma of engaging in sex crimes and the merit of prosecuting that form of criminality, despite the selectivity of prosecution. Selective prosecution may, however, lend manipulating actors a low cost expression of support for a co-operative international endeavour.[114] The Special Court's prosecution of "forced marriage", a crim-

[113] Selective retribution is not an unfamiliar phenomenon for Sierra Leoneans. They've witnessed before the trials and commissions of enquiry established by incoming regimes with expressive intent to justify themselves and discredit their predecessors. Upon examining Sierra Leone's history of regime change, be it the regimes of Juxton-Smith, Siaka Stevens or Valentine Strasser, one observes these processes.

[114] Oona Hathaway, "Do Human Rights Treaties Make a Difference?", in *Yale Law Journal*, 2002, p. 111; Boston University School of Law Working Paper no. 2–3.

inal creation itself viewed by Tim Kelsall as culturally contentious,[115] I argue, presented a low cost affirmation of an international endeavour, unlikely to cause Sierra Leone's government to affect cessation of the practice.

A citizenry and international community sceptical of an institution pursuing selective prosecution may nonetheless acknowledge the criminality of sexually related offending and the legitimacy of its prosecution. However, it remains untenable that positive expressivist outcomes are achieved at the expense of retribution and deterrence. Where courts prosecuting international crimes are created and design by external actors with disparate cultural backgrounds, the expressivist impact of the institution may be impeded by perceptions of cultural hegemony and an absence of legitimacy.

States wield ever more discreet and sophisticated techniques to affect case selection that serves their interests. The neo-liberal rhetoric so often accompanying prosecution of international crimes, and in some cases underpinning scholarly consideration of case selection criteria, requires a more constructivist lens. Diversifying rather than homogenising case selection criteria provides one more manipulative tool to those seeking to shape case selection for duplicitous purposes. As international criminal justice shifts towards pressuring States to carry out prosecutions domestically, preferencing thematic prosecution of sex crimes against the grain of consolidating emerging norms lends greater manipulative discretion to duplicitous actors.

[115] Tim Kelsall, "Culture under cross-examination: International justice and the Special Court for Sierra Leone", Cambridge University Press, Cambridge, 2009, pp. 243–255. Kelsall also argues that expressivist goals of engineering social change should not be pursued through international law with its notions of individual autonomy, self determination and sexual freedom (p. 255). This argument might be reinforced by the absence of consultation with Sierra Leoneans, other than elites, during the court's design.

5

Prospect for Thematic Prosecution of International Sex Crimes in Latin America

Flor de Maria Valdez-Arroyo[*]

In the particular case of Latin America, where no international criminal tribunal exists, human rights violations that may constitute international crimes like genocide, crimes against humanity, and war crimes[1] have to be prosecuted in national tribunals. Sexual violence, one of the most common aggressions in armed conflicts and dictatorships that took place in the region in the past half century, was documented as a systematic and widespread practice by truth commissions and civil society organizations only in the past two decades. Despite these efforts to give visibility to this scourge, at that time no trials were started in domestic jurisdictions for a number of reasons. Among them is the existence of amnesty laws applicable to the perpetrators of crimes committed during dictatorships or armed conflict, criminal codes that did not address international crimes,[2] the reluctance of the victims to give their account of the violence they endured due to fear or shame or mistrust to the judicial system, and the lack of awareness in general that sexual violence is a violation of human rights that could constitute a war crime or a crime against humanity.[3] Therefore,

[*] **Flor de Maria Valdez-Arroyo** is a consultant of the Inter-American Commission of Women (CIM) at the Organization of American States (OAS).

[1] For the purposes of this chapter, 'international crimes' will be used interchangeably with 'genocide, crimes against humanity and war crimes'.

[2] For the purposes of this chapter, 'thematic prosecution of sex crimes' will mean the prosecutorial prioritization, at least initially, of international sex crimes over other crimes, including arguably more serious crimes as killings. The definition was provided in the Concept Note of the Seminar 'Thematic Investigation and Prosecution of International Sex Crimes' organized by the Forum for International Criminal and Humanitarian Law, Yale University and the University of Cape Town, and held in Cape Town, South Africa, on 7–8 March 2011.

[3] For more information on the legal framework of international crimes in the region, see Kai Ambos, "Latin American and International Criminal Law", in *International Criminal Law Review* (Special Edition), vol. 10, no. 4, 2010.

thematic prosecution of sex crimes has not been raised as an issue nor expressly established by national courts.

However, in the past two years the region has witnessed indictments and judgments stating that rape and other forms of sexual violence were perpetrated as crimes against humanity. This is due to two main reasons. First, the ratification of the Rome Statute that created the International Criminal Court, which led to the enactment of implementing legislation that typified international crimes in the national criminal codes. Second, the influence of the Inter-American system of protection of human rights in national courts. The reports and decisions of the Inter-American Commission on Human Rights (hereinafter 'IACHR') as well as the jurisprudence of the Inter-American Court on Human Rights (hereinafter 'the Court') reaffirmed the obligation of States to investigate and punish gross violations of human rights in general, and sexual violence in particular. Said jurisprudence was produced while analysing the violations of the American Convention on Human Rights (hereinafter 'ACHR') and most importantly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women-Convention of *Belem do Para* (hereinafter 'the Convention of *Belem do Para*'). The Convention of *Belem do Para*, the first international treaty in the world focused on violence against women and the most ratified Inter-American human rights treaty in the Americas,[4] enshrines in Article 7 the State's duty of due diligence in the investigation, prosecution and punishment of said violence, as well as the provision of reparations for the victims.

In light of these developments, would thematic prosecution be eventually used by national courts? The prioritization of cases is a practice that originated in most international tribunals due to budget constraints that would make it impossible to prosecute all crimes that come to their knowledge. Political reasons for the prioritization of certain cases are not excluded since these tribunals were created by States who tailored their objectives and rules in the tribunal's statute. National courts, on the contrary, have a different origin and approach compared with international tribunals. In theory, national courts in the region prosecute all cases supported with enough evidence in order to fulfil the State's international obligations, as contained in the ACHR and the Convention of *Belem do*

[4] The Convention of *Belem do Para* has been ratified by 32 States from Latin America and the Caribbean. See full list at http://www.oas.org/juridico/english/sigs/a-61.html, last accessed on 25 March 2012.

Para, to ensure men and women's right of access to justice. Furthermore, national courts are regarded as less susceptible to political influence,[5] since in Latin America the judiciary is, at least on paper, an independent power and no influence can divert them from their duty to provide justice for all.

Since the Inter-American system is focused on the enforcement of Inter-American human rights law in national courts, and the Court addresses the responsibility of the State's human rights obligations rather than the responsibility of individual perpetrators, thematic prosecution of sex crimes is not addressed *per se*. Nevertheless, the Court's assessment of the expressivist value of the law, which is one of the foundations of thematic prosecution, would support the said practice especially in crimes as invisible, under-prosecuted, and unpunished in the region as sex crimes. In that regard, the Court showcases its expressivist spirit by condemning the historically unequal power relations between men and women, and the consequent deep-rooted patterns of discrimination against women and girls in the region which was also stated in the Convention of *Belem do Para*, and ensuring visibility of sexual violence as a weapon of war. This would confirm Sloane's statement that the expressive capacity of punishment best accommodates the confluence of international criminal law and international human rights law.[6]

Another justification of thematic prosecution, namely, the gravity of sex crimes in contexts of gross violations of human rights, is assessed by the Court especially when these crimes are perpetrated by State agents or non-State actors with the instigation, tolerance, or acquiescence of the State, as part of the State's policy. This analysis is usually done by contextualising sex crimes, which would require the identification of most actors and patterns of violence involved, as well as the acknowledgement of all the facts possible. Prosecuting sex crimes does not only ensure access to justice for the victims, it would ensure that their experiences are given visibility within a context as well as a place in their society's history.

Bearing this context in mind, this chapter will explore possible grounds for the use of thematic prosecution in Latin America based on

---

5 For more information see Robert D. Sloane, "The Expressive Capacity on International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law,* vol. 43, 2007, p. 40 and 55.

6 *Ibid.,* p. 44.

two indicators: the jurisprudence of the Court regarding sex crimes and its impact in national prosecutions. In Section 5.1., we will examine the mandates of the Convention of *Belem do Para* and explore some judgments of the Inter-American Court of Human Rights, especially five that address violations to the said Convention: *Castro ('Castro Prison') v. Peru* (2006),[7] *Gonzalez et al. ("Cotton Field") v. Mexico* (2009),[8] *'Dos Erres' Massacre v. Guatemala* (2009),[9] *Rosendo Cantu et al. v. Mexico* (2010)[10] and *Fernandez Ortega v. Mexico* (2010).[11] Other judgments assessing the prohibition of amnesties, statutes of limitation, and other mechanisms that ensure impunity for gross violation of human rights; and the right to truth as both an individual and collective right are also reviewed. In Section 5.2., we will examine three cases from Argentina and Peru, whose domestic tribunals have already indicted or judged sexual violence as a war crime, crimes against humanity, or crime amounting to genocide in the past two years; we will note the influence of the Court's jurisprudence in achieving that goal.

5.1. The Framework: The Convention of *Belem do Para* and the Court's Jurisprudence Related to the Violation of its Dispositions

5.1.1. The Mandates of the Convention of *Belem do Para*

Among the contributions of the Convention of *Belem do Para* is its ample definition of violence against women, understanding it as "any act or con-

---

7 Inter-American Court of Human Rights, *Case of the Miguel Castro Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), 25 November 2006, Series C, no. 160.

8 Inter-American Court of Human Rights, *Gonzalez et al. ("Cotton Field") v. Mexico*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 16 November 2009, Series C, no. 205.

9 Inter-American Court of Human Rights, *Case of the 'Las Dos Erres' Massacre v. Guatemala* Judgment (Preliminary Objection, Merits, Reparations and Costs), 24 November 2009, Series C, no. 211.

10 Inter-American Court of Human Rights, *Case of Rosendo-Cantú and other v. Mexico*, Judgment (Preliminary Objection, Merits, Reparations, and Costs), 31 August 2010, Series C, no. 216.

11 Inter-American Court of Human Rights, *Case of Fernández-Ortega et al. v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 30 August 2010, Series C, no. 215

duct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere". Article 2 expands the scope of perpetrators by stating that the said violence can occur within the family or domestic unit, or within any other interpersonal relationship in the community, and that it can be perpetrated or condoned by the State or its agents. It is particularly important that, in Article 9, the Convention asks the States Parties to take special account of the situation of vulnerability of women when they are affected by armed conflict or deprived of their freedom, among other circumstances.

Another milestone of the Convention is the recognition, in Article 3, of the right of women and girls to a life free from violence in public and private spheres. The said right shall be understood, according to Article 6, as the right of women to be free from all forms of discrimination, and the right to be valued and educated free of stereotyped patterns of behaviour, social, and cultural practices based on concepts of inferiority or subordination. In order to ensure the full exercise and enjoyment of this right, Article 7 of the Convention lists a number of obligations of the State to prevent, investigate, punish, and eradicate violence against women,[12] among which stands the obligation to apply due diligence to prevent, investigate, and impose penalties for violence against women.

[12] Convention of *Belem do Para*, Art. 7: The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
b. apply due diligence to prevent, investigate and impose penalties for violence against women;
c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;

Furthermore, the Convention allows the lodging of petitions with the IACHR regarding violations to Article 7, which among them is the obligation of due diligence. Therefore when States, via their domestic tribunals, do not fulfil this obligation and perpetrators of sex crimes are not indicted or are acquitted, victims can file a petition to the IACHR. This organ will analyse the matter and further issue a report with recommendations to the denounced State. If these recommendations are not complied with, the Commission will submit the case to the Court.

In the five cases where sexual violence was involved,[13] the Commission usually requests the Court to pronounce on the violation of the obligation of the State to ensure to all persons, subject to their jurisdiction, the free and full exercise of those rights and freedoms as established in Article 1(1) of the ACHR. Moreover, it was also demanded that the duty of due diligence established in Article 7 of the Convention of *Belem do Para*. The judgments of the Court in the said cases have been critical not only in developing the contents of the duty of due diligence in the prevention, investigation, and punishment of violence against women, but also in analysing the existence of sex crimes in both contexts of armed conflict and times of peace.

Perhaps the main contribution of the Convention is that its mere existence showcases that violence against women is indeed a serious violation of human rights and that States have the political will to recognize it as such and act accordingly. During the debate of the draft text of the Convention launched by the Inter-American Commission of Women ('CIM') of the Organization of American States, Jorge Seall-Saisain favoured the adoption of a Convention on the subject because:

> An international convention of the requisite specificity could make violence against women the gravest and most extreme form of discrimination against them, and a violation of human rights with specific features. Indeed, the complex diffi-

f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

[13] See *supra* notes 7–11.

> culties of the phenomenon: its occurrence within the privacy of the home, its misperception as a private conjugal matter, the reluctance of authorities and individuals to intervene, the lack or fewness of shelters for women, their fear of retaliation, loss of property rights or loss of custody of the children, and the whole backdrop of a patriarchal society, must be taken into account in defining the problem.[14]

The Court summarized this view in *Gonzales et al. ("Cotton Field") v. Mexico* when remarking that the Convention

> [...] reflects a uniform concern throughout the hemisphere about the severity of the problem of violence against women, its relationship to the discrimination traditionally suffered by women, and the need to adopt comprehensive strategies to prevent, punish and eliminate it.[15]

5.1.2. The Court's Jurisprudence

As stated in *Gonzalez et al. ("Cotton Field") v. Mexico*, the purpose of the existence of a system of individual petitions within the Convention of *Belem do Para* is to achieve the greatest right to judicial protection possible in those States that have accepted judicial control by the Court.[16] In order to enhance this protection, through its jurisprudence the Court has been developing arguments and standards that give content to the obligations established by the Convention related to the prevention, investigation and punishment of violence against women.

In this subsection, some of these arguments are examined: the gravity of sexual violence, the prohibition of amnesties and statutes of limitation and its relation to the 'interest of justice', and the right to truth in its individual and collective dimensions.

---

[14] Jorge Seall-Saisain, "Preparation and Viability of a Convention on Violence against Women", in *Proceedings: Inter-American Consultation on Women and Violence*, Inter-American Commission of Women (CIM), Washington D.C., 1990, p. 141.

[15] Inter-American Court of Human Rights, *Gonzales et al. ("Cotton Field") v. Mexico, supra* note 8, para. 61.

[16] *Ibid*.

5.1.2.1. Gravity of Sexual Violence in the Jurisprudence of the Court

5.1.2.1.1. Participation of State Agents in the Perpetration of the Crime or Existence of a State's Policy

In the jurisprudence of the Court, the participation of States agents have always been regarded as an indicator of gravity, since violence is exercised by the same officers in charge of protecting the population and ensuring the free and full exercise of all rights and freedoms by all persons subject to their jurisdiction. In the gender-pioneering sentence *Castro Castro Prison v. Peru* (2006) where violations to Article 7 of the Convention of *Belem do Para* were addressed by the Court for the first time, the Court acknowledges that the rape of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent.[17] In addition, in the judgments of *Rosendo-Cantu et al. v. Mexico* and *Fernandez-Ortega et al. v. Mexico* which related to the rape of indigenous women by State agents, the Commission sustained to the Court the demand against Mexico by concluding that rape perpetrated by the members of any State's security forces against civil population constitutes a grave violation of human rights, especially the right to personal integrity (Article 5 ACHR) and the right to have the honour and dignity protected (Article 11 ACHR).[18]

Sexual violence is considered grave when committed as part of a State policy. In both *'Dos Erres' Massacre v. Guatemala* and *Plan de Sanchez Massacre v. Guatemala* (2004),[19] where sexual violence was committed against women and girls was held before their killing along with other members of the communities of *Dos Erres* and *Plan de Sanchez*, the Court determined that the "rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level"[20] and that

[17] *Castro Castro Prison v. Peru*, *supra* note 7, para 311.

[18] *Rosendo Cantu et al. v. Mexico*, *supra* note 10, para. 80; *Fernandez Ortega et al. v. Mexico*, *supra* note 11, para. 90.

[19] Inter-American Court of Human Rights, *Plan de Sanchez Massacre v. Guatemala*, Judgment (Reparations and Costs), 19 November 2004, Series C, no. 116.

[20] *'Dos Erres' Massacre v. Guatemala*, *supra* note 9, para. 139; *Plan de Sanchez Massacre v. Guatemala, supra* note 19, paras. 19, 49.

the "lack of investigation of grave facts against human treatment such as torture and sexual violence in armed conflicts and/or systematic patterns, constitutes a breach of the State's obligations in relation to grave human rights violations".[21]

5.1.2.1.2. Context of Discrimination and Patterns of Gender-Related Violence

The biggest breakthrough of the system was when sexual violence was considered as a grave violation of human rights when fuelled by a context of discrimination or patterns of gender-related violence. The judgment *Gonzalez et al. ("Cotton Field") v. Mexico* recalls the several reports and the government of Mexico's acknowledgement of responsibility in which the high rates of violent deaths of women in Ciudad Juarez were due to a "culture of discrimination" and a pattern of gender-related violence that influenced these murders.[22]

In fact, the Court's jurisprudence in general notes the importance of analysing patterns of violence when investigating and punishing a specific type of violation of human rights.[23] This analysis is applicable regardless of the context of armed conflict or internal strife. In the particular case of *Gonzalez et al. ("Cotton Field") v. Mexico*, the Court stated that Mexico failed to consider the brutal murder of women in Ciudad Juarez as part of a generalized phenomenon of gender-based violence. In the case *Castro Castro Prison v. Peru*, the Court verified that the sexual crimes committed against the female inmates of the Castro Castro prison responded to a pattern of violence against women in armed conflict already documented by the Peruvian Truth and Reconciliation Commission. That said pattern implied the use of sexual violence as means to punish, intimidate, pressure, humiliate, and degrade the population.[24]

In this context, the assessment of discrimination and inequalities, their causes and consequences, remain essential. The Convention of *Belem do Para* had already established in its Preamble that violence against women constituted a manifestation of the historically unequal power relations between women and men and that it strikes society at its very foun-

[21] *"Dos Erres" Massacre v. Guatemala*, *supra* note 9, para. 140.
[22] *Gonzales et al. ("Cotton Field") v. Mexico, supra* note 8, para. 399.
[23] *Ibid.,* para. 366.
[24] *Castro Castro Prison v. Peru, supra* note 7, para. 226.

dations. In fact, one of the arguments used to promote the adoption of a regional convention on violence against women was that despite the existence of national legislation and international treaties on human rights, the phenomena of violence against women did not diminished but increased, and that an explicit legal prohibition was needed to create awareness of the problem.[25]

5.1.2.1.3. Impunity

Another indicator of gravity of cases of violence against women considered by the Court was the impunity surrounding these cases. Most of the gross violations of human rights that included sexual violence were not properly investigated and did not have a sentence, or had concluded with an exoneration of the accused due to lack of proof or the statutes of limitation. As the Court established in *Gonzalez et al. ("Cotton Field") v. Mexico*, the impunity of the crimes committed sends the message that:

> [...] violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice.[26]

In the assessment of gravity due to impunity, time is a critical factor. In earlier jurisprudence the Court considered the right of access to justice, whose objective was to ensure, within a reasonable time, the right of the alleged victims or their next of kin to have everything necessary done to uncover the truth of the events and to punish those responsible.[27] In *Gonzalez et al. ("Cotton Field") v. Mexico* the Court linked the increase of violence against women in Ciudad Juarez with the lack of investigation to establish the truth by stating that, up until 2005, most of the crimes had not been resolved, and murders with characteristics of sexual violence involved higher levels of impunity.[28]

---

[25] Seall-Saisain, 1990, p. 141, *supra* note 14.

[26] *Gonzales et al. ("Cotton Field") v. Mexico, supra* note 8, para. 400.

[27] Inter-American Court of Human Rights, *Case of Bulacio v. Argentina*, Judgment (Merits, Reparations, and Costs), 18 September 2003, Series C, no. 100, para. 114; *Case of Zambrano Vélez et al. v. Ecuador*, Judgment (Merits, Reparations, and Costs), 4 July 2007, Series C, no. 166, para. 115; and *Case of Kawas Fernández v. Honduras*, Judgment (Merits, Reparations and Costs), 3 April 2009, Series C, no. 196, para. 112.

[28] *Gonzales et at ("Cotton Field") v. Mexico, supra* note 8, para. 164.

5.1.2.1.4. Objective and/or Impact of Sexual Violence in the Victims' Lives

Another element considered when gravity is assessed is the objective or impact of sexual violence against women. In *Castro Castro Prison v. Peru,* the Court described the gravity of rape as:

> [an] extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim "physically and emotionally humiliated".

Furthermore, following the reasoning of the European Court of Human Rights ('ECHR')'s *Aydin v. Turkey* (1997), it settles that the inflicted damage is a "situation difficult to overcome with time, contrary to what happens with other traumatic experiences".[29]

One of the contributions of the Court is that it analysed the impact by taking into account the personal, familiar, and communitarian spheres of the victims. In both *Rosendo-Cantu et al. v. Mexico* and *Fernandez-Ortega et al. v. Mexico* the Court determined that rape was a paradigmatic form of violence against women that had consequences that go beyond the victim.[30] In *Gonzalez et al. ("Cotton Field") v. Mexico*, the message sent with the sexually-connoted torture or mutilation of women before their murder is that of hate because of their gender, which lead to several researchers and activist to call this phenomenon femicide ('*feminicidio*').[31] In '*Dos Erres*' *Massacre v. Guatemala*, the sexual violence perpetrated within the massacre had the objective to terrorize the community prior to their collective murder; while in *Plan de Sanchez Massacre v. Guatemala*,

---

[29] *Castro Castro Prison v. Peru*, *supra* note 7, para. 311.

[30] *Fernandez Ortega et al. v. Mexico, supra* note 11, para 119, *Rosendo Cantu et al. v. Mexico, supra* note 10, para 109.

[31] For more information on femicide, see: Ana Carcedo, *No Olvidamos ni Aceptamos: Femicidio en Centroamérica 2000–2006 (We Neither Forget nor Accept: Femicides in Central America 2000–2006)*, San José, CEFEMINA, 2010; Patsili Toledo, *Feminicidio (Femicide)*, UN High Commissioner for Human Rights, Mexico DF, 2009; Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), *Monitoreo sobre el Feminicidio/Femicidio en Bolivia, Ecuador, Paraguay, Peru y Republica Dominicana (Monitoring Femicide in Bolivia, Ecuador, Paraguay, Peru and Dominican Republic)*, CLADEM, Lima, 2008; and also from CLADEM, *Monitoreo sobre el Feminicidio/Femicidio en El Salvador, Guatemala, Honduras, Mexico, Nicaragua y Panama (Monitoring Femicide in El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama)*, CLADEM, Lima, 2007.

the impact of the violence on women was assessed from an intercultural perspective, debating the impact of violence on the role of women as transmitters of culture, spirituality, and memory of the Maya-Achí community.[32]

The above analysis is essential to support the notion of violence against women as a grave violation of human rights. Common factors analysed in the cases include: the participation of the State through the action of State actors or through its failure to prevent and prosecute the activities of non-States actors; the existence of a structured policy or a pattern based on omissions; the social context of discrimination and an acceptance of violence against women due to prejudice and stereotypes that regard women as inferior to men; the impunity surrounding the cases and the deep impact of sexual violence in the victim, their families and communities have been the common factors in the cases analyzed.

5.1.2.2. The "Interest of Justice" and Prohibition of Amnesties in the Jurisprudence of the Court

The Rome Statute, which created the International Criminal Court (1998), establishes in its Article 53 that the prosecutor may in some circumstances decline to prosecute on grounds that it would not serve the interests of justice. Since no consensus as to its meaning was reached at the Rome Conference, this Article has been understood to function as an open door for amnesties or other non-prosecutorial alternatives.[33] It has also been regarded to mean: "so that justice may be administered in an orderly way", or "the good administration of justice", or "advancing the trial process".[34]

As for Latin America and the Caribbean, only Article 8(5) of the AHCR regarding the right to a fair trial deals with the subject. It mentions that criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice. The Court has yet to develop the notion, while the Commission has used it in some cases, determining that

[32] Expert report of Augusto Willemsen–Diaz before the Court, in Inter-American Court of Human Rights, *Plan de Sanchez Massacre v. Guatemala*, *supra* note 19, p. 20 and also para. 49(12) and 85.

[33] Human Rights Watch, "The Meaning of Interests of Justice in Article 53 of the Rome Statute", June 2005, p. 4.

[34] *Ibid,* p. 6.

the "higher interests of justice" implied the right to the truth.[35] The "interest of justice" is also taken into account by the Court when ensuring that the acts of acquiescence by the State are acceptable for the purposes of the Inter-American system of protection of human rights.[36] So far no mention of "interest of justice" has been undertaken when analysing cases of sexual violence that reached the Inter-American system; however, the aforementioned elements would suggest that the Court would understand that "interest of justice" implies the protection of the interest of the victim. That is the reason why the right to truth is protected and the acquiescence of the State does not jeopardize the rights of the petitioner, especially to access and obtain justice and reparations.

As to the possibility of considering the notion of "interest of justice" as an open door for amnesties, the application of statutes of limitation or any other form of exoneration of responsibility for the perpetration of human rights abuses, the Court has already settled that these measures are prohibited by the Inter-American system. In *Chumbipuma Aguirre et al. ('Barrios Altos') v. Peru* (2001) the Court referred to the so-called self-amnesties are manifestly incompatible with the objectives of the Convention[37] and "an inadmissible offence against the right to truth and the right to justice".[38] The Court added:

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of

---

35 Inter-American Court of Human Rights, *Case of Myrna Mack-Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), Reasoned Opinion of Judge Antonio Cançado-Trindade, 25 November 2003, Series C, no. 101, para. 17.

36 In *Kawas-Fernandez v. Honduras* the Court indicates that:

> [it] does not limit itself to merely verifying the formal conditions of the said acts, but relates them to the nature and gravity of the alleged violations, the requirements and interests of justice, the particular circumstances of each case, and the attitude and position of the parties.

It was also stated, among others, in the *Case of Myrna Mack-Chang v. Guatemala*, *supra* note 35, para. 106–108; and Inter-American Court of Human Rights, *Case of Kimel v. Argentina*, Judgment (Merits, Reparations and Costs), 2 May 2008, Series C, no. 177, para. 24.

37 Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment (Merits), 14 March 2001, Series C, no. 75, para. 43.

38 *Ibid.*, para. 5

> those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[39]

The judgment *Almonacid Arellano v. Chile* (2006) goes further on the prohibition of amnesties and focuses on the issue of the statutes of limitation, remarking that the time passed cannot pose as an obstacle for the victims seeking to obtain justice, due to the gravity of the crime and the longstanding duration of the harm produced. They further added,

> [that] the damage caused by these crimes still prevails in the national society and the international community, both of which demand that those responsible be investigated and punished.[40]

Both *Chumbipuma Aguirre et al. ('Barrios Altos') v. Peru* (2001)and *Almonacid Arellano v. Chile* (2006) have been crucial to starting the debate and the eventual over-turning of amnesty laws that prevented the prosecution of international crimes, as well as the rejection of statutes of limitation for crimes that constituted gross violations of human rights in the region. National courts judging sexual violence as a crime against humanity are now relying on these rulings to reject exceptions related to the application of statutes of limitations.[41]

Furthermore, while the Court's rulings did not address the issue of sexual violence, it established a standard for these cases when they fall within the indicators of gravity referred to in the previous section. As a result, they will be included as the "serious human rights violations" as stated in *Chumbipuma Aguirre et al. ('Barrios Altos') v. Peru* (2001) and therefore amnesties, statutes of limitation, and other provisions of exoneration of responsibility will not be applicable. In *Castro Castro Prison v. Peru*, *Rosendo-Cantu v. Mexico* and *Fernandez-Ortega v. Mexico*, the Court agreed that the sexual violence endured by the victims met the three elements required for it to be considered torture: (i) it is intentionally inflicted; (ii) it causes severe physical or mental suffering and (iii) it is per-

[39] *Ibid.,* para. 41.

[40] Inter-American Court of Human Rights, *Case of Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, Series C, no.154, para. 152.

[41] See *infra* Section 5.2.

petrated with a certain aim or objective.[42] For that reason, rape can amount to torture even when it occurred only once and outside an establishment controlled by the State[43] In fact, the Court recognized that rape, as well as torture, aims at intimidating, degrading, humiliating, punishing and controlling the victim.[44]

On the subject of sexual violence and torture, however, it is interesting to note the position of the Court in *'Dos Erres' Massacre v. Guatemala*. In that judgment, the Court undertakes analysis of torture and sexual violence as if they were two separate issues. At one point the Court assesses the lack of investigation of the massacre at the domestic level, criticizing that it focused on murder and not "on alleged torture against members of the community *and other* alleged acts of violence against the children and female population" (emphasis added).[45] Then, while quoting the report of the *Comisión de Esclarecimiento Histórico* ('CEH'), establishes that:

> [t]he State had official knowledge of alleged acts of torture against the population and children of the community, *as well as* abortions and other types of sexual violence against girls and women (emphasis added).

The separation, however, seems to blur when the Court determined that the government of Guatemala should effectively "investigate all facts of the massacre […] particularly the alleged acts of torture, in light of the differentiated impact of the alleged violence against girls and women".[46] This resolution would not only acknowledge that the sexual violence found in the case was indeed torture, but also demand a gender-sensitive analysis, which is the only way to assess the different impact of violence in both women and men.

5.1.2.3. The Right to Truth in the Jurisprudence of the Court

While the right to truth is still in emergence, the Inter-American system of protection of human rights has promoted and ensured it since the estab-

---

[42] Standard followed by the Court since *Case of Bueno-Alves v. Argentina*, Judgment (Merits, Reparations and Costs), 11 May 2007, Series C, no. 164.

[43] *Rosendo Cantu et al. v. Mexico, supra* note 10, para. 118.

[44] *Ibid.*, para. 117.

[45] *'Dos Erres' Massacre v. Guatemala*, *supra* note 9, para 136.

[46] *Ibid.*, para. 233.

lishment of the Court. As an individual right, the Court has recognized, since *Velasquez Rodriguez v. Honduras* (1988), the State's general duty of due diligence to investigate the violations of the rights enshrined in the AHCR, and the "search for the truth by the government". This search had to be effective and must be assumed by the State as its own legal duty.[47] The prohibition of amnesties, statutes of limitation, and other means of exonerating of criminal responsibility, also intends to guarantee the exercise of this right and to avoid putting it into jeopardy, as seen in section 5.1.2.2.

The search for the historical truth has become the pillar of the right to a domestic remedy and access to justice, and the fact that the State's duty of due diligence in the prevention, investigation, and punishment of violence against women is consecrated in the Convention of *Belem do Para* makes it an obligation of States to fulfill in the benefit of women.

The Court has been vocal and consistent throughout the years on the development of the individual right to truth. However, it has just started to address the collective right to truth. In its jurisprudence the Court has established that not only the victim is entitled to the right to truth, but also the next-of-kin[48] and society.[49] It is noteworthy that in *Gonzales et al. ("Cotton Field") v. Mexico* – a landmark case regarding gender crimes, the Court had elaborated on the requirement of the right to truth:

> […] the determination of the most complete historical truth possible, which includes determination of the collective patterns of action, and of all those who, in different ways, took part in said violations.[50]

This jurisprudence favouring the right to truth would also encourage the prosecution of sex crimes in the region. One of the contributions of the Court is to require the state, based on the duty of due diligence, to establish the historical truth and all the facts of the crimes, taking into account

---

47 Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988, Series C, no. 4, para. 177.

48 *Plan de Sanchez Massacre v. Guatemala*, *supra* note 19, para. 97, *Castro Castro Prison v. Peru*, *supra* note 7, para. 382.

49 *Gonzales et al. ("Cotton Field") v. Mexico, supra* note 8, para. 388; Inter-American Court of Human Rights, *Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Judgment, 24 November 2010, Series C, no. 219, para. 200.

50 *Gonzales et al. ("Cotton Field") v. Mexico, supra* note 8, para. 454.

the different impact of the crimes in women (as stated in *'Dos Erres' Massacre v. Guatemala*,[51] and in *Castro Castro Prison v. Peru*[52]); the patterns of violence especially when more than one factor of discrimination is present (which were crucial in *Gonzales et at ("Cotton Field") v. Mexico,* when the victims were discriminated for their being women and poor, or in *'Dos Erres' Massacre v. Guatemala*, where the victims were women, indigenous and poor) and the role of women in her family and community (reparations in *Plan de Sanchez Massacre v. Guatemala* were determined to try to fix the damage caused by the rape and death of women as keepers and transmitters of the culture).

Regarding thematic prosecution, the emergence of the right to truth as a collective right would better support the thematic prosecution of sex crimes. The individual's right to truth belongs to all men and women, and is usually individually exercised and adjudicated. This loses the perspective on the context that framed the crimes. Sexual violence as war crimes, crimes against humanity or crimes amounting to genocide usually have a collectivity of perpetrators, perhaps with different backgrounds but with the same motivation: target and harm a collectivity of victims who perhaps shared no more bonds than being targeted by these perpetrators. The establishing of collective truth, therefore, would require a more complete assessment of the victims' suffering; their relationships among themselves; the previous relationships with the perpetrators, if any; and the relationships with their State and other groups. The context is of critical importance, since it frames (in)equality and power relations, among others relevant. The characteristics, relationships, and experiences of all actors are crucial to depict a story as complete and as inclusive as possible, in which society can identify the causes of violence, the patters it took and its consequences.

The experiences of women were mostly absent either in these cases or as individual ones, in national courts and truth commissions in the region until 1998 when Guatemala's 'Memory of Silence' Report was released; and in the very Court's jurisprudence until 2006 with the case of *Castro Castro Prison v. Peru*. For that reason, prioritizing cases of sexual violence would fill the void by including women's experiences in the general narrative and, by making them visible and public, this will send

[51] Supra note 46.
[52] *Castro Castro Prison v. Peru, supra* note 7, para. 223.

the message that the said crimes cannot be committed and society must address their causes in order to prevent these facts from happening again. In that way, the collective truth would therefore be more inclusive, with women and all actors involved. It would not be narrowed to a men-only experience or a women-only experience.

5.2. National Cases on International Sex Crimes

The jurisprudence of the Court addressing sexual violence as international crimes has impacted in domestic tribunals in Latin America in recent years, encouraging more domestic trials on international sex crimes. Before that, either the said cases remained unpunished or the victims of human rights abuses and their advocates opted for the universal jurisdiction in order to achieve justice denied by national courts. Due to the successful use of universal jurisdiction in the extradition request of Chile's former president Augusto Pinochet, victims preferred to file their complaints before Spain's National Audience ('*Audiencia Nacional*').[53]

For this section we have selected three cases from Argentina and Peru: two with judgments and one with an indictment and a court order starting prosecution. These two cases are interesting comparisons because the three of them have used different strategies. In Argentina, rape and other sexual violence crimes were prosecuted as collective cases, and alongside other serious crimes like murder and torture. In Peru, on the contrary, there is one indictment on sexual crimes only.

5.2.1. Argentina: Case of Gregorio Rafael Molina[54]

Gregorio Rafael Molina was an officer serving at the Military Air Force Base of Mar del Plata, also known as 'The Cave (*La Cueva*) Detention Centre', between 1974 and 1982. He was accused of and condemned by the Oral Tribunal of Mar del Plata in June 2010 to life imprisonment for

[53] One of the most emblematic cases filed before the National Audience is the Mayan genocide perpetrated by the Guatemalan army and the paramilitar *Patrullas de Autodefensa Civil* (PAC) between 1979–1986. The case was filed by the Rigoberta Menchu Tum Foundation and other organizations in 1999 against Efrain Rios-Montt, *de facto* president of Guatemala between 1982–1983 and seven other high-ranked Guatemalan officials, and is still onging.

[54] Federal Criminal Oral Tribunal of Mar del Plata, Argentina, File no. 2086 and accumulated no. 2277 against Gregorio Rafael Molina, Judgment, 11 June 2010. ("*Molina*")

several crimes against humanity, among them a number of counts of rape and counts of attempted rape of two women.

This case is an important jurisprudence for several reasons. Firstly, it is the first one in which sexual violence was considered as crimes against humanity by itself and not subsumed under part of other crimes such as torture. In that regard it went further than the *Horacio Americo Barcos*[55] and *Miara et al.*[56] judgments in which rape and other forms of sexual violence were declared a form of torment or torture. While rape is considered a form of torture in the Court's jurisprudence, the *Molina* judgment contributes to increasing the visibility of rape and sexual violence in general as a specific crime systematically perpetrated against detainees, especially women.

Secondly, it expressly followed the jurisprudence of the Court as well as the ACHR and the Convention of *Belem do Para*. This is relevant since most national jurisprudence dealing with international crimes usually quote jurisprudence from international criminal tribunals rather than the Court's jurisprudence or human rights treaties. Interestingly enough, the *Molina* judgment relies on the Court's reasoning in *Castro Castro Prison v. Peru* which was based on the rulings of the International Criminal Tribunal for Rwanda's *Akayesu* judgment, and the International Criminal for the former Yugoslavia's *Kunarac et al*. Hence the Court translates the developments in international criminal courts into guidelines and mandates for the national courts to follow.

As for thematic prosecution of international sex crimes, no evident criteria are identified. However, it appears that the existence of survivors willing to tell their stories in court was the main factor that influenced the going forward of their prosecution. In the *Molina* case, the testimonies of two victims and other witnesses were the main and only evidence produced by the prosecution to prove the counts on sexual violence and establish a pattern of violence against detained women. This is of utmost relevance considering that in the 2008 judgment of *Santiago Omar Riveros et al.*, due to the low number of testimonies related to rape, the Court dismissed, for lack of merit, the rape counts against Riveros, assert-

[55] Federal Criminal Oral Tribunal of Santa Fe, Argentina, *Cause Horacio Americo Barcos*, Judgment 08/10, 19 April 2010.

[56] Federal Criminal Oral Tribunal Nº 2 of the Autonomous City of Buenos Aires, Argentina; File no. 1668, *Miara, Samuel et al.*; and File 1673, *Tepedino, Carlos Alberto Roque*, Judgment, 22 March 2011.

ing that the said cases were isolated and therefore did not constitute a pattern or systematic practice and were therefore not a crime against humanity.[57]

In any case, rape and sexual violence carry less jail time than murder, even if prosecuted as a crime against humanity. Jail time was used as a criterion to assess the veracity of the victims' testimonies, since the Tribunal established that it is not likely that the victims have any interest in making up a story about being raped provided that the maximum prison time for those crimes is minimum compared to those for the other international crimes in the same case.[58]

5.2.2. Argentina: Miara *et al.*[59] (Cases Atletico, Banco and Olimpo)

In this case, Samuel Miara and other 16 co-defendants were condemned to life imprisonment for a number of crimes against humanity perpetrated in the *Club Atletico*, *Banco* and *El Olimpo* detention centres, and unlike the *Molina* judgment in which there were counts of rape as crime against humanity *per se,* in *Miara et al.* sexual violence was subsumed into the figure of torment (*tormento*), so there were no specific counts of rape or sexual abuse. This is so because the subjective element, according to the Tribunal, fits better with the criminal type of torment rather than aggression to the sexual integrity.[60]

The judgment establishes that sexual violence was part of a core of degrading practices, not only in the aforementioned detention centres aforementioned, but in all centres that carried out the systematic plan imposed by the *de facto* regime in power between 1976 and 1983. Following *Castro Castro Prison v. Peru*, the judgment asserted that the cases of en-

---

[57] Federal Court in Criminal and Correctional Matters no. 2 of San Martín, Argentina; File 4012, *Santiago Omar Riveros et al.*, Judgment, 19 December 2008.

[58] Federal Criminal Oral Tribunal of Mar del Plata, Argentina, *Gregorio Rafael Molina* case, p. 110.

[59] In the cause 1668 the co-defendants were Samuel Miara, Raúl González, Juan Carlos Avena, Eduardo Emilio Kalinec, Juan Carlos Falcón, Eufemio Jorge Uballes, Luís Juan Donocik, Oscar Augusto Isidro Rolón, Julio Héctor Simón, Roberto Antonio Rosa, Guillermo Víctor Cardozo, Eugenio Pereyra Apestegui, Raúl Antonio Guglielminetti, Ricardo Taddei and Enrique José Del Pino. In cause 1673, the co-defendants were Carlos Alberto Roque Tepedino, Mario Alberto Gómez Arenas, Enrique José Del Pino y Juan Carlos Avena.

[60] *Ibid.*, p. 862.

forced nudity constituted sexual violence, while the same crime together with sexualized verbal abuse against the detainees was considered "sexual torture" in accordance with the Istanbul Protocol.[61]

As for thematic prosecution, again, no criterion has been put in evidence, but this judgment suggests a different approach from that of the *Molina* judgment. Both of them based their cases of sexual violence mostly on the testimony of victims and witnesses, which happened to be key in the prosecution of these crimes. However, in *Miara et al.* the witnesses, all of them survivors of the detention centres, provided most of the testimonies related to sexual violence, since a large number of victims did not come forward or were among the murdered or disappeared.

From both judgments it could be inferred that the statement of the victim herself could give the prosecution a greater chance to present counts of rape or other forms of sexual violence as crimes against humanity, without subsuming it as torment. If there are more witnesses than victims, the prosecution will optimize their accounts to establish a pattern of torture and inhumane treatment in the detention centers, and provide an engendered content to the "imposition of torment" crime.

5.2.3. Peru: Case *Manta and Vilca*[62]

Manta and Vilca are two villages in Huancavelica, Peru. In accordance with the Peruvian Truth and Reconciliation Commission ('CVR'), they were both reported to have endured sexual violence as a systematic or widespread practice during the 1980–2000 internal armed conflict in Peru. Overall the CVR identified a total of 538 cases of sexual violence in the country in the same period, from which 13 are currently being reviewed by prosecutors and only 3 have indictments and/or are in the commencement of trial stage (*apertura de instruccion*). *Manta and Vilca* is one of the cases with a court order opening prosecution.

Manta and Vilca, similarly to *Molina*, is addressing rape as a crime against humanity *per se.* The reason, however, is mostly formal: at the

[61] Federal Criminal Oral Tribunal no. 2 of the Autonomous City of Buenos Aires, Argentina, *Miara et al.*, pp. 858–859.

[62] Fourth Supraprovincial Criminal Court, Peru, File 2007-00899-0 (against Rufino Donato Rivera Quispe, Vicente Yance Collahuacho, Epifanio Delfin Quiñones Loyola, Sabino Rodrigo Valentin Rutti, Amador Gutierrez Lisarbe, Julio Julian Meza Garcia, Pedro Chanel Perez Lopez and Martin Sierra Gabriel), Court order opening prosecution, 3 April 2009.

time of the commission of the crimes the Peruvian Criminal Code did not typify torture, only rape.[63] The judge did not elaborate on the crimes against humanity in the court order opening prosecution. The latter only develops the subject of crimes against humanity in order to support the non-applicability of the statutes of limitation for said crimes.[64]

This case differs from both Argentinean cases because the indictment contemplates the counts of rape only, whereas *Molina* and *Miera et al.* consisted of complex cases with a number of crimes against humanity involved.

In terms of thematic prosecution, there appears to be two main reasons for going forward with the prosecution of this case: the evidence (in this case the testimony of the victim and the forensic psychological examination), and the fact that the case was highlighted by the CVR Final Report. It is interesting to see how the CVR and civil society cooperating in the disseminating of the findings of the Final Report can influence public prosecutors in their work of strengthening their cases for indictment. On the other hand, from the court order opening prosecution, the lack of familiarity of the judiciary with sexual crimes as war crimes and crimes against humanity is worrisome. The judge remains mostly silent when sustaining that rape was a widespread and/or systematic practice, and that the use of the principle of legality and non-retroactivity of the law goes against the core notion of crimes against humanity, which can be prosecuted at any time. As the process develops it might pose an obstacle in the prosecution of these crimes.

5.3. Conclusions

The Convention of *Belem do Para* and the Court have already given sufficient guidelines through its jurisprudence to assess the gravity of sex crimes perpetrated in the region. The Court found that these crimes are generally committed by State agents or as part of a State's policy; that they correspond with a generalized discrimination against women that allows for extreme forms of violence against them in the public and private spheres; and that they usually go unpunished and have a more devastating impact in the victim and her community compared to other human rights abuses. In cases of massive gross violations of human rights, contextualiz-

[63] *Ibid.,* pp. 9–10.
[64] *Ibid.*, pp. 23–26.

ing the violence endured by women will give a better insight not only of their own suffering, but also that of each of the members of her community and the community as a whole.

Therefore, national courts have an obligation to prosecute human rights abuses and, if there is a backlog of cases, the aforementioned criteria could prove useful in supporting the case to prioritize the prosecution of sex crimes. The Court's rulings would also support the use of thematic prosecution in its expressivist sense since the Inter-American system of protection of human rights aims to eradicate violence against women, give visibility to the said crimes in broader contexts as conflicts or massacres, and ensuring women's right to justice regardless of the time that has passed. The strong ties between the Inter-American system of protection of human rights and domestic tribunals in the region would guarantee the application of the said guidelines and the introduction of new ones as the Court's jurisprudence develops, for example, in the case of the right to truth. *Castro Castro Prison v. Peru* is the most quoted judgment, but it looks like it will only be a matter of time before the national courts to use the other judgments analysed in this chapter, which were ruled on during or after the national judgments or opening of prosecution.

This favourable context is enhanced by recently enacted legislation punishing international crimes, and the progressive removal of amnesties and statutes of limitations that prevent the prosecution of gross violations of human rights. Still, national courts in the region still face two main challenges while prosecuting sexual violence configured as international crimes. Since an important number of sex crimes were committed during the dictatorships and internal armed conflicts that took place three to four decades ago, a first challenge will be the time that has passed between the perpetration of the crime and its prosecution, which will endanger the collection of evidence and the location of victims and witnesses. The second challenge is the reluctance of the victims to come forward and tell their stories of violence. The higher visibility of sexual violence as a gross violation of human rights has encouraged more and more women to talk; however, due to the time that has passed, a large number of victims have rebuilt their lives and do not feel the need to come back to that memory again. Feelings of fear, angst, and shame will also prevent the victims from filing a case. As long as the account from the victim is still seen as the main piece of evidence in the prosecution of sex crimes that have been committed far in the past, the number of indictments and trials will be

low. The lower the numbers, the less the backlogs of cases in that matter, and hence the less likelihood that national courts will find it necessary to establish public criteria for the prioritizing of cases of international sex crimes.

6

Thematic Prosecution of International Sex Crimes and Stigmatisation of Victims and Survivors: Two Sides of the Same Coin?

Benson Chinedu Olugbuo*

> Witness: My body was affected […]. I was very ashamed. Now I have become useless. That is something that I do not believe anyone could be subjected to in life, that is to totally destroy someone's body. You become totally useless. You no longer have any value. When somebody sees you, they do not value you any longer, and they look down on you. God forgive me.[1]
>
> Judge: [W]hat you have said, that a woman who is raped is a woman who has no value, she has to be ashamed, she is totally useless, that is not true […]. [T]he shame here is the shame of the entire world. This is dishonour for humanity. You should not be ashamed. You are brave. You are courageous. What you are doing today is going to help society to realise that they are not doing their job correctly. Please do not consider yourself as useless. You are not. You are respectable. Generally speaking, I respect women. After my mother, you are the woman that I respect most in this world. Thank you.[2]

Thematic prosecution of international sex crimes involves the selection and prioritization of sexual crimes over and above other crimes for investigation and prosecution at national or international judicial institutions.

* **Benson Chinedu Olugbuo**, Doctoral Candidate and Research Associate, Public Law Department, University of Cape Town, South Africa. Earlier drafts of this chapter were presented at the "Thematic Investigation and Prosecution of International Sex Crimes" conference organised by the Forum for International Criminal and Humanitarian Law in Cape Town 7–8 March 2011 and the Emerging Researchers' Breakaway of the Faculty of Law, University of Cape Town at Mount Fleur Estate, Stellenbosch 13–15 June 2011. I am grateful to participants at the two workshops for their comments and to Oluwatoyin Badejogbin for his invaluable suggestions.

1 *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-T-141-Red-ENG WT, 14 May 2010, 1/83 RM T. Trial Chamber II Court proceedings of 14 May 2010, p. 39, available at http://www.icc-cpi.int/iccdocs/doc/doc885074.pdf, last accessed on 15 October 2011.

2 *Ibid*.

Despite arguments objecting to this process due to competing prosecutorial demands, lack of resources and trained personnel, proponents are of the opinion that it is an effective way of dealing with the recurring decimal of sexual violence during armed conflicts. This chapter argues that the solution to sexual violence may not lie with targeted prosecution of international sex crimes. Rather, efforts should be made to address the underlying factors that result in the stigmatization of victims and survivors of sexual violence. This chapter will further argue that these underlying factors also lead to the exacerbation of international sex crimes during armed conflicts and, if not addressed, will further stigmatize victims and survivors through targeted investigations and prosecutions.

6.1. Introduction

Thematic prosecution of international sex crimes is the process by which prosecutors and investigators focus on the selection and prioritization of sex crimes for prosecution either at national or international criminal justice institutions.[3] It may involve exclusive focus on sex crimes to the exclusion of other crimes of concern to the international community. It may also involve prioritization of the prosecution of sex crimes but not to the exclusion of other crimes. The appropriateness of focusing on the prosecution of sex based crimes has been questioned because of empirical evidence indicating that many people consider sex crimes to be less serious than crimes resulting in death.[4] Furthermore, there are issues of inadequate resources and lack of effective capacity to deal with thematic prosecution of international sex crimes.

International sex crimes can be prosecuted either as genocide,[5] crimes against humanity,[6] or war crimes.[7] In relation to genocide, the acts[8]

[3] Morten Bergsmo, "International Sex Crimes as a Criminal Justice Theme", *FICHL Policy Brief Series no. 8 (2011)*, p. 1.

[4] *Ibid.*, p. 2.

[5] Art. 2 of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260(III)A of the UN General Assembly on 9 December 1948 entered into force on 12 January 1951; Art. 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Art. 2 of the Statute of the International Criminal Tribunal for Rwanda; Art. 7 of the Rome Statute of the International Criminal Court.

[6] To meet the threshold of culpability, the crimes must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

must be committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group. Sexual crimes that fall under crimes against humanity are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[9] For sex crimes to be classified as war crimes, the acts must be committed as part of a plan or policy or as part of a large scale commission of such crimes during international[10] or non-international armed conflicts.[11]

Rape and sexual violence have been systematically used as weapons of war, military strategy and in some instances to change the ethnic compositions of communities.[12] We are confronted daily with stories of international sex crimes that still shock the conscience of humanity.[13] Most victims and survivors[14] of international sex crimes suffer in silence while

---

7 Acts like rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Art. 3 common to the Four Geneva Conventions; Art. 8 of the Rome Statute.

8 Killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

9 See Rome Statute, Art. 7(g).

10 Rome Statute, Art. 8(2)(b)(xxii).

11 Rome Statute, Art. 8(2)(c)(vi).

12 The Economist, "War's overlooked victims: Rape is horrifyingly widespread in conflicts all around the world", 13 January 2011, available at http://www.economist.com /node/17900482#footnote1, last accessed on 12 October 2011; Alexis Arieff, "Sexual Violence in African Conflicts", in *Congressional Research Service Report*, November 2010, p. 8 available at http://www.fas.org/sgp/crs/row/R40956.pdf, last accessed on 16 October 2011; Michele Leiby "Wartime Sexual Violence in Guatemala and Peru", in *International Studies Quarterly*, 2009, vol. 53, p. 449; Nancy Farwell, "War Rape: New Conceptualizations and Responses", in *Affilia*, 2004, vol. 19, no. 4, pp. 389–403; Jeanne Ward and Mendy Marsh, "Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources", available at http://www.unfpa.org/emergencies/symposium06/docs/finalbrusselsbriefingpaper.pdf, last accessed on 12 October 2011; Manuela Melandri, "Gender and Reconciliation in Post-Conflict Societies: The dilemmas of Responding to Large Scale Violence", in *International Public Policy Review*, 2009, vol. 5, no. 1, p. 9.

13 Eve Ayiera, "Sexual violence in conflict: A problematic international discourse", in *Feminist Africa,* 2010, vol. 14, p. 13.

14 I have decided to use the terms 'victims and survivors' together. Megan Mullet, "Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in

some live with fear and regret.[15] A good number are blamed by the society for what befell them and are subjected to various forms of discrimination.[16] Some of them are rejected by their families while many who are predominantly women are left by their husbands.[17] The problem is exacerbated by the trauma of their experiences and the inability to relate it to family members because of stigmatization.[18] Many suffer multiple medical conditions as a result of sexual violence perpetrated against them.[19] Despite this gloomy picture, the international community has tried to punish those who commit crimes of sexual violence and international sex crimes.

The Nuremberg and Tokyo Tribunals have been criticised for low-level prosecution of international sex crimes notwithstanding the level of atrocities committed during the Second World War.[20] There was considerable improvement in the treatment of victims of international sex crimes at the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') set up by the United Nations ('UN'). However, their rights were limited as they participated in the trials only as witnesses.[21] The advent of the International

Capital Cases", in *Indiana Law Journal,* 2011, vol. 86, pp. 1617–1647. For a critique of the use of 'victims', see Martha Minow, "Surviving Victim Talk", in *University of California Los Angeles Law Review*, 1993, vol. 40, pp. 1411–1445.

15 Evelyne Josse, "They came with two guns: the consequences of sexual violence for the mental health of women in armed conflicts", in *International Review of the Red Cross,* 2010, vol. 92, no. 887, p. 184.

16 *Ibid.*, p. 184.

17 *Ibid.*, p. 179.

18 John Ehrenreich, "Coping with Disasters: A Guide to Psychological Intervention", available at http://www.toolkitsportdevelopment.org/html/resources/7B/7BB3B250-3EB8-44C6-AA8E-CC6592C53550/CopingWithDisaster.pdf, last accessed on 12 October 2011.

19 Human Rights Watch, "My Heart is Cut: Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire", 2007, vol. 19, no. 11(A), p. 86.

20 Theodor Meron, "Reflections on the Prosecution of War Crimes by International Tribunals", in *The American Journal of International Law*, 2006, vol. 100, no. 3, p. 567.

21 Anne-Marie de Brouwer and Marc Groenhuijsen, "The Role of Victims in International Criminal Proceedings", in Goran Sluiter and Sergey Vasihev (eds.), *International Criminal Procedure: Towards Coherent Body of Law*, CMP Publishing, London, 2009, p. 149.

Criminal Court ('ICC') and its promotion and protection of the rights of victims of international sex crimes is seen as a positive development.[22]

The chapter will seek to answer the question whether the prioritisation of prosecuting international sex crimes will ultimately eliminate or reduce the incidences of sexual violence. It will also investigate whether targeted prosecution will result in further stigmatisation or labelling of victims and survivors of international sex crimes. In addressing the above question, the chapter is divided into four broad sections. Section 6.2. addresses the theoretical and conceptual framework of the chapter by analysing the prevalence of international sex crimes and stigmatization of sexual violence. Section 6.3. discusses the intervention of the ICTY and the ICTR. Section 6.4. looks at the UN Security Council ('UNSC') interventions through the resolutions adopted to fight sexual violence during armed conflicts. Section 6.5. draws attention to emerging scenarios in Democratic Republic of the Congo ('DRC') and its impact on the prosecution of international sex crimes at the national level. Section 6.6. concludes the chapter. The chapter concentrates on international sex crimes[23] committed during international and non-international armed conflicts although the arguments could be relevant for judicial systems seeking ways and means to contain sex crimes committed at the national level.

6.2. Conceptual and Theoretical Framework of Sexual Violence

In conceptualising the definition of rape, Susan Brownmiller stated that "[m]an's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric time, along with the use of fire and first crude stone axe".[24] She further argues that rape is "a conscious process of intimidation by which *all* men keep *all* women in a state of fear".[25] For Brownmiller, rape is the earliest expression of an intent by men to control women through fear and intimidation and this process has succeeded in changing women's perception

[22] Cherie Booth and Max du Plessis, "The International Criminal Court and Victims of Sexual Violence", in *South African Journal of Criminal Justice*, 2005, vol. 18, no. 3, p. 252.

[23] The terms international sex crimes, sexual violence and sex crimes are used interchangeably.

[24] Susan Brownmiller, *Against Our Will Men, Women and Rape*, Simon and Schuter Publishers, New York, 1975, p. 14.

[25] Susan Brownmiller, 1975, p. 15, *ibid.* (emphasis in the original).

and their social status. This definition indicts all men as capable of committing rape. However, the definition does not take into consideration the fact that men and boys are at times victims of rape though probably on a smaller scale compared to women.[26]

Regarding rape during armed conflicts, Christine Chinkin states,

> [w]omen are raped in all forms of armed conflict, international and internal, whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all these. They are raped by men from all sides – both enemy and "friendly" forces.[27]

Chinkin believes women are targeted by soldiers as part of a war strategy whether they are winning or losing the war. Women lose out in the process as they are neither protected by the victorious soldiers nor by the defeated armed forces.

Ann Cahill explores the physical and emotional challenges of sexual violence on women. She states that rape is "a pervasive, sustained, and repetitive, but not ultimately defining, element of the development of women's experience".[28] She further argues that sex crimes are experienced differently by different women with some common features shared by them.[29] Rape marks women as different from men and the experience of sexual violence for women begins with the body and the significance does not end there.[30] Cahill's definition goes beyond the physical by connecting the emotionally and psychologically debilitating effects of rape on women.

The definition of rape in international law has not been consistent.[31] International law has developed at snail speed in relation to the crime of

---

[26] Dustin Lewis, "Unrecognised Victims: Sexual Violence Against Men in Conflict Settings Under International Law", in *Wisconsin International Law Journal*, 2009, vol. 27, no. 1, pp. 1–49; Gertie Pretorius and Richard Hull, "The Experience of Male Rape in Non-Institutionalised Settings", in *Indo-Pacific Journal of Phenomenology*, 2005, vol. 5, no. 2, pp. 1–11.

[27] Christine Chinkin, "Rape and Sexual Violence of Women in International Law", in *European Journal of International Law*, 1994, vol. 5, p. 326.

[28] Ann Cahill, *Rethinking Rape*, Cornell University Press, New York, 2001, p. 4.

[29] *Ibid.*, p. 5.

[30] *Ibid.*, p. 5.

[31] Gay J. McDougall, "Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict", UN Economic and Social Council, E/CN.4/Sub.2/1998/13, 22 June 1998.

rape and sexual violence committed during armed conflicts. Until very recently, the specific elements of the crime of rape were not clearly set out. However, based on the decisions of the ICTY and ICTR, there is an emerging consensus on the definition of rape, both in terms of the *actus reus* and the *mens rea*, although some differences still persist.[32]

In the *Prosecutor v. Tadić* case,[33] the accused person was charged with crimes under grave breaches of the Geneva Conventions of 1949; violations of the laws and customs of war; and crimes against humanity. Although there was insufficient evidence to convict Tadić for all the crimes he was accused of, the ICTY found that he aided and abetted sexual violence crimes.[34]

In *Prosecutor v. Akayesu*,[35] the ICTR found that rape and sexual violence constituted an act of genocide when committed with specific intent to destroy a group in whole or in part.[36] The ICTR made an unprecedented legal decision by finding that rape and sexual violence underpinning crimes against humanity also constituted the crime of genocide.[37] The Trial Chamber defined rape as:

> […] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[38]

The ICTY in *Prosecutor v. Furundžija*[39] defines rape as:

> […] sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis

---

32 Mark Ellis, "Breaking the Silence: Rape as an International Crime", in *Case Western Reserve Journal of International Law*, 2007, vol. 38, no. 2, p. 229.

33 *The Prosecutor v. Dusko Tadić* ('Dule'), IT-94-1-T, 7 May 1997.

34 *The Prosecutor v. Dusko Tadić*, para. 726, *ibid*.; Ellis, 2004, p. 226, *supra* note 32.

35 *The Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998.

36 *The Prosecutor v. Akayesu*, para 71, *ibid*.

37 George Mugwanya, "The Contribution of the International Criminal Tribunal for Rwanda to the Development of the International Criminal Law", in Chacha Murungu and Japhet Biegon (eds.), *Prosecution of International Crimes in Africa*, Pretoria University Law Press, Pretoria, 2011, p. 68.

38 *The Prosecutor v. Akayesu*, para 598, *supra* note 35; Diane Amann, "Prosecutor v. Akayesu Case", in *The American Journal of International Law*, 1999, vol. 93, no. 1, p. 197.

39 *Prosecutor v. Furundžija*, IT-95-17/1-T, 10 December 1998

> of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person.[40]

Furthermore, in the *Prosecutor v. Kunarac, Kovač and Vuković* ICTR held that:

> [r]ape is the sexual penetration, however slight: (a) of a vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Con-sent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[41]

This definition has been endorsed by subsequent cases decided by the ICTR.[42] The Elements of Crime of the ICC provides that there is a crime of rape if:

> […] invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine con-sent.[43]

The UN has defined violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[44] Amongst several forms of violence against women identified by the UN, systematic sexual abuses including international sex crimes that occur during international and non-international armed conflicts are glaring forms of violence against women.

---

40 *Prosecutor v. Furundžija*, para 185, *ibid*.

41 *Prosecutor v. Kunarac, Kovac and Vuković,* 22 February 2001, para 460.

42 *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgment, 7 July 2006, paras. 147–157; *Prosecutor v. Muhimana Case*, ICTR-95-1B-T, Judgment, 28 April 2005, paras. 550–551;Mugwanya, 2011, p. 72, *supra* note 37

43 United Nations, "The Elements of Crimes of the International Criminal Court", Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, UN publication, Sales no. E.03.V.2 and corrigendum, part II(B).

44 World Health Organisation, "Violence against women", Fact Sheet No. 239, November 2009.

Sexual violence against women during armed conflicts has a long history and its effect on women is devastating.[45] According to Amnesty International,

> [r]ape constitutes an especially humiliating assault. Consequently, it often carries traumatic social repercussions, which may be affected by a woman's cultural origins or social status. Such factors may affect her ability to bear the trauma of rape, let alone the time it may take for her to come to terms with the emotional distress and physical effects of rape.[46]

6.3. International Criminal Justice and Sexual Violence

Despite the incidents of rape and sexual violence that has dogged the international community during several conflicts throughout the world, their prosecution has not been as effective as expected. This is due to several reasons. One is the lack of political will by those responsible to take action. Another reason is the tendency not to recognize rape and sexual violence as specific crimes but ancillary to other crimes of concern to the international community.

After World War I, the War Crimes Commission was set up in 1919 to examine the atrocities committed by Germany and other Axis powers during World War I, as it was evident that rape and other forms of sexual violence had been used by the German army against citizens of Belgium and France.[47] Though the prosecutions did not succeed, rape and enforced prostitution were recognised as violations of the laws and customs of war.[48]

During World War II, several incidences of rape and sexual violence also took place but during Nuremberg trials, there was no political will to prosecute these crimes.[49] A major deficiency of the Nuremberg trials was the absolute neglect of international sex crimes against women.[50]

---

45 Chinkin, 1994, p. 327, *supra* note 27; Rosalind Dixon, "Rape as a Crime in International Humanitarian Law: Where to from here", in *European Journal of International Law*, 2002, vol. 13, no. 3, p. 700.

46 Amnesty International, "Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces", 1993, EUR 63/01/93, p. 1.

47 Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunal*, Martinus Nijhoff Publishers, Dordrecht, 1997, p. 42.

48 *Ibid*.

49 Anne-Marie de Brouwer and Marc Groenhuijsen, 2009, p. 7 *supra* note 21.

50 Askin, 1997, p. 97, *supra* note 47.

The Tokyo Tribunal was more effective in prosecuting international sex crimes compared with the Nuremberg Tribunal. This is because rape was prosecuted as a war crime, under "inhumane treatment", "ill-treatment" and "failure to respect family honour and rights".[51]

International sex crimes occur regularly during armed conflicts and most times perpetrators are not held accountable.[52] Few examples in Sudan and Libya are discussed. In Darfur, Sudan, the Janjaweed militias have been accused of complicity with the government forces to commit international sex crimes of mass rape and other sexual crimes against Darfurians. The International Commission of Inquiry ('ICI') found several incidents of mass rape and sexual crimes committed against women and girls in Darfur and stated that;

> […] deliberate aggressions against women and girls, including gang rapes, occurred during the attacks on the villages […] women and girls were abducted, held in confinement for several days and repeatedly raped during that time […] rape and other forms of sexual violence continued during flight and further displacement, including when women left towns and IDP sites to collect wood or water. In certain areas, rapes also occurred inside towns. Some women and girls became pregnant as a result of rape.[53]

The ICI further stated international sex crimes committed in Darfur may have been under-reported "due to the sensitivity of the issue and the stigma associated with rape".[54] The report of the ICI provided a springboard for the referral of the Darfur conflict to the ICC in 2005 by the UNSC acting under Chapter VII of the UN Charter.[55]

Recently in Libya, it was alleged that children as young at eight years old were sexually assaulted during the conflict between Libyan National Transitional Council ('NTC') fighters and Mu'ammar Gaddafi-led

---

51 *Ibid.*

52 Kim Thuy Seelinger *et al.*, "The Investigation and Prosecution of Sexual Violence", in *Sexual Violence and Accountability Project Working Paper Series*, Human Rights Center University of California, Berkeley, available at http://www.law.berkeley.edu/HRCweb/pdfs/SVA_IandP.pdf, last accessed on 14 October 2011.

53 United Nations, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General", pursuant to the UN Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf, last accessed on 15 October 2011.

54 *Ibid.*, para 336.

55 United Nations Security Council ('UNSC'), Res. 1593, 31 March 2005.

soldiers.[56] Furthermore, there were allegations that Gaddafi-led soldiers were given Viagra to aid them in sexual violence during the conflict with the NTC forces.[57]

Though it is desirable to prosecute perpetrators of sexual violence, the impact of sexual violence on victims and survivors at times is not mitigated by prosecution of perpetrators. Some authors have argued that there are limitations to what criminal justice institutions can achieve in relation to victims and survivors of sexual crimes.[58] Nichola Henry is of the view that international criminal justice does not always provide satisfaction and closure to victims and survivors.[59] Efforts should be made at the national level to provide accountability mechanisms for international sex crimes. These mechanisms should complement both national and international criminal justice systems aimed at alleviating the immediate impact of sexual violence on victims and survivors.

6.3.1. The International Criminal Tribunal for the Former Yugoslavia

The events in the former Yugoslavia that led to the establishment of the ICTY are documented.[60] Elizabeth Wood has argued that the sexual abuse of Bosnian Moslem women by Bosnian Serb forces was so systematic and

---

[56] Save the Children, "Save the Children receives reports of child rape in Libya", available at http://www.savethechildren.org.uk/en/15432.htm, last accessed on 9 October 2011.

[57] Herald Sun, "Libya troops 'given Viagra to rape'", available at http://www.heraldsun.com.au/news/world/libya-troops-given-viagra-to-rape/story-e6frf7lf-1226046748468, last accessed on 16 October 2011.

[58] Dianne Martin, "Retribution Revisited: a Reconsideration of Feminist Criminal Law Reform Strategies", in *Osgoode Hall Law Journal*, 1998, vol. 36, no. 1, p. 155.

[59] Nichola Henry, "Witness to Rape: The Limits and Potentials of International War Crimes Trials for Victims of Wartime Sexual Violence", in *International Journal of Transitional Justice*, 2009, vol. 3, no. 1, p. 130.

[60] Bert Swart *et al.*, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, New York, 2011; Askin, 1997, *supra* note 47; Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication", in *Fordham International Law Journal*, 1999, vol. 23, no. 2 pp. 440–459; Lilian Barria and Steven Roper, "How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR", in *International Journal of Human Rights*, 2005, vol. 9, no. 3, pp. 349–368.

widespread that it was a crime against humanity under international law.[61] All parties to the conflict in Bosnia-Herzegovina committed abuses, including rape and sexual violence. While Moslem women were the chief victims, the main perpetrators were members of Serbian armed forces.[62] There is consensus amongst some scholars that rape and sexual violence were used as strategies and weapons of war especially against Moslem women by Bosnian Serbs.[63]

The Serbian forces carried out unprecedented ethnic cleansing, targeting women and girls while holding several of them captive as sexual slaves. Women were repeatedly raped to make them pregnant and held in captivity to ensure that they did not terminate the pregnancy. This was to make them have non-Moslem children thereby changing the composition of the families. This confirms the argument by Dianna Marder of the philosophy and thought process of the perpetrator that, "[w]hen I rape your woman, […] I destroy your property. I insult you. I humiliate you. If I rape all your women, I defile an entire generation. And if I force your women to bear my children, I pollute your race".[64] These heinous crimes are not targeted only at the women but the family, society and community at large.

Rape during armed conflicts is also used as a bonding process and as initiation rites for soldiers.[65] According to Radhika Coomaraswamy:

> During wartime, sexual violence is not usually a private crime. It is often committed in public, in front of fellow soldiers and the family of the victim. This public spectacle is aimed at instilling terror among the population, but it also strengthens bonds and comradeship among fellow soldiers or militias. The public acts are meant to harden the warrior and to create shared experiences

[61] Elizabeth Wood, "Variation in Sexual Violence during War", in *Politics and Society*, 2006, vol. 34, no. 3, p. 307.

[62] Amnesty International, 1993, p. 3, *supra* note 46.

[63] Danise Aydelott, "Mass Rape during war: Prosecuting Rapists of under International Law", in *Emory International Law Review*, 1993, vol. 7, p. 600; Theodor Meron, "Rape as a Crime under International Humanitarian Law", in *American Journal of International Law*, 1993, vol. 87, no. 3, p. 425; Theodor Meron, "The Case for War Crimes Trials in Yugoslavia", in *Foreign Affairs*, 1993, vol. 72, no. 3, p. 125.

[64] Dianna Marder, "Once Again, Rape Becomes a Weapon of War", in *Atlanta Journal and Constitution*, 17 February 1993, p. 111, quoted in Danise Aydelott, 1993, p. 587, *supra* note 63.

[65] Jelke Boesten, "Analysing Rape Regimes at the Interface of War and Peace in Peru", in *The International Journal of Transitional Justice*, 2010, vol. 4, no. 1, p. 117.

> among the men. Studies into the lives of perpetrators have clearly shown that this element of male bonding is an essential aspect of rapes during wartime.[66]

Perpetrators of rape and sexual violence see the society, community and future generations through the body of the woman and her violation is the ultimate conquest.[67] It is these mindsets, thought processes, and false assumptions about military strategies of rape and sexual violence during armed conflicts that has fuelled the unprecedented international sex crimes against women despite laws enacted to prohibit the crimes.[68] These false assumptions may have also resulted in the low reportage of rape of men and boys during war as they do not fall into the "war booty" narratives.[69] The stigma attached to rape and sexual violence by the society has also made it difficult for victims and survivors to relate their experiences because of the fear of stigmatization and loss of social status in the community.

Not all victims and survivors subscribe to criminal processes because of its negative effects. While some find succour and relief in giving evidence during criminal proceedings, others find it difficult and traumatising.[70] The cross-examinations by defence counsel that take place during criminal trials also contribute to the stress and discomfort of victims and survivors who elect to become witnesses. Some of them are forced to relive traumatic experiences while giving evidence in criminal proceedings and may become re-traumatised in the process.

---

66 Radhika Coomaraswamy, "Sexual Violence during Wartime", in Helen Durham and Tracy Gurd, *Listening to the Silences: Women and War*, Martinus Nijhoff Publishers, Leiden, 2005, p. 55.

67 Simon Chesterman, "Never Again … and Again: Law, Order and the Gender of War Crimes in Bosnia and Beyond", in *Yale Journal of International Law*, 1991, vol. 22, no. 2, pp. 325–328.

68 Carlie Sperline, "Mother of Atrocities: Pauline Nyiramasuhuko's Role in Rwanda Genocide", in *Fordham Urban Law Journal*, 2006, vol. 33, p. 662.

69 Sandesh Sivuakuraman, "Lost in Translation: UN responses to sexual violence against men and boys in situations of armed conflict", in *International Review of the Red Cross 201*, vol. 92, no. 877 pp. 259–277; Will Storr, "The rape of men", The Observer, 17 July 2011, available at http://www.guardian.co.uk/society/2011/jul/17/the-rape-of-men, last accessed on 12 October 2011; Lara Stemple, "Male Rape and Human Rights", in *Hastings Law Journal*, 2009, vol. 60, pp. 605–647.

70 Alexandra Miller, "From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape", in *Penn State Law Review*, 2003, vol. 108, no. 1, p. 357.

6.3.2. International Criminal Tribunal for Rwanda

Between April and July 1994 about five hundred to one million Tutsis and moderate Hutus were killed in a planed genocide orchestrated by political leaders, threatened with the loss of political power.[71] The UNSC set up the ICTR to hold leaders of the genocide accountable. The ICTR has been credited with making advancements in the protection of victims and survivors of sexual crime. The widespread and systematic rape of Tutsi women that occurred in Rwanda according to the ICTR amounted to genocide.[72] Despite the advancements made by the ICTR, it has also been argued by some scholars that the establishment of the ICTR was an afterthought as the international community failed to protect those killed during the genocide.[73] The ICTR has tried several individuals accused of complicity in the genocide that took place in Rwanda. However, one case that stands out in relation to rape and sexual violence after the case of *Prosecutor v. Akayesu* is *Prosecutor v. Nyiramasuhuko*.[74]

Nyiramasuhuko is from the region of Butare in Rwanda and was an administrator, lawyer and politician. She was a member of the inner circle of the Hutu government in Kigali. She was a close friend of Agathe Habyarimana, the wife of the former president of Rwanda, Juvenal Habyarimana, whose death triggered the genocide in 1994.[75] Initially, Butare was immune to the slaughter that was going on around Rwanda for several reasons. It had a concentration of both Tutsis and Hutus. The National University of Rwanda was based there, including the Research In-

---

71 Human Rights Watch, "Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath", 1999, available at http://www.hrw.org/node/78333, last visited on 9 August 2011.

72 *The Prosecutor v. Akayesu*, paras. 732–734, *supra* note 35.

73 Alison Hopkins, "Defining the Protected Groups in the Law of Genocide: Learning from the Experience of the International Criminal Tribunal for Rwanda", in *InfraRead: Dalhousie Journal of Legal Studies Online Supplement*, 2010, vol. 1, p. 27; Brent Beardsley, "The Endless Debate over the 'G Word'", in *Genocide Studies and Prevention*, 2006, vol. 1, no. 1, pp. 79–82; Walter A. Dorn *et al.*, "Preventing The Bloodbath: Could the UN have Predicted and Prevented the Rwanda Genocide?", in *Journal of Conflict Studies*, 2000, vol. 20, no. 1, pp. 9–52.

74 *The Prosecutor v. Pauline Nyiramasuhuko et al*., ICTR-98-42-T, 24 June 2011. Other accused persons are Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje.

75 Peter Landesman, "A Woman's Work", *The New York Times*, 15 September, 2002.

stitute. Furthermore, *Préfet* Habyalimana of Butare *préfecture* refused to be drawn into the Hutu power ideology of the extermination of Tutsis.[76]

However, things changed when Nyiramasuhuko arrived from Kigali to "cleanse" Butare of Tutsi elements and to carry out the plan of killing Tutsis and moderate Hutus in collaboration with the *Interahamwe* militia imported from other regions of Rwanda.[77] What makes Nyiramasuhuko's case very interesting is the fact that she was the Minister of Family and Women's Development. Furthermore, it is also said that she has a Tutsi background and therefore can be classified as a Tutsi.[78]

Nyiramasuhuko encouraged the *Interahamwe* to rape their victims before killing them.[79] She may have been under pressure to maintain political favour with the Hutu government and in that process proceeded to act with murderous intent while encouraging the *Interahamwe* to rape and kill Tutsi elements that stood against her political future and power base. Nyiramasuhuko was convicted of rape as a crime against humanity. The Trial Chamber was disappointed with the prosecution for omitting the crime of rape as genocide in the charges against her.[80]

Nyiramasuhuko's conviction was based on the massive support and encouragement she gave to the *Interahamwe* militias to rape and kill Tutsi women.[81] The Trial Chamber stated that Nyiramasuhuko had a superior-subordinate relationship with the *Interahamwe.* Her effective control over them was evidenced by the fact that her orders to rape Tutsi women were obeyed. She knew of, and failed to prevent or punish the rapes and was held responsible as a superior for the international sex crimes perpetrated by the *Interahamwe.*[82]

Nyiramasuhuko's involvement in the rape and killings committed against the Tutsi in Butare bring to question the argument by Susan Brownmiller that women are raped by men to keep them in perpetual state of fear. Nyiramasuhuko is a woman. She did not commit the rapes herself. But she aided and abetted those who did and encouraged them to rape

[76] *The Prosecutor v. Nyiramasuhuko et al.*, para. 637, *supra* note 74.
[77] *Ibid.*, paras. 926–933.
[78] Landesman, 2002, *supra* note 75.
[79] *The Prosecutor v. Nyiramasuhuko et al.,* para. 5938, *supra* note 74.
[80] *Ibid.,* para. 6087.
[81] *Ibid.*.
[82] *Ibid.,* para. 6088.

their victims before killing them.[83] The ICTR found her guilty of rape as a crime against humanity and stated that she bears responsibility as a superior for the rapes perpetrated by the *Interahamwe*.[84]

It seems from the discussions above that rape is no longer gender specific and can be employed by both men and women. According to Sam Sasan Shoamanesh,

> [t]he Nyiramasuhuko case and its horrendous facts have demonstrated that rape as a tool of war is not gender specific and can be employed with severe cruelty by men and women alike; indeed, that women can be ruthless agents of egregious violations of human rights on a par with their male counterparts.[85]

Carrie Sperling supports this view and argues that there is nothing special in the way and manner Nyiramasuhuko acted. She believes that expressing outrage about Nyiramasuhuko's behavior reinforces the same prejudices and patriarchal ideologies that perpetuate rape and sexual violence against women.[86] The general belief that it is only men that have monopoly of power to commit atrocities should be discountenanced as there have been instances where women have facilitated and contributed not only to the rape and abuse of fellow women but also to the overall strategy of conquering the enemy.[87] The conviction of Pauline Nyiramasuhuko for rape and sexual violence reinforces the argument that men as well as women were complicit in the genocide in Rwanda.

6.3.3. The International Criminal Court

The Rome Statute entered into force on 1 July 2002 enabling the establishment of the ICC.[88] The Court has achieved modest successes coupled

---

83 *Ibid.*, para. 6014.

84 *Ibid.*, para. 6088.

85 Sam Shoamanesh, "Nyiramasuhuko: The Mother Who Awarded Rape For Murder", The Huffpost World: The Internet Newspaper, 9 August 2011, available at http://www.huffingtonpost.com/sam-sasan-shoamanesh/nyiramasuhuko-the-mother-_b_922216.html?view=print&comm_ref=false, last accessed on 31 August 2011.

86 Carrie Sperling, "Mother of Atrocities: Pauline Nyiramasuhuko's Role in The Rwanda Genocide", in *Fordham Urban Law Journal*, 2006, vol. 33, p. 658.

87 Nicole Hogg, "Women's Participation in the Rwanda Genocide: Mothers or Monsters?", in *International Committee of the Red Cross*, 2010, vol. 92, no. 877, p. 92.

88 Rome Statute of the International Criminal Court, U.N Doc A/CONF.183/9, 17 July 1998.

with complimentary controversies.[89] The practical application of the Rome Statute in relation to victims generally has not been without shortcomings as the ICC tries to assert its existence and relevance. Victims of crimes are allowed to participate actively during trials. Alex Little argues that this will likely limit the rights of defendants.[90] The activation of cases by the ICC have also brought to the fore the need for national judicial systems to promote the rights of victims of international sex crimes under the principle of complementarity.[91] This is because the Rome Statute provides that, "it is the primary responsibility of States to hold accountable its nationals accused of international crimes".[92]

Supporters of the Court argue that its success can be seen not only in the cases currently before the court but its deterrent effect on potential criminals.[93] However, critics like Mahmood Mandani argue that the Court is neither free nor independent from the politicization of the UNSC.[94]

---

89 Nick Grono, "The International Criminal Court: success or failure?", in *Open Democracy*, available at http://www.opendemocracy.net/article/the-international-criminal-court-success-or-failure, last accessed on 11 October 2011; Mitja Mertens, "The International Criminal Court: A European Success Story?", in *EU Diplomacy Papers*", 2011, vol. 1, pp. 1–22.

90 Alex Little, "Balancing Accountability and Victim Autonomy at the International Criminal Court", in *Georgetown Journal of International Law*, 2007, vol. 38, no. 2, p. 378.

91 Benson Olugbuo, "Positive Complementarity and the Fight Against Impunity in Africa", in Chacha Murungu and Japhet Biegon (eds.), *Prosecution of International Crimes in Africa*, Pretoria University Law Press, Pretoria, 2011, p. 251.

92 Preamble of the Rome Statute; Open Society Foundations, "Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya", available at http://www.soros.org/initiatives/justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf, last accessed on 15 October 2011; Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity", in Armin von Bogdandy and Rudiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, p. 592.

93 Payam Akhavan, "Are International Criminal Tribunal a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism", in *Human Rights Quarterly*, 2009, vol. 31, no. 3, p. 636; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *The American Journal of International Law*, 2001, vol. 95, no. 7, p. 12.

94 Mahmood Mandani, *Saviours and Survivors: Darfur, Politics and the War on Terror*, HSRC Press, Cape Town, 2009, p. 287.

Some of those indicted by the court are yet to be arrested and there have been arguments about the need for the court not to give the impression that it is a Western tool targeting weak African states.[95]

The ICC lacks enforcement officers like police and a military. It depends heavily on the co-operation and goodwill of states parties and non-state parties. The ICC has also been dogged by the peace and justice debate.[96] Zachary Lomo has called on the ICC to withdraw its indictments in Uganda and allow local means of dispute resolution to be implemented.[97] Another issue confronting the ICC is that some of the superpowers like U.S.A. and Russia are not State Parties to the Rome Statute. However, as permanent members of the UNSC they have participated in referring the conflicts in Sudan and Libya to the ICC.[98] Despite these challenges, the ICC has continued to investigate and prosecute cases relating to international sex crimes in its docket.[99]

The progress achieved by the ICC in prosecuting international sex crimes is not a result of the Office of the Prosecutor's ('OTP') initiative. It is a civil society driven campaign that has criticised the way investigations in DRC are handled.[100] In fact, when the OTP issued the first arrest

---

95 Charles Jalloh, "Regionalizing International Criminal Law?", in *International Criminal Law Review*, 2009, vol. 9, no. 3, p. 499.

96 Julie Flint and Alex De Waal, "To put justice before peace spells disaster for Sudan", The Guardian, 6 March 2009, available at http://www.guardian.co.uk/commentisfree/2009/mar/06/sudan-war-crimes, last accessed on 9 August 2011; Alex De Waal *et al.*, "ICC approach risks peacemaking in Darfur The Guardian, 10 June 2008, available at http://www.guardian.co.uk/world/2008/ jun/10/sudan.unitednations, last accessed on 9 August 2011; Julie Flint and Alex De Waal, "Justice off Course in Darfur", The Washington Post, 28 June 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/27/AR2008062702632.html, last accessed on 9 August 2011.

97 Zachary Lomo, "Why the International Criminal Court must withdraw Indictments against the Top LRA Leaders: A Legal Perspective", in *The Sunday Monitor*, 20 August 2006; Zachary Lomo and Lucy Hovil, "Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda", in *Refugee Law Project Working Paper 11*, 2004, p. 48.

98 UNSC Res. 1593 (Sudan), 31 March 2005, *supra* note 55; UNSC Res. 1970 (Libya), 26 February 2011.

99 Patricia Sellers, "Gender Strategy is not a Luxury for International Courts", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, p. 322.

100 Meredith Tax, "The ICC's failure to prosecute gender violence is symptomatic of the way human rights advocacy has come to overlook women", 29 December 2010, in

warrant against Thomas Lubanga for conscription of child soldiers, there was outrage in DRC as activists contended that there were cases of sexual crimes that the prosecutor had ignored. It was argued that the prosecutor was insensitive to the plight of the women who faced several challenges daily due to sexual crimes committed against them by warring parties in the conflict.[101]

In the case between the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,[102] the defendants' indictments include rape and sexual slavery as war crimes[103] and crimes against humanity.[104] In *Prosecutor v. Callixte Mbarushimana* case,[105] the accused person was charged with acts of rape constituting war crimes[106] and crimes against humanity.[107] Women's Initiative for Gender Justice argues that "charges brought against Mbarushimana reflect a new effort by the OTP to charging a wider range of gender-based crimes at the arrest warrant proceedings".[108]

The OTP opened an investigation on the crimes committed in the Central African Republic in 2007 and singled out mass rape and international sex crimes for prosecution. According to the OTP,

> [t]he allegations of sexual crimes are detailed and substantiated. The information we have now suggests that the rape of civilians

Equality, Feminism, Gender Mainstreaming, Global, Human Rights, Opinion Comment, available at http://womensphere.wordpress.com/2010/12/29/the-iccs-failure-to-prosecute-gender-violence-is-symptomatic-of-the-way-human-rights-advocacy-has-come-to-overlook-women/, last accessed on 12 October 2011.

101 Susana Sacuto and Katherine Cleary, "Investigation of sexual violence and gender-based crimes at the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, p. 341.

102 *Prosecutor v. Germanin Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07, available at http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0107/Democratic+Republic+of+the+Congo.htm, last accessed on 8 August 2011.

103 Rome Statute, Art. 8(2)(b)(xxii).

104 Rome Statute, Art. 7(1)(g).

105 *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, available at http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf, last accessed on 8 August 2011.

106 Rome Statute, Arts. 8(2)(b)(xxii) and 8(2)(e)(vi).

107 Rome Statute, Art. 7(1)(g).

108 Women's Initiative for Gender Justice, "2010 Gender Report Card of the International Criminal Court", available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf, last accessed on 15 October 2011.

> was committed in numbers that cannot be ignored under international law.[109]

In the confirmation hearing by the ICC on the charges of war crimes and crimes against humanity against Mr. Bemba Gombo, Pre-Trial Chamber II stated that acts of rape were committed as part of the widespread attack directed against the CAR population and that rapes occurred when civilians resisted the looting of their goods by soldiers.[110]

6.4. National Response to International Sex Crimes in DRC

The rate at which international sex crimes are committed in DRC is alarming.[111] The number of the people alleged to have been raped is higher than the available data because of the stigmatization and social exclusion suffered by women who have been experienced sexual violence.[112] An average of 48 women and girls are raped every hour in the DRC. Furthermore, 400,000 females aged 15–49 were raped over a 12-month period in 2006 and 2007.[113] The current UN Special Representative on Sexual Violence in Conflict, Margot Wallstrom believes that the DRC is "the rape capital of the world".[114] Things are so bad that women are escorted to the market by UN troops to avoid being raped while on their way to the market.[115] In the same DRC, the Head of the United Nations Peace Keeping Mission in DRC ('MONUSCO'), Roger Meece, stated that about 15,000 women were raped in 2010 in the country.[116]

---

[109] ICC, "Prosecutor Opens Investigation in the Central African Republic", 22 May 2007.

[110] *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 15 June 2009, para. 188.

[111] Gregory Gordon, "An African Marshall Plan: Changing U.S. Policy to Promote the Rule of Law and Prevent Mass Atrocity in the Democratic Republic of the Congo", in *Fordham International Law Journal*, 2008, vol. 32, no. 5, p. 1362.

[112] Amber Peterman *et al.*, "Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo", in *American Journal of Public Health*, 2011, vol. 101, no. 6, p. 1060.

[113] *Ibid*., pp.1064–1065.

[114] BBC World Service, "UN official calls DR Congo 'rape capital of the world'", 28 April 2010, available at http://news.bbc.co.uk/2/hi/8650112.stm, last accessed on 16 October 2011.

[115] *Ibid*.

[116] Aljazeera News Service, "15,000 rapes in war-torn DR Congo", available at http://english.aljazeera.net/news/africa/2010/10/201010160582650725.html, last accessed on 16 October 2011.

To counter this worrisome development, mobile courts have been established to deal with mass rapes and crimes against civilians committed by soldiers and it has been argued that these courts are having minimum desired impacts.[117] In February 2011, a mobile court in Eastern DRC investigating a case of mass rape and sexual violence sentenced a military commanding officer, Lieutenant Colonel Daniel Kibibi Mutware to 20 years in jail for crimes against humanity.[118] He was accused of sending his troops to rape and loot from a civilian population in Eastern DRC. About 49 women testified against the officer and those indicted with him. The defendants were charged with crimes against humanity involving rape, false imprisonment, terrorism, and other inhuman acts in violation of the Rome Statute. These allegations were based on the activities of the accused persons in January 2011 in Fizi, South Kivu of DRC.

According to the *Advocats Sans Frontières* ('ASF') 89 victims of mass rape and sexual violence demanded redress before the Military Court. Furthermore 58 of the 89 victims who testified also stated that they had been subjected to arbitrary confinement, the looting of their property and other forms of inhuman and degrading treatment.[119] Despite the success recorded by the mobile courts in the Fizi trial, a word of caution is necessary here. This is not the first time that mobile courts have convicted soldiers on sex related crimes in the DRC. Some of those who were con-

[117] Tessa Khan and Jim Wormington, "Mobile Courts in the DRC: Lessons from Development for International Criminal Justice", in *Oxford Transitional Justice Research Working Paper Series*, 2011, available at http://www.csls.ox.ac.uk/documents/OTJR-KhanandWormington-MOBILECOURTSINTHEDRC-LESSONSFROMDEVELOPMENTFORINTERNATIONALCRIMINALJU.pdf, last accessed on 15 October 2011; Kelly Askin, "Fizi Diary: Finally, Justice For All?", 18 February 2011, available at http://blog.soros.org/2011/02/fizi-diary-finally-justice-for-all/, last accessed on 11 October 2011; International Bar Association, "Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo", August 2009, p. 37.

[118] BBC, "DR Congo colonel Kibibi Mutware jailed for mass rape", available at http://www.bbc.co.uk/news/world-africa-12523847, last accessed on 23 February 2011.

[119] Advocats Sans Frontières, "Lieutenant-Colonel Mutware (DRC) sentenced to 20 years imprisonment", available at http://www.asf.be/en/lieutenant-colonel-mutware-drc-sentenced-20-years-imprisonment, last accessed on 16 October 2011.

victed escaped from the prisons and no compensations were paid to the victims of the crimes.[120]

International instruments ratified by the DRC apply directly in the country as long as these are not contrary to law and custom.[121] While the preamble to the revised Code acknowledges that the DRC had ratified the Rome Statute, it did not adopt the Statute's definitions of genocide, war crimes, and crimes against humanity. Instead the Code proposed alternate, unclear definitions.[122] Military courts in DRC have exclusive jurisdiction over genocide, war crimes and crimes against humanity even if the perpetrator is a civilian.[123]

There have been concerns about the military courts and their jurisdiction over civilians as it violates the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[124] Though international treaties ratified by the DRC apply directly, it should be stated that some provisions of the Rome Statute are not self-executing and will require some form of implementation. For example, there is need to specify which government agency will be responsible for co-operation between the ICC and the DRC government.[125]

---

120 Advocats San Frontieres, "The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo", 2009, available at http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf, last accessed on 16 October 2011.

121 Arts. 153 and 215 of the Constitution of Democratic Republic of Congo, 18 February 2006.

122 Mima Adjami and Guy Mushiata, "Democratic Republic of the Congo: Impact of the Rome Statute and the International Criminal Court", in *International Centre for Transitional Justice Briefing paper*, May 2010, available at http://ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf, last accessed on 16 October 2011.

123 International Centre for Transitional Justice (ICTJ), "The Democratic Republic of Congo must adopt the Rome Statute implementation law", April 2010, available at http://ictj.org/sites/default/files/ICTJ-DRC-Rome-Statute-2010-English.pdf, last accessed on 16 October 2011.

124 Principle L(c) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted in 2001; Marcel Koso, "Military justice and human rights: An urgent need to complete reforms", Open Society Initiative for Southern Africa, 2010, available at http://www.afrimap.org/english/images/report/AfriMAP-DRC-MilitaryJustice-DD-EN.pdf, last accessed on 15 October 2011.

125 Rome Statute, Part 9, "International Cooperation and Judicial Assistance".

6.5. The Impact of the United Nations Security Council Resolutions

The UNSC has tried to assert its relevance in combating international crimes and sexual violence during conflicts. Its intervention is not limited to the establishment of the international tribunals. In relation to the protection of women during armed conflicts, the UNSC has helped to strengthen international humanitarian law. It has also promoted women as stakeholders in conflict prevention and resolution efforts.[126] The UNSC had adopted several resolutions aimed at protecting the rights of women during armed conflicts. UNSC Resolutions 1325 (2000), 1820 (2008) and 1888 (2009) will be discussed to highlight the experiences of women during armed conflicts and how the resolutions have been used to combat international sex crimes.

UNSC resolution 1325 was adopted in 2000 to empower women in relation to issues of conflict prevention, resolution and reducing gender based violence through mainstreaming gender-specific concerns in peace and security policy considerations.[127] In furtherance of its intended objectives, the resolution, "[r]ecognise[d] that an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security".[128]

The resolution also called on all parties to armed conflicts to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.[129] The resolution emphasised the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls. It therefore

[126] Allan-Guy Tachou-Sipowo, "The Security Council on Women in War: Between Peacebuilding and Humanitarian Protection", in *International Review of the Red Cross*, 2010, vol. 92, no. 877, p. 207.

[127] Amy Barrow, "UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law", in *International Review of the Red Cross*, 2010, vol. 92, no. 877, p. 229.

[128] UNSCR 1325, Preamble.

[129] *Ibid.*, Para 10.

stressed the need to exclude these crimes, where feasible from amnesty provisions.[130]

There have been criticisms of the UNSC resolutions regarding their contents in relation to international sex crimes. Maria Butler argues that most times, UNSC resolutions address issues relating to protection and prosecution while neglecting prevention strategies, which should be a major component of any UNSC intervention to maintain international peace and security.[131]

UNSC resolution 1820 of 2008 is focused principally on sexual violence in armed conflicts.[132] It strengthens the understanding of international sex crimes beyond the existing provisions of the Geneva Conventions.[133] The Resolution acknowledges, "[…] sexual violence can be used as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations".[134] It states that sexual violence can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security.[135] The UNSC also stated that it would take effective steps to prevent and respond to acts of sexual violence by adopting appropriate steps to address widespread or systematic sexual violence.[136]

Resolution 1820 also noted that rape and other forms of sexual violence can constitute war crime, crime against humanity, or genocide.[137] The resolution called on member states of the UN to exclude sexual violence crimes from amnesty provisions during conflict resolution processes.[138] The resolution reiterated the obligations of UN member states in prosecuting persons responsible for international sex crimes.[139] In addi-

[130] *Ibid.*, Para 11.

[131] Maria Butler *et al.*, "Women, Peace and Security Handbook: Compilation and Analysis of United Nations Security Council Resolution Language 2000–2010" in *Peace-Women Project of Women's International League for Peace and Freedom*, available at http://www.peacewomen.org/assets/file/peacewomen_schandbook_2010.pdf, last accessed on 6 October 2011.

[132] Amy Barrow, 2010, p. 232, *supra* note 127.

[133] *Ibid*.

[134] UNSC Res. 1325, para. 1.

[135] *Ibid.*

[136] *Ibid.*

[137] UNSC Res. 1820, para. 4.

[138] *Ibid.*

[139] *Ibid*.

tion, resolution 1820 mandates member states of the UN to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice.[140]

The UNSC resolution 1888 (2009) on Women and Peace and Security[141] mandates peacekeeping missions to protect women and girls from sexual violence during armed conflict. In the preamble of the resolution, the UNSC acknowledged the ineffective resolutions it had passed in the past demanding for a cessation of sexual violence against women during armed conflict.[142]

Despite the resolutions adopted by the UNSC to end international sex crimes during armed conflicts, it appears that there is no dramatic decrease in the prevalence of sexual crimes committed during armed conflicts. This may be as a result of lack of enforcement mechanisms. Alain-Guy Tachou-Sipowo argues that the UNSC went beyond the bounds of Chapter VII of the UN Charter and adopted resolutions declaratory of international law.[143] He further stated that the impact of the Resolutions will be limited because thematic resolutions do not impose the same binding obligations as those of decisions made in response to a threat to peace or international security.[144]

6.6. Conclusion

This chapter has shown that women most times bear the brunt of armed conflicts whether international or non-international and are subjected to untold hardships. Some victims and survivors of international sex crimes will no doubt insist on the thematic investigation and prosecution of perpetrators for sexual violence. However, this process may only be effective if the underlying causes of rape and sexual violence during conflicts are addressed and adequately dealt with.

Victims of rape are generally traumatized. Furthermore, they may display some medical conditions such as social withdrawal, uncertainty, anxieties, depression, tensions, anorexia, suicidal moods, or simple disori-

[140] *Ibid*.
[141] UNSC Res. 1888 (2009) SC/9753, adopted 30 September 2009.
[142] *Ibid.*, Preamble.
[143] Tachou-Sipowo, 2010, p. 217, *supra* note 126.
[144] *Ibid*.

entation in space and time.[145] The psychological and emotional problems suffered by victims of sexual violence notwithstanding, at most times, the society sees them as the guilty ones and the perpetrators as the victims. In some instances, the body of the victim or survivor is used to celebrate victory and the subjugation of the enemy.[146]

Addressing the causes of sexual violence will involve confronting stigma and the social exclusion experienced by victims and survivors of international sex crimes. This will be in line with the resolution adopted during the Review Conference of the ICC on the impact of the Rome Statute system on victims and affected communities. The resolution encourages governments, communities and civil organisations at the national and local levels to play an active role in sensitizing communities on the rights of victims especially victims of sexual violence in accordance with the Rome Statute.[147] Furthermore the populace is required to speak out against the marginalisation and stigmatization of victims and survivors by assisting them in their social reintegration process and by their participation in consultations, and to combat a culture of impunity for these crimes.[148]

Care should also be taken to avoid the further stigmatization of victims and survivors of sexual crimes through thematic prosecution as it may reinforce existing prejudices and limitations placed on women if we see sexual violence as purely a women's tragedy. The need for accountability for international sex crimes should be pursued with vigour but women's perception and immediate needs should not be sacrificed on the altar of targeted prosecution of international sex crimes.[149]

---

[145] Martina Belić and Vesna Kesić, "Interim Report no II Center for Women War Victims", Zagreb, August 1993 – February 1994, available at http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1093, last accessed on 15 October 2015.

[146] Amanda Beltz, "Prosecuting Rape in International Criminal Trials: The Need to Balance Victims' Rights with the Rights of the Accused", in *St. John's Journal of Legal Commentary*, 2008, vol. 23, no. 1, p. 172.

[147] ICC Assembly of States Parties, "Resolution RC/Res.2: The impact of the Rome Statute system on victims and affected communities", Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010.

[148] *Ibid*.

[149] Claire Mcglynn, "Feminism, Rape and the Search for Justice", in *Oxford Journal of Legal Studies*, 2011, vol. 31, no. 4, p. 13.

During conflicts, women's bodies are seen as strategic battlegrounds.[150] As long as the root causes of these perceptions are not dealt with, thematic prosecution of international sex crimes will likely re-stigmatise victims and survivors. This is because the underlying causes of international sex crimes will be glossed over in the bid to achieve targeted investigation and prosecution. The reduction and subsequent elimination of incidences of sexual violence should involve the community shifting the blame and stigma from the victim and survivor to the perpetrator of the crime.[151] This will ensure that victims and survivors are given opportunities to regain their lives by reducing their sufferings that are made worse by stigmatization. Victims and survivors should be consulted in making decisions that affect them directly. It is also important for the UNSC to ensure the enforcement of its resolutions and sanctions on sexual violence during conflicts.

Education, empowerment and the opportunity to contribute their own quota to the development of the society should be seen as a good way to help victims and survivors achieve their goals in life. There is a need for the reorientation of the armies and militaries including those who use private military units. The notion that the body of women can used to celebrate victory or punish those defeated has to be changed. These will require concerted efforts of all involved. Research has shown that not all military units engage in international sex crimes as a reward for soldiers. According to Elizabeth Wood:

> Rape during war is not inevitable. When it occurs, rape is not an unavoidable collateral damage of war. Its victims – men and women of all ages – were not brought down by cross-fire or errant missile. They were intentionally violated; the question then is: Is anyone beyond the immediate perpetrator responsible for the crime? Armed groups – non-state actors as well as state militaries – often effectively limit sexual violence by their members, to exclude sexual violence from their repertoire. The fact that many armed groups do not engage in sexual violence should help to put the stigma of sexual violence on the perpetrators rather than the victims

[150] UN Office for the Coordination of Humanitarian Affairs, "Our Bodies – Their Battle Ground: Gender-based Violence in Conflict Zones", September 2004, available at http://www.irinnews.org/pdf/in-depth/GBV-IRIN-In-Depth.pdf, last accessed on 15 October 2011.

[151] Judith Herman, "Justice from the Victim's Perspective", in *Violence Against Women*, 2005, vol. 11, p. 585.

> of sexual violence and strengthen accountability for sexual violence.[152]

Reversing the current tide of stigma associated with international sex crimes on victims and survivors, adequate enlightenment, education, empowerment and cultural mobilisation will provide positive developments. According to Susan Brownmiller,

> [r]ape can be eradicated, not merely controlled or avoided on an individual basis, but the approach must be long-range and cooperative, and must have the understanding and good will of many men as well as women.[153]

This will include mobilization for attitudinal changes on ideas that reinforce the stigma that victims are responsible for the crimes and women's bodies are battle grounds to celebrate the conquest of the enemy.

[152] Elizabeth Wood, "Sexual Violence during War: Variation and Accountability", in Alette Smeulers and Elies van Sliedregt, (eds.), *Collective Crimes and International Criminal Justice: An Interdisciplinary Approach*, Intersentia, Antwerp, 2010, p. 322; Elizabeth Wood, "Armed groups and sexual violence: when is wartime rape rare?", in *Politics and Society*, 2009, vol. 37, no. 1, p. 153; Wood, "Variation in Sexual Violence during War", 2006, pp. 307–341, *supra* note 61.

[153] Brownmiller, 1975, p. 404, *supra* note 24.

7

Thematic Prosecution of Crimes Against Children

Susanna Greijer*

7.1. Introduction

International criminal justice aims at ending impunity for those who commit the most serious crimes, but due to factors such as limited resources (both temporal and infrastructural), an important choice must be made: Who should be prosecuted? It is unrealistic to hope or expect (and perhaps it is even undesirable) that all authors of international crimes be held accountable in an international court or tribunal. This chapter will look at the specific choice of the International Criminal Court[1] to, in its very first cases, try persons for the crimes of recruiting and using children in armed conflict.

The aim of the chapter is threefold. First, the intention is to shed light on the reasons that lie behind the Prosecutor's choice to prosecute thematically – that is, to grant particular attention to crimes against children – in the Court's initial case law. It will start by offering a brief overview of the crimes as such, before raising the question as to whether a specific, and thus deliberate, strategy lies behind the choice to prosecute thematically, or whether the reasons are merely coincidental.

Second, an important question arises when considering thematic prosecutions, namely, whether the underlying reasons for choosing to prosecute thematically are always the same, regardless of whether the focus is on sex crimes or on child recruitment. Part of the chapter therefore aims at discerning eventual common features that could explain why these two typologies of crimes have gained such an increased attention within international judicial bodies.

In conclusion, the chapter seeks to identify eventual reasons that could justify the choice to prosecute thematically, taking into account the

* **Susanna Greijer**, PhD candidate, Department of Law, European University Institute, Florence.

1 Hereinafter 'ICC' or 'the Court'.

potential impact that such prosecutions may have on international justice as a whole.

7.2. Reasons Behind the Choice to Prosecute Crimes Against Children

When the decision to prosecute international crimes is taken, some criteria for the selection of cases must necessarily be found. "Sometimes these criteria are legal, rational, regulated and follow elaborated strategies. Other times, they obey no rational rules".[2] Do the selection criteria used to prosecute for crimes against children belong to the first or second of these two assumptions? This section will start with looking at the inclusion of the acts of conscripting, enlisting, and using children in armed conflict as war crimes under the Rome Statute of the ICC, and then move on to examine the reasons to thematically prosecute such crimes in the initial case law of the ICC.

7.2.1. The War Crimes of Conscripting, Enlisting and Using Children under 15 in an Armed Conflict

The Rome Statute represents the first international instrument in which the acts of recruiting and using children in armed conflict are explicitly classified as international crimes and, more precisely, as war crimes.[3] According to Article 8(2)(b), applicable in international armed conflicts, the acts of "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" constitute war crimes. Article 8(2)(e), applicable in non-international armed conflicts, contains a prohibition adapted to that context, setting forth that "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" constitute war crimes. Whether carried out in an international armed conflict or in a non-international one, the abovementioned acts are included as war crimes by the Rome Statute under the category

[2] Mirna Goransky and Maria Luisa Piqué, "(The lack of) criteria for the selection of crimes against humanity cases: the experience of Argentina", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Second Edition), Torkel Opsahl Academic EPublisher, 2010, p. 91.

[3] UN General Assembly, "Rome Statute of the International Criminal Court" (last amended January 2002), 17 July 1998, A/CONF. 183/9.

"other serious violations of the laws and customs"[4] applicable to armed conflict. But, if they had not previously been codified as such, where exactly do these war crimes come from? Did the inclusion of the abovementioned acts in the Rome Statute represent, as has been suggested, an innovation, and thus a step away from the codification process that the Rome Statute is often identified with?

7.2.1.1. Crimes Against Children as War Crimes

The four 1949 Geneva Conventions ('GC') are silent with regard to the direct involvement of children in armed conflict, but GC IV on the protection of civilians makes a number of important references to children and their protection.[5] On the other hand, the two 1977 Additional Protocols ('AP') I and II to the GC are perfectly explicit in their prohibition of the acts of recruiting or using children under the age of 15 in armed conflict.[6] Such acts are not, however, considered by these instruments as "grave breaches".

Nevertheless, while it is true that the GC and AP I make a distinction between grave breaches and "other" violations, and that only grave breaches are considered as war crimes,[7] it is important to recall that "grave beaches of those instruments are war crimes of gravity, but do not exhaust that concept".[8] Moreover, in 1977, an explicit obligation already existed upon states to react against *all* breaches. Indeed, Article 86(1) of AP I sets forth that:

---

4 *Ibid.*, Arts. 8(2)(b) and (e).

5 Geneva Convention (GC) IV, 1949, Arts. 14, 17, 23, 24, 38(5), 50, 68, 82, 94, and 132. Moreover, GC IV Art. 51 states that: "The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted".

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 77(2) on the Protection of Children, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 4(3) on Fundamental Guarantees.

7 *Ibid*., Protocol I, Art. 85(5).

8 G.I.A.D Draper, *The Implementation and Enforcement of the Geneva Conventions of 1949 and of the two Additional Protocols of 1978*, The Hague Academy of International Law, Sijthoff & Noordhoff, Alphen aan den Rijn (NL), 1980, p. 33.

> [t]he High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol […].

Nothing thus prevents a state from enacting penal measures against breaches of AP I, whether these are of a grave nature or not.

AP II does not make any distinction between grave or "other" breaches. Furthermore, it remains less detailed with regard to the repression of breaches. Nevertheless, considering the existence of an apposite Article regarding penal prosecutions[9] does, at the very least, not exclude such action.

Between the 1977 Additional Protocols and the adoption of the Rome Statute in 1998, one major international law instrument containing provisions relative to children and armed conflict was adopted. The 1989 Convention on the Rights of the Child ('CRC'),[10] the most comprehensive international instrument on children's rights, repeats almost to the letter what AP I had already established, illustrating the close relationship between international humanitarian law ('IHL') and international human rights law.[11] In its Article 38, the CRC prohibits the recruitment and use of children under the age of 15 in armed conflict[12] and recalls the obligations of states to comply with their obligations under IHL relative to children. This Article should also be read in the light of Article 4 of the CRC, which sets forth that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". The CRC is the most ratified human rights treaty in the world, and the overwhelming support for its provisions as well as the extended practice of state reporting and monitoring on children's rights indicate that this instrument today belongs to customary international law.

In addition to this *quasi*-universal instrument, an important regional treaty was adopted in 1990 with regard to children. The African Charter

---

9 Protocol II, Art. 6 on penal prosecutions, *supra* note 6.

10 United Nations General Assembly, "Convention on the Rights of the Child", New York, 20 November 1989.

11 Graça Machel, *Impact of Armed Conflict on Children*, United Nations Doc. A/51/306, 26 August 1996, para. 228; Ann Sheppard, "Child soldiers: Is the Optional Protocol Evidence of an Emerging 'Straight-18' Consensus?", in *The International Journal of Children's Rights*, vol. 8, 2000, pp. 37–70 (p. 42).

12 The CRC makes no distinction between armed conflicts of an international or non-international nature.

on the Rights and the Welfare of the Child establishes, first of all, that a child is any human being under the age of 18 years.[13] Furthermore, the Charter sets forth that States shall "take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child".[14]

A practical example of actions aimed at implementing the prohibition to recruit and use children in armed conflict can be taken from the United Nations Security Council ('UNSC') that, in 1998, decided to include this issue on its agenda.[15] The issue was soon considered a threat against international peace and security, and eight binding resolutions and several presidential statements have so far been adopted, condemning the practice and calling for a stronger international response against it.[16] Moreover, a specific Working Group on Children and Armed Conflict has been created under the UNSC.[17]

The CRC only refers to state actors, and leaves the issue of non-state actors recruiting children into armed groups outside of the scope of the Convention. This is troubling because, as knowledge has grown stronger regarding the plight of children in war, it has become clear that child recruitment is much more frequent in non-state armed groups than in the armed forces. In the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict ('CRC-OPAC'),[18] adopted in 2000, this issue was addressed by imposing an explicit obligation on the states party to the Protocol to take measures against non-state actors who use such practices:

---

13 Organisation of African Unity (OAU), "African Charter on the Rights and Welfare of the Child", Doc. CAB/LEG/249/49, 1990, Art. 2.

14 *Ibid.*, Art. 22(2).

15 The first step in the United Nations Security Council's involvement in the issue of children and armed conflict came as a Presidential Statement (Doc. S/PRST/1998/18) condemning the targeting of children in armed conflict.

16 United Nations Security Council (UNSC), Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011) and Presidential Statements S/PRST/1998/18, S/PRST/2006/33, S/PRST/2008/6, S/PRST/2008/28, S/PRST/2009/9, S/PRST/2010/10.

17 UNSC Resolution 1612 (2005), para. 8.

18 United Nations General Assembly, "The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict", New York, 2000.

> Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
>
> States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal mea-sures necessary to prohibit and criminalize such practices.[19]

As this article illustrates, the OPAC also raises the age limit for the recruitment and use of persons in armed hostilities. For armed conflicts not of an international character, the prohibition to recruit persons under 18 years of age became absolute with this Protocol. For international armed conflicts, instead, the prohibition is somewhat limited. Articles one to three of the Protocol establish that children under the age of 18 must not be "compulsorily" recruited into the armed forces of a state, nor take a "direct" part in hostilities. Nevertheless, with regard to voluntary recruitment, the OPAC only requires that states increase the minimum age for voluntary recruitment. The Committee on the Rights of the Child has interpreted this raise in the minimum age for voluntary recruitment as a requirement to be expressed in "years", which results in the new minimum age for voluntary recruitment being that of 16 years of age.[20] States are, however, encouraged to increase the age limit to 18 years for all types of recruitment.[21]

The OPAC was adopted after the Rome Statute for the ICC, and may perhaps seem of little relevance to the latter. Nevertheless, the negotiations had been ongoing for years before the OPAC was finally adopted in 2000. It may therefore serve as an element in arguing that the prohibition of recruitment and use of children under the age of 15 was a customary rule already before the adoption of the Rome Statute, and that such acts were considered crimes for which penal actions should be undertaken. Had that not been the understanding of many states, it seems doubtful that the OPAC, and Article 4 in particular, would have been adopted and supported by 142 states.[22]

---

19 *Ibid*., Arts. 4(1) and (2).

20 NGO Group for the CRC, *Reporting on the OPSC and OPAC: A Guide for Non-Governmental Organizations*, 2010, p. 2.

21 The United Nations Committee on the Rights of the Child has recommended that the minimum age for recruitment and use of children in armed conflict be raised to 18 years since the beginning of the 1990s. See for instance: Document CRC/C/10, 2nd Session, 5 October 1992, paras. 68 and 77.

22 The number of states party to the OPAC as of 1 September 2011.

Turning, instead, to international judicial practice, the creation and case law of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR') have contributed in a fundamental way to the development of international criminal law ('ICL'). The jurisprudence of these two *ad hoc* tribunals has also contributed to the evolution of customary international law relative to war crimes. One important example is that of sex crimes, such as rape and sexual slavery, which through these two tribunals have been given increased attention and have been treated as crimes of the maximum gravity.

These two tribunals did not, however, have jurisdiction over the crimes of recruiting and using children in armed hostilities.[23] Indeed, the only international court with jurisdiction over the crimes of recruiting and using children in armed conflict, besides the ICC, is the Special Court for Sierra Leone ('SCSL'). The Statute of this hybrid court, which establishes a mixed jurisdiction of both international law applicable in non-international armed conflicts and of Sierra Leonean law, was adopted subsequent to the Rome Statute in 2000. The SCSL was created through an agreement between the United Nations and the government of Sierra Leone, in order to grant accountability for those carrying the greatest responsibility for the atrocious crimes committed in the country's 11 year long civil war – a war largely fought by children. The armed conflict in Sierra Leone counted tens of thousands of children actively involved in the hostilities, many of whom were as young as seven at the time of their recruitment. Surveys have shown that 70 per cent of ex-combatants were children at the start of the war, and 72 per cent of all ex-combatants claim to have been forcibly conscripted.[24] The decision to include the crimes of

[23] This although the abuse of and negative impact on children was massive and widespread in both conflicts. In Rwanda many children under the age of 15 also fought in the war. For more information with regard to children's involvement in the Rwandan genocide, see for instance Romeo Dallaire, *They Fight Like Children, They Die Like Soldiers*, Hutchinson, London, 2010. On the impact of the conflict in former Yugoslavia see for example Council of Europe Resolution 1011 (1993) on the situation of women and children in the former Yugoslavia. See also Jenny Kuper, *Military Training and Children in Armed Conflict*, Martinus Nijhoff Publishers, 2005.

[24] Survey by the Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE), a Sierra Leonean NGO, assisted by the ITCJ, cited in Elizabeth M. Evenson, "Truth and Justice in Sierra Leone: Coordination between Commission and Court", in *Columbia Law Review*, 2004, vol. 104, p. 762.

recruiting and using children in armed hostilities in the jurisdiction of the Court was therefore a natural step in the accountability process.

In its May 2004 Decision on Preliminary Motion Based on Lack of Jurisdiction in the case against Hinga Norman,[25] the Appeals Chamber of the SCSL held that the prohibition of the recruitment and use of children in armed conflict was already part of international customary law before 1996, and that these acts constituted an international crime for which individual criminal responsibility should be established.[26] To support this position, the Appeals Chamber offered an extensive explanation, basing itself to a great extent on the test established by the ICTY in *Tadić*, to determine whether a breach of IHL is subject to prosecution and punishment.[27] According to this test, the rule must be part of customary or conventional law and the violation must constitute an infringement of IHL. The violation must also be serious; that is, breaching a rule that both protects fundamental values and involves serious consequences for the victim. Finally, the violation must entail individual criminal responsibility, under customary or conventional law, of the person committing it. The Court also recalled, again with reference to the ICTY case law,[28] the general principles of *nullum crimen sine lege* and *nullum crimen sine poena* as essential elements of all legal systems.[29]

The first part of the challenge, namely whether or not the rule prohibiting child recruitment existed in international (customary) law by 1996 and whether a violation of the rule constituted an infringement of IHL, could be addressed without much difficulty, and the Appeals Chamber replied to this part rather swiftly. Instead, a much more detailed response was required for the second part, namely whether the violation was of a serious character and entailed individual criminal responsibility at the

[25] Sam Hinga Norman was one of the leaders of the former Civil Defence Forces. He was indicted, among other charges, for the crimes of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. The case against Hinga Norman was closed before a sentence had been pronounced, due to the death of the accused.

[26] Special Court for Sierra Leone, Appeals Chamber, "Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)", Hinga Norman, SCSL-2004-14-AR72(E), 31 May 2004.

[27] *Ibid*.

[28] Specifically the ICTY case of *the Prosecutor v. Hadžihasanović*.

[29] "Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)", *supra* note 26, para. 25.

time of the indictments. In this respect, the Appeals Chamber relied heavily on the *amicus curiae* letters from various human rights organisations, which strongly emphasised the fundamental value of the prohibition to recruit and use children in armed conflict.[30] The Appeals Chamber also recalled:

> [T]he rejection of the use of child soldiers by the international community was widespread by 1994 […] Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments.[31]

According to the Appeals Chamber, the principles of legality and specificity were upheld.[32] The position that the recruitment and use of children in armed conflict was a crime by the time of the SCSL indictments has also been supported by the UN Secretary General who, in his report on the establishment of the Special Court, emphasized that:

> [v]iolations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused.[33]

Although the textual definition of recruitment and use of children under 15 in armed conflict as war crimes had not been used prior to the adoption of the Rome Statute, it can be argued that those acts were indeed already considered as crimes under international law, and that their inclusion in the Rome Statute as war crimes was neither a surprise nor a novelty.[34]

---

30 *Ibid*.

31 *Ibid*., paras. 52–53.

32 *Ibid*., para. 53.

33 Report of the Secretary General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, para. 14.

34 This is also clear from the negotiation process of the Rome Statute, in which states agreed immediately that the crime of recruiting and using children in armed conflict should be included. There was, however, some discussion on the exact wording of the relevant provisions.

7.2.2. The Choice of the Prosecutor of the ICC to Prosecute for War Crimes Against Children

The choice of a case can, arguably, be divided into two different phases. The first phase is represented by the choice of a situation; that is, a country in which international crimes have been committed. This choice needs to be made on the basis of factors such as security on the ground, possibilities of witness and victim protection, chances of arrest warrants being carried out, and other practical issues which will determine whether an investigation should be initiated. The Prosecutor also has to evaluate the "interest of justice" of initiating an investigation in a certain country.[35] The second phase relates to the choice of cases; that is, of which persons to indict and for which crimes. This chapter addresses only the second phase of the choice.

Thematic investigations for the crimes of recruiting and using children in armed conflict have been used by the ICC in the situations of Uganda and the Democratic Republic of Congo ('DRC'), and the two first trials to initiate before the ICC both concern those crimes.[36] What were the reasons or criteria used by the Prosecutor to select these particular crimes in the situations of the DRC and Uganda, and to perhaps *not* choose to prosecute for other crimes (equally or more serious, depending on the position one takes)?

The Office of the Prosecutor ('OTP') of the ICC has published certain criteria that it claims to follow in its case selection procedure. First of all, in its Policy Paper from 2003, the OTP declared that it would follow a "two-tiered approach". According to this approach, the Prosecutor would choose to prosecute "leaders who bear most responsibility for the crimes", whereas national prosecutions or other means of justice would be encouraged for lower-ranking perpetrators.[37]

7.2.2.1. Assessing Gravity

In its Prosecutorial Strategy from 2006, the OTP presented a so-called "sequenced approach to selection".[38] This approach meant, according to

[35] Rome Statute for the International Criminal Court, Art. 53, *supra* note 3.

[36] International Criminal Court, The *case of the Prosecutor v. Thomas Lubanga Dyilo* and the *case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

[37] International Criminal Court, Office of the Prosecutor, "Policy Paper", 2003.

[38] "Prosecutorial Strategy", 2006, *ibid*.

the Prosecutor, that cases would be selected on the basis of gravity. Support for such a strategy can be found in the Rome Statute, in the articles relative to the admissibility of a case, and the initiation of an investigation.[39] The OTP introduced four criteria which, considered together, would serve to determine the gravity of a case: (1) the scale of the crime; (2) the nature of the crime; (3) the manner of the crime; (4) the impact of the crime. These criteria have thereafter been inserted in the Regulations of the Office of the Prosecutor, which entered into force in 2009.[40]

The gravity element in the selection of international court cases has been criticised as subjective and it has been suggested that it should not be used to select cases for prosecution. While there may be some truth in that, it cannot be ignored that this element, and the criteria of which it is composed, has played a determinant role in the case selection of the ICC Prosecutor. Therefore, instead of dismissing this element, it ought to be carefully considered to – if anything – determine its correct interpretation and use.

The first criterion, the scale of the crime, is the most straightforward one. It requires that numbers of both direct and indirect victims be taken into account, and that temporal and geographical intensity be considered.[41] This criterion, because it looks at time, area, and numbers, represents the most objective of the four.

In the ICC Prosecutor's selection of the crimes of recruiting and using children in armed conflict, this criterion undoubtedly played an important role. Both in the conflicts in DRC and in Uganda, the practices of recruiting and using children have been widespread and have involved tens of thousands of children, both boys and girls, some as young as seven years old.[42] The massive scale of these acts shocked the OTP in its first two investigations, and there was a strong agreement that something had to be done about the rampant impunity that was connected to the crimes.

---

[39] Rome Statute, Arts. 17 and 53, *supra* note 3.

[40] International Criminal Court, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, entry into force 23 April 2009, Regulation 29(2).

[41] International Criminal Court, "Policy Paper on Preliminary Examinations" (draft), 4 October 2010, The Hague, para. 70.

[42] See Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report*, 2004.

In the case of Uganda, the Lord's Resistance Army ('LRA') has been active since 1987 and has systematically recruited children, often with the help of heinous rituals,[43] since the beginning of its existence. This is a typical pattern in many places where children are involved in armed conflict; their recruitment and use is often large-scale, long-lasting, and systematic.[44] The ICC does not have jurisdiction over crimes occurring before 2002. Nevertheless, if the Prosecutor is to take into account the temporal element as an indicator of the gravity of the crimes committed, he should, arguably, look at the entire time span during which the crimes have occurred.

In the DRC, all parties to the armed conflict, including the Government armed forces, have been involved in recruiting thousands of children for combat and support roles, as well as for sexual slavery. Following the opening of the ICC investigation in 2004, a number of legislative changes have been made in the DRC in order to increase the protection of children and prevent their recruitment.

The second criterion, the nature of the crime, refers to the specific elements of each offence,[45] and is more complicated to interpret. Based on the argument that most national legal systems prioritize certain kinds of crimes, which involve loss of life or serious violation of physical integrity, it was held that this criterion should be considered in the selection of cases.[46] Such an approach will often result in the automatic prioritisation of crimes involving the victims' death.

In light of the objectives of modern international criminal justice, which seems to have moved away from the classical "punishment as retribution" discourse to endorse a vision that is more directed toward the future, and to deterrent and restorative elements, this implicit hierarchy can be questioned. In a world where contemporary armed conflicts increasing-

[43] Pictures of Ugandan children with lips, noses and ears cut off are not unusual, and the initiation rituals that recruited children had to go through are among the most chocking and repulsive that one can imagine. For more on children in the Ugandan armed groups and forces, see for instance: Peter Eichstaedt, *First kill your family: Child Soldiers of Uganda and the Lord's Resistance Army*, Lawrence Hill Books, 2009.

[44] See for example, beside Uganda, the conflicts in Sierra Leone, Colombia, Sri Lanka and Myanmar.

[45] International Criminal Court, "Policy Paper on Preliminary Examinations" (draft), *supra* note 41.

[46] Paul Seils, "The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court", in Bergsmo (ed.), 2010, p. 73, *supra* note 2.

ly involve the civilian population, and where the crimes committed are often strategically targeted against vulnerable groups and intended to deprive victims of all human dignity, the gravity criteria of crimes may need to be re-evaluated.

The selection of crimes in international courts should reflect the reality in which sexual slavery and the transformation of young children into slaughter machines – that is, crimes involving a complete deprivation of the victims' value as human beings, or "murder of the soul"[47] – can, depending on the situation, be of greater gravity than the deprivation of lives on a battlefield. This issue seems, at least, worthy of discussion as it raises some important questions as to the objectives of international criminal justice, which are relevant for the interpretation of the gravity element in ICC case selection.

The manner of the crime represents the third criterion of the OTP to determine gravity. It is intended to encompass especially aggravating factors such as particular cruelty, targeting of especially vulnerable victims, and abuse of authority.[48] Like the first criterion relative to the scale of the crime, it can be applied in a more objective way. Although it may be argued that all of the crimes that are included in the Rome Statute are of particular cruelty, and that this is the very reason why they have been included therein and categorised as international crimes, not all such crimes are committed with the intention to touch the harmless and the vulnerable. To deliberately target those individuals who, in their initial position, could pose no threat to their aggressors indeed seems like an aggravating factor of an act that would already represent a very serious crime had it been committed against enemy combatants.

For what concerns children recruited into armed groups or forces, it seems obvious that this crime is targeting an especially vulnerable group, namely children under the age of 15 years. Furthermore, the exercise of recruiting and using these children, forcing them through military training and to commit crimes – often under life threat and through various forms of physical and sexual abuse – is also a clear case of abuse of authority.

---

47 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. 1.

48 International Criminal Court, "Policy Paper on Preliminary Examinations" (draft), *supra* note 41.

Whether particular cruelty is used is, arguably, a more subjective matter, which necessitates a case-to-case evaluation.[49]

Lastly, the fourth criterion for gravity is the impact of the crime. Impact can arguably be seen in two ways in this context. First, impact can be seen as the deterrent effect that the prosecution of certain crimes may have.[50] However, one of the main purposes of international prosecutions in general is to deter would-be perpetrators from committing international crimes.[51] Second, certain crimes can cause an extremely widespread and profound negative impact on the civilian population and/or on a society at large,[52] and may therefore be granted priority in the crime selection process. Again, this criterion is subjective and depends, for instance, on whether short-term or long-term impact is considered. If impact is seen as something immediate, the loss of life may seem of the utmost gravity. However, if long-term impact is favoured, such impact will depend on its effects on the post-conflict situation of a country and that country's chances to peace and reconciliation.

Certainly, transforming tens of thousands of children into weapons of war instead of sending them to school has anything but a positive long-term impact on a (post-conflict) society that needs to get back on its feet and create a lasting peace.

The OTP's criteria for assessing gravity could open up a new way of crime selection, which, if rightly used, may better reflect the reality of armed conflicts and mass atrocities of today. Combined with a gender sensitive and child friendly structure and *modus operandi*, the potential of the ICC to represent a new international criminal justice, which contributes to ending impunity and empowers women and children to take the future in their hands, is huge.

---

[49] There is, in my view, no doubt that abducting a child and forcing him/her to kill and commit other heinous crimes, as well as subjecting him/her to physical and/or sexual abuse, sometimes for years, is beyond cruel treatment; it is denying that child to be human.

[50] Seils, 2010, *supra* note 46, p. 75.

[51] Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice*, Oxford University Press, 2009, p. 90. The importance of deterrence has also been noted by the *ad hoc* tribunals for the former Yugoslavia and Rwanda, which in several cases highlighted this factor.

[52] International Criminal Court, "Policy Paper on Preliminary Examinations" (draft), *supra* note 41, para. 70(d).

7.2.2.2. The Case of the *Prosecutor v. Thomas Lubanga Dyilo*

In the beginning of 2006, the OTP decided to issue a warrant of arrest for Thomas Lubanga Dyilo – leader of the rebel group the Union of Congolese Patriots ('UPC') – for the war crimes of conscripting, enlisting and using children in armed conflict,[53] and brought no charges in relation to other crimes that were allegedly committed in the region and by Lubanga himself, such as killings or rapes. At that time, the two prosecutorial strategies referred to above had not yet been issued and only the 2003 policy paper, in which no particular interest in crimes for children was manifested and no reference to gravity was made, existed. To what extent did the course of events influence the OTP's prosecutorial strategy and not *vice versa*?

While the arrest warrants against five members of the LRA in Uganda that were issued in 2005 contained several charges of crimes against humanity and war crimes, the warrant against Lubanga brought only three charges, related to the enlistment, conscription and use of children in armed conflict. The LRA charges also included, but were not limited to, the forced enlisting of children. Indeed, they reflected a broader picture of the conflict in which a series of crimes, such as sexual slavery and rape, attacks on the civilian population, murder and pillaging, and recruitment and use of children, were committed. The prosecutorial "thematisation" in the Ugandan situation could be seen as a choice to focus on a selection of serious crimes committed in the country, not granting exclusivity to one crime only.

The decision to charge Thomas Lubanga only for crimes against children provoked a lot of criticism among civil society organisations, and there was a strong opinion that allegations of killings and sexual violence should have been reflected in the charges.[54] The OTP has explained its choice by emphasising, firstly, the seriousness of the crimes contained in the Lubanga indictment. Secondly, in its application for an arrest warrant

[53] International Criminal Court, "Warrant of arrest for Thomas Lubanga Dyilo", Doc. ICC-01/04-01/06, 10 February 2006.

[54] See for instance Human Rights Watch, who wrote a letter to the ICC Prosecutor lamenting the narrow charges. For a short account on the criticism relative to the Lubanga case, see http://www.aegistrust.org/Lubanga-Chronicles/victims-raise-their-voice-in-the-lubanga-case.html, last accessed on 3 September 2011.

for Lubanga, the Prosecutor asked to leave open the possibility of bringing further charges against the accused.

While the seriousness of such crimes was not discussed, a few points can be made in favour of the decision. As illustrated in Section 7.2.1., the history of the approach towards the acts of recruiting and using children in armed conflict shows an increasing determination to put an end to these practices. From their prohibition in the Additional Protocols to the four Geneva Conventions in 1977, to their proscription through the 1989 Convention on the Rights of the Child, and all the way to their inclusion as war crimes in the Rome Statute of the International Criminal Court in 1998, as well as the obligation on states to criminalise such acts in the 2000 Optional Protocol to the CRC, the acts of recruiting and using children in armed conflict have, relatively quickly, gone from being a widespread but little known practice to representing one of the most serious international crimes. The horrific impact of these acts on hundreds of thousands of children is today widely known.

According to the reports of the OTP, the decision to focus only on crimes against children was also triggered by another factor; namely, the possible imminent release of Thomas Lubanga from DRC custody. At that time of the investigation, the Prosecutor was not able to bring charges for other crimes and, instead of risking Lubanga's release, decided to demand his arrest on the basis of the evidence that already existed. The Prosecutor thus introduced the concept of the so-called 'principle of opportunity'.[55]

In addition to this, it has been argued that the Prosecutor had to avoid charging Lubanga for the same acts that had led to his arrest in the DRC. This was in order not to violate the complementarity rule, according to which the ICC has jurisdiction only in cases where the state has taken no action or, in case of action, where it has proven unwilling or unable to carry out the investigation/prosecution.[56] In the *Lubanga* case, however, it is doubtful whether this reasoning was necessary. First, the DRC had already made a self-referral to the ICC of its situation,[57] thus granting the

[55] Seils, 2010, *supra* note 46, p. 75.

[56] Rome Statute, Art. 17.

[57] See ICC Press Release, "Prosecutor receives referral of the situation in the Democratic Republic of Congo", ICC-OTP-20040419-50, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB, last accessed on 3 September 2011.

Court admission to investigate international crimes on its territory. Second, the fact that Lubanga had been held in custody for charges of crimes against humanity for nearly 12 months with no further action taken – and the high possibility that he would have been released without trial at the fulfilment of 12 months in custody – seem to indicate a failure, whether on the grounds of inability or unwillingness, on behalf of the DRC authorities to carry out the investigation on its own. Since no trial was being carried out, or had even been planned, against Lubanga, it seems far-fetched to exclude the Court's jurisdiction for crimes that he had been indicted for in the DRC. Nevertheless, at the time of the ICC arrest of Lubanga, the Prosecutor estimated that he had sufficient grounds to indict him for child recruitment only.

Regarding the possibility of bringing further charges against the accused, it is unclear how much effort was made by the OTP to actually do so. The OTP did indicate in its application for an arrest warrant that it wanted to leave open the possibility of bringing further charges.[58] Nevertheless, at a later stage, the Office stated that it would not continue the investigation due to security risks. The chance to bring further charges to the case was thus excluded and, indeed, at the time of the initiation of the trial against Lubanga in 2009, no such amendments had been done.

This leads to a question regarding international criminal proceedings: Can additional charges be brought against a person who has already been indicted for other crimes and, if so, when? The Rome Statute clearly sets forth that the possibility exists for the Prosecutor to add or withdraw charges to a case as the investigation process in a country situation advances, as long as this is done prior to the Pre-trial Chamber's hearing on the confirmation of charges.[59] Between this hearing and the commencement of the trial, the Prosecutor may also, with the permission of the Pre-trial Chamber, amend the charges, but if the amendment seeks to add further charges a new hearing on the confirmation of those charges must be held.[60] In the Lubanga case, the Pre-Trial Chamber held that the investigation must be completed by the time the confirmation hearing starts, unless there are exceptional circumstances.[61]

---

58 Seils, 2010, *supra* note 46, p. 74.

59 Rome Statute, Art. 61(4).

60 *Ibid*., Art. 61(9).

61 P*rosecutor v. Thomas Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006, paras. 130–

Once the trial has commenced, the Prosecutor can no longer amend the existing charges or add new ones.[62] This can be done, on the other hand, by the Trial Chamber. Court Regulation 55 entitles, in accordance with the *iura novit curia* principle,[63] the Trial Chamber to change the legal characterisation of facts as long as it does not exceed the facts and circumstances described in the charges and any amendments to the charges. In order to ensure that the rights of the accused are respected, the Trial Chamber may suspend the hearing to allow for an effective preparation of the defence.[64]

Despite the theoretical grounds for an amendment of charges during the trial-phase, this possibility was rejected in the case of *Prosecutor v. Lubanga*. The ICC Appeals Chamber reversed a decision by the Trial Chamber to consider amendments of the charges to include crimes of sexual slavery and inhuman or cruel treatment.[65] The victims' representatives had asked for this in view of the massive witness testimony of rape and sexual abuse in Lubanga's militia that was presented before the Trial Chamber. Although the Appeals Chamber recognised that a modification of the legal characterisation of the facts is not necessarily incompatible with general principles of international law (or with the Rome Statute for that matter), it held that the Trial Chamber's reasoning in the Lubanga case was flawed and reversed the decision. The Appeals Chamber held that Regulation 55, and the requirement that the facts and circumstances described in the charges and any amendments thereto must not be exceeded, had been wrongly interpreted by the Trial Chamber. A wrongful application of this Regulation would risk compromising its compliance with

131, cited in Kai Ambos and Dennis Miller, "Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective", in *International Criminal Law Review,* 2007, vol. 7, pp. 335–360 (p. 339).

62 Ambos and Miller, 2007, p. 347, *ibid*.

63 *Ibid*., p. 359.

64 International Criminal Court, Regulations of the Court, Doc. ICC-BD/01-02-07, Regulation 55 on the Authority of the Chamber to modify the legal characterisation of facts. See also Art. 74(2) of the Rome Statute, which sets forth that, in its decisions, the Trial Chamber "shall not exceed the facts and circumstances described in the charges and any amendment to the charges".

65 See http://www.haguejusticeportal.net/eCache/DEF/11/285.html, last accessed on 3 September 2011.

internationally recognised human rights, as set forth by Article 21(3) of the Rome Statute.[66]

A similar issue was addressed by the SCSL, which, in the case of *the Prosecutor v. Sesay, Kallon and Gbao* (the 'RUF case'), allowed for two instances of amendments of charges. The first was made in February 2004, before the trial commenced, and therefore leaves little to discuss in terms of procedural issues. Nevertheless, the amended indictment is noteworthy because it included, for the first time under international law, the charge of forced marriage as a crime against humanity under the category "other inhumane acts".[67] The opinions among gender advocates regarding this "new" crime differ widely, and the decision has been seen by some to stigmatise women instead of achieving the opposite.[68] The accused in the RUF case were found guilty of forced marriage by the Trial Chamber in its 2009 judgment.[69]

The joint trial against three RUF members commenced in July 2004 and, in 2006, a new amendment was made following the Trial Chamber's decision to partially grant a motion by the Prosecutor to do so.[70] However, the approved amendment was merely a matter of form, and the Chamber instead rejected what would have been a substantial change. The Prosecutor's request was to amend the indictment by changing not the counts themselves, but the time frame within which the crimes contained in the charges had been committed. The Defence opposed the amendment, holding that it would be prejudicial to the rights of the accused, since it would allow for the introduction of a large number of factual allegations of the crimes.[71]

---

66 International Criminal Court, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 8 December 2009, Doc. ICC-01/04-01/06-T-219-ENG.

67 Micaela Frulli, "Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New Crime against Humanity'", in *Journal of International Criminal Justice*, vol. 6, 2008, pp. 1033–1042.

68 International Center for Transitional Justice, *The Special Court for Sierra Leone under Scrutiny*, March 2006, p. 27.

69 Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-T, Judgment, 2 March 2009.

70 Special Court for Sierra Leone, "Fourth Annual Report of the President of the Special Court for Sierra Leone", January 2006 to May 2007, p. 17.

71 Special Court for Sierra Leone, Trial Chamber, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 2006.

Like in the Lubanga case before the ICC, the SCSL rejected the possibility of substantially amending the indictment during trial, due to risk of compromising the rights of the accused. In another case, the SCSL Trial Chamber also rejected a motion of amendment of charges before the commencement of the trial. In the case of *the Prosecutor v. Hinga Norman, Fofana and Kondewa* ('CDF case'), the Prosecution filed a motion asking to add four new counts to the already existing ones. While the Court had already allowed for such amendments in the RUF and the AFRC cases, this time it took the opposite decision. According to the Chamber, the request was filed too late, not respecting the imperative of due diligence, and would therefore result in a violation of the defendant's right to a fair and expeditious trial.[72]

If the ICC were to categorically reject all motions for amendments of charges, this would risk putting an extremely high pressure on the OTP. The Prosecutor is supposed to start his cases as soon as possible after an investigation has been initiated, and the expeditious conduct of the proceedings shall be guaranteed. However, there may be situations in which, in the interest of justice, amendments of the legal characterisation of the facts should be seriously considered and permitted. Making it impossible, in practice, to make such amendments once the trial has commenced may increase the risk that very serious crimes go unpunished and that victims are deprived of their right to justice. While the rights of the accused should always be guaranteed in international criminal proceedings, the Court should also, within the framework of the law, carefully evaluate this risk. Depending on the case, it may serve justice better to amend the legal characterisation of facts, temporarily halting the hearings in order for the accused to have an adequate chance to prepare his/her defence.

In the case of *Prosecutor v. Lubanga*, the many girls who were abducted both for purposes of use in the armed conflict and of sexual slavery will never get any recognition (at least not through the ICC) of the atrocious sex crimes that Lubanga and his men committed against them, but "only" for the crimes of which both boys and girls fell victims; that is, the recruitment and use of children in armed conflict.[73] Nevertheless, if

[72] Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 20 May 2004.

[73] It should be noted that, although to a lesser extent, boys also fall victim of sex crimes.

the rights of the accused could not be guaranteed, the Appeals Chamber took the right decision to reject the amendment of charges. Considering the particularities relative to the Lubanga case, and the Prosecutorial strategy that is reflected in the other cases of the ICC, it seems fair to say that the choice to focus exclusively on crimes against children is not a deliberate strategy of the OTP. Rather, the circumstances surrounding the case were determinant for the way it was shaped. The OTP indicated, in its Prosecutorial Strategy of both 2006 and 2009, that it would pay particular attention to crimes against children, without further specifying what this means.[74] Nevertheless, at no point has the OTP manifested the intention to focus exclusively on those crimes, while leaving other serious crimes unpunished. Indeed, the indictments of the other cases of the ICC that involve crimes against children also contain several other charges.

7.3. Thematic Prosecution of Sex Crimes and Crimes Against Children: Two Crimes, One Approach?

At the ICC, both crimes against children and sex crimes are given special importance. But the thematic investigation and prosecution of sex crimes started much earlier through the case law of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and for Rwanda ('ICTR'), which were created in 1993 and 1994 respectively.[75] This section will discuss the attention paid to these two types of crimes in international criminal justice and examine whether there are (or should be) similarities in the approach toward them.

7.3.1. Evolution of the Crimes

Child recruitment and sexual violence have been frequent in armed conflicts since far back in history, but these practices have been considered differently in different time periods. Rape, for instance, was seen both as a property crime and as a crime against the honour of the husband or the family before being considered as a crime against women or a "gender crime".

---

[74] International Criminal Court, Office of the Prosecutor, "Prosecutorial Strategy 2006", and "Prosecutorial Strategy 2009–2012".

[75] These *ad hoc* tribunals were established by the United Nations Security Council in 1993 and 1994 respectively.

The reactions against these practices have evolved gradually during the 20th century, with the rise of human rights law and the adoption of international (legal) instruments aiming at protecting women and children.[76] In IHL, the Geneva Conventions and their Additional Protocols establish a special protection for women and children, defining them as protected persons. These instruments also prohibit (some forms of) sexual violence and child recruitment. GC IV and the Additional Protocols set forth that women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.[77] Such acts are not defined by these instruments as "grave breaches" (although inhuman treatment is, which could arguably include sexual violence), but states nevertheless had the obligation to take measures to end such violations.[78] As mentioned above, GC IV also establishes special protection for children under 15, and the Additional Protocols explicitly prohibit the recruitment and use of children under the age of 15 in both international and non-international armed conflicts.[79] Again, such acts are not defined by these instruments as "grave breaches".

From the adoption of the Additional Protocols, ICL has developed greatly and today sexual violence and child recruitment are international crimes under international law. Rape and sexual violence were codified as international crimes much earlier than child recruitment, although initially in a limited manner. The wars in the former Yugoslavia and in Rwanda were shocking in terms of the atrocities committed against women and girls of all ages and this was one of the reasons why the UN Security Council decided to establish the International Criminal Tribunals for these two countries. The ICTY had, explicitly, jurisdiction only over the crime

[76] Examples of such instruments are: the Universal Declaration for Human Rights, 1948; the two International Covenants, 1966; the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, proclaimed by UNGA Resolution 3318 (XXIX) (1974); the Convention for the Elimination of the Discrimination against Women ('CEDAW'), 1979; the Convention on the Rights of the Child ('CRC'), 1989 and its Optional Protocol on the involvement of children in armed conflict, 2000.

[77] Geneva Convention IV, Art. 27, Additional Protocol I, Art. 76, and Additional Protocol II, Art. 4(2).

[78] Art. 146 of GC IV establishes that "[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article".

[79] Additional Protocol I, Art. 77 and Additional Protocol II, Art. 4(3).

of rape.[80] Nevertheless, the term 'rape' has been broadly interpreted to encompass other forms of sexual assault such as enforced prostitution.[81] The ICTR followed in the footsteps of the ICTY, and was granted jurisdiction over the same types of crimes as the former. Based upon the evidence of widespread and systematic rape and other sexual violence that emerged throughout the investigations of the Office of the Prosecutor, the Prosecutor decided to consider this specific category of crimes for prosecution. The first international case regarding sex crimes, in which rape was defined, comes from the ICTR: the *Akayesu* case.

In the Rome Statute of the ICC, sex crimes are defined in a far more detailed way, which better reflects the many facets of sexual violence. These crimes are constituted by acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity or which constitutes a serious violation of the Geneva Conventions.[82] The SCSL also had jurisdiction over sex crimes and, to a great extent, copied its definition of such crimes from the Rome Statute.

With the "label" crimes against children I refer, as illustrated in part one, to the acts of conscripting or enlisting children under 15 years of age into armed groups or forces and/or using them to participate actively in hostilities, whether in an armed conflict of an international or non-international character.[83] In international human rights law, and for those states that have ratified the Optional Protocol to the CRC for Children and Armed Conflict, there is a (partial) prohibition to recruit/use children under the age of 18 years.[84]

While sex crimes can be committed both as crimes against humanity and as war crimes, depending on how they are carried out and the circumstances in which they take place, crimes against children can only amount to war crimes. Thus, to qualify as international crimes these acts must always take place within the context of an armed conflict. As can be

[80] Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 5(g).

[81] See for example the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 and Add. 1, 1993.

[82] Rome Statute for the ICC, 1998, Art. 7(1)(g) relative to crimes against humanity, Arts. 8(2)(b)(xxii) and 8(2)(e)(vi) relative to war crimes.

[83] *Ibid*., Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii) relative to war crimes.

[84] The Optional Protocol to the CRC on the involvement of children in armed conflict, *supra* note 18.

seen from the definition of sex crimes – for example, forced pregnancy – sex crimes cover acts that are mainly carried out against women, but there are of course cases in which men, although in a much smaller number, fall victim of, for instance, rape.[85] Obviously, the victim of a sex crime can be a child and, to a striking extent, victims of child recruitment are also victims of sex crimes within those crimes.

This creates a complex picture, in which the sufferer of the crimes is, very often, repeatedly victimised. First, this re-victimisation can present itself as a situation in which an individual is subject to several acts of violence, spread out in time, constituting different (international) crimes. Examples of this type of re-victimisation can be that of women who have been sexually abused by members of an armed group and flee their home villages, only to be (apart from displaced) sexually abused again, either by members of the same or of another armed group. The frequent destiny of children who – after having escaped or been demobilised from one armed group – are forced into the armed forces or into an enemy group, or even re-recruited into the same group they had first ran away from, represent another such example.

Second, women and children who have been victims of sexual violence or who have been recruited and forced to commit atrocious acts in the context of an armed conflict are often vulnerable to further exploitation in post-conflict settings, deriving from, for instance, the rejection from their husbands or families in the home community.

Third, and most important for the purposes of this chapter, there is often a re-victimisation that derives from the very efforts to respond to these crimes. In criminal proceedings, such re-victimisation can be found, for instance, when hearings and interrogations are carried out by personnel that do not have any knowledge in gender sensitivity. This was, reportedly, the case in some of the ICTY and ICTR cases.[86]

'Double victimisation' can, arguably, occur for many different crimes and is not necessarily limited to the two types of crimes discussed here. So why is it that a special attention is needed for sex crimes and

[85] See, for example, Christine Chinkin, "Rape and Sexual Abuse of Women in International Law", in: *European Journal of International Law*, vol. 5, 1994, pp. 326–341.

[86] One example of this can be found in Anne-Marie de Brouwer, "Gacumbitsi Judgment", in G. Sluiter and A. Klip (eds.), *Annotated leading cases of international criminal tribunals: The international criminal tribunal for Rwanda 2005–2006*, 2009, pp. 583–594.

crimes against children, and how is it justified?[87] First of all, "classic" wars, that is, military combat between the armed forces of two or more states, have been almost completely supplanted by civil wars, which involve the civilian population to a much larger extent than before.[88] This makes women and children especially vulnerable to victimisation. It is, furthermore, recognised that certain crimes – which strongly undermine the sense of dignity of the victim and include strong elements of shame and humiliation – are particularly hard to have to talk about and to recover from. Indeed, it is no coincidence that rape has been called "murder of the soul".[89] As mentioned above, women and children who fall victim of sexual violence and/or recruitment are often vulnerable to further exploitation in post-conflict settings. They are often rejected by their families and home communities, and seen as "tainted" or "haunted by bad spirits", because of what they have been put through or forced to do.[90] Raped women may be abandoned by their husbands and children may be pushed away by families who are ashamed or afraid of them. For those women and children, the only way to survive may be to turn to prostitution or criminal activities.

Even where justice mechanisms are established in a post-conflict setting, women and children are particularly vulnerable to re-victimisation. One typical example can be found in the worrying number of accounts of peace keeping officers who have committed rape and other sex crimes against women they were supposedly there to protect,[91] or of security or government officers who have used demobilised children for intelligence purposes or for favours that risk putting them in danger and/or that

[87] Despite the fact that the special focus on sex crimes and on crimes against children surely has a wide range of reasons, for reasons of time and space, only a few of them shall be discussed here.

[88] Estimates show that up to 75 per cent of victims of today's conflicts are civilians, as opposed to 5 per cent at the beginning of the 20th century. See Jeanne Ward and Mendy Marsh, "Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources", a briefing paper prepared for the Symposium on Sexual Violence in Conflict and Beyond, 21–23 June 2006, Brussels, Belgium.

[89] See *supra* note 47.

[90] Peter Eichstaedt, 2009, *supra* note 43, p. 24.

[91] See for example Christine Chinkin, 1994, *supra* note 85.

constitute some form of abuse.[92] But it is not always necessary for a crime to be committed in the post-conflict phase; sometimes the very justice system as such is simply not sufficiently sensitive to protect victims of crimes that involve a strong sense of humiliation. Since the mechanisms to reach justice – whether truth and reconciliation commissions, courts or rehabilitation or reparations programmes – tend to include testimony, witnesses and victims will generally have to tell what they have seen or suffered. For many victims this means reliving their atrocious experiences a second time, and for reasons of shame, traumatisation and fear of reprisals they may be reluctant to talk.[93] In order to attenuate this 'double victimisation', which often involves a strong feeling of degradation and risks further undermining the victim's self-esteem, certain 'thematic' considerations can be made.

To thematically prosecute certain crimes does not necessarily mean that such crimes are prioritised over other crimes, which will be left unaddressed, but rather that such crimes are investigated and prosecuted in a thematic way, meaning that methods specific to the acts and the victims are employed. Such specific, or thematic, methods increasingly involve gender aspects – like having female personnel interrogate female victims and ensuring that all personnel working with victims of sex crimes receive training in gender sensitivity and other specifically relevant skills. The same goes for child victims, for whom child friendly procedures are needed. These include having as small a number as possible of persons interrogate a child victim, having child psychologists present, shortening the length of each interrogation, *et cetera*. Special units, with thematic expertise, may be created for these purposes.

The International Criminal Court is the first of its kind to have incorporated gender sensitive and child friendly considerations in its structure. The Court currently has more than 60 per cent female judges, and many of the judges have experience and/or expertise in gender issues.[94] Moreover, special advisers on gender issues have been appointed, and the

[92] On the use of child recruits for intelligence purposes, see for instance: the Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2008 – Colombia".

[93] Report of the United Nations Secretary General, "Rape and Abuse of Women in the Territory of the Former Yugoslavia", UN Doc. E/CN.4/1994/5, 1993, para. 13.

[94] Louise Chappell, "Gender and Judging at the International Criminal Court", in *Politics and Gender*, vol. 6, no. 3, 2010, pp. 484–495.

Court also envisages work with external experts.[95] The Prosecutor has adopted a prosecutorial strategy that involves paying special attention to gender crimes and crimes against children, as well as to investigative methods for such crimes.

A further consideration that has to be made when addressing situations in which the victims of the crimes are, to a high degree, still alive, is the repercussions that they can have on post-conflict societies in the long run. The recovery from these types of crimes is a difficult and lengthy procedure, which does not always result in a full rehabilitation of the victim. Many victims of sex crimes have to live the rest of their lives with irreparable physical damage, or with sexually transmittable diseases that may even kill them. Moreover, the feelings of fear and degradation may persist throughout the women's whole lives and, where rape has been widespread, risk undermining the sense of security and well-being of a whole community.[96] Children who have been forced or convinced to commit atrocities may, depending on the legal system they belong to, be held accountable for war crimes and imprisoned. Other times they are abandoned by the system and never have the chance to go back to school or to reintegrate into society. Those children know nothing but violence and crime, and the repercussions that this will have on post-conflict societies with high rates of child participation in the armed conflict, risk being massive in the long run.

Finally, the systematic nature characterising sex crimes in recent conflicts has made it imperative to address those crimes firmly. This was the case in the conflict of the former Yugoslavia where the massive, organized and systematic committing of sex crimes became, at least in some parts, an instrument of warfare.[97] Those acts were so obviously targeted against one group of people, that is, women, that they constituted an unacceptable discrimination on the basis of sex, widely banned by both customary and conventional human rights law.[98] Still, in the words of Theodor Meron,

> [i]ndescribable abuse of thousands of women in the territory of former Yugoslavia was needed to shock the international

[95] International Criminal Court, Office of the Prosecutor, "Prosecutorial Strategy 2009–2012", 2009.

[96] Christine Chinkin, 1994, *supra* note 85.

[97] United Nations Security Council, Resolution 820, 1993.

[98] See for example UDHR, ICCPR, especially Art. 4, and CEDAW, Art. 1.

> community into re-thinking the prohibition of rape as a crime under the laws of war.[99]

A similar type of pattern, relative to both women and children, could be seen in the civil war of Sierra Leone. This decade-long armed conflict saw tens of thousands of children involved in the fighting, and a huge majority of the children recruited into the RUF were abducted.[100] This group was composed of up to 80 children under the age of 15. In the other factions the percentage of abductions was lower, but the voluntary recruitment of children in those groups seems to correlate with the higher percentage of displaced children.[101] Thousands of girls were abducted and forced to become 'bush wives' to the soldiers.

This armed conflict – based on power battles that took place far above the heads of the children who were forced to fight it – has resulted in Sierra Leone still being, ten years after the end of the war, one of the least developed countries in the world[102] with a population of a median age of 19 years,[103] and where only about 40 per cent of the population above 15 years of age is literate.[104] We are again in front of a situation in which one group of individuals, more vulnerable than the average population, was directly targeted. This time, however, we are not only in front of a systematic violation used as an instrument of war, but of a systematic violation which involves transforming the victims themselves into weapons of the continued warfare. The distinction may seem irrelevant but can be of great importance in terms of accountability issues. Facing these and other situations of wide-scale abuses, which particularly targeted women and/or children, the international community was forced to react. The re-

---

99 Theodor Meron, "Rape as a Crime in International Humanitarian Law", in *American Journal of International Law*, vol. 87, 1994, p. 425.

100 Myriam Denov, *Child Soldiers: Sierra Leone's Revolutionary United Front*, Cambridge University Press, 2010, p. 63.

101 Macartan Humphreys and Jeremy Weinstein, "What the Fighters Say: A Survey of Ex-Combatants in Sierra Leone", Center on Globalization and Sustainable Development, Working Paper no. 20, 2004.

102 Sierra Leone was listed as number 158 out of 169 states by the UNDP Human Development Index 2010; see http://hdrstats.undp.org/en/countries/profiles/SLE.html, last accessed on 3 September 2011.

103 See https://www.cia.gov/library/publications/the-world-factbook/geos/sl.html, last accessed 3 September 2011.

104 UNDP Human Development Index, 2010, *supra* note 102.

action has many facets, and ranges from socio-political and humanitarian steps to legal and enforcement measures.

For what concerns sex crimes, the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, brought women into the focus of human rights concerns and prohibits discrimination against women. Furthermore, the UNHCR has advocated for the needs of women affected by armed conflict, and has developed programmes that especially target women.[105] In 1994, a UN Special Rapporteur on violence against women was appointed, with the mandate to work for the elimination of all forms of gender-based violence.[106] UN Security Council resolution 1325, adopted in 2000, addresses the impact of armed conflict on women and calls for – among other things – an increased participation and representation of women in decision-making, an increased attention to the needs of women and girls in armed conflict, and gender perspectives to be taken into account in post-conflict processes and operations.[107]

With regard to the recruitment and use of children in armed conflict, the 1989 adoption of the Convention on the Rights of the Child ('CRC') was a turning point. The decade that followed was filled with initiatives to strengthen the rights and protection of the child, especially in times of armed conflict. A UN Special Representative for Children and Armed Conflict was appointed, the issue was put on the permanent agenda of the UN Security Council and regarded as a threat to international peace and security, and the Optional Protocol to the CRC was negotiated and, finally, adopted in 2000. Moreover, the Statutes for the International Criminal Court and the Special Courts for Sierra Leone were adopted in 1998 and 2000 respectively, both containing provisions defining the recruitment and use of children in armed conflict as international crimes for which they had the jurisdiction to establish individual criminal responsibility.

[105] See, for example, Ward and Marsh, 2006, *supra* note 88.

[106] The first special Rapporteur was Ms. Radhika Coomaraswamy, who today occupies the post as UN Special Representative for Children and Armed Conflict.

[107] United Nations Security Council, Resolution 1325, adopted by unanimity in December 2000.

7.3.2. International Criminal Law Responses

On the level of international criminal law, the response to the above-mentioned situations resulted in the creation of two *ad hoc* tribunals, ICTY and the ICTR, and one hybrid tribunal, the SCSL. These judicial institutions initiated a path toward international criminal justice for the crimes here discussed, and were soon followed by the first permanent international criminal tribunal, the ICC, which began its activity in 2002.

The ICTY has, throughout its case law, given increasing priority to sex crimes.[108] The ICTY Statute and Rules do not contain a list of case selection criteria and, in the beginning, availability of evidence was a strong factor in deciding who was to be indicted.[109] This, coupled with the fact that the mandate of the Tribunal was very broad,[110] led to many cases against "low-level" perpetrators – something that several of the judges of the ICTY have strongly criticised. By the end of 1995, certain selection criteria were elaborated by the Office of the Prosecutor and one of them was to take into account the level of responsibility of the accused.[111] After this, a statement by then Chief Prosecutor Louise Arbour followed, indicating a shift towards a more accused-based prosecutorial strategy. A Presidential Statement from the UN Security Council in 2002 indicated its agreement that the ICTY should focus on individuals in leading positions

[108] Especially noteworthy are the so-called Foča cases:

> In June 1996, the first indictment which deal[t] exclusively with sexual violence was issued in relation to events that took place in the municipality of Foca, to the south east of Sarajevo. This indictment allege[d] that when the area was taken over by Serb forces in April 1992, many Muslim women were detained in houses, apartments, schools and other buildings, and were subjected to repeated rape by soldiers. […] women and girls were enslaved in houses run like brothels, where they were also forced to perform domestic work […].

Extract from "Women 2000 – Sexual Violence and Armed Conflict: United Nations Response", United Nations, Division for the Advancement of Women, Department of Economic and Social Affairs.

[109] Claudia Angermaier, "Case selection and prioritization criteria in the work of the International Criminal Tribunal for the Former Yugoslavia", in Bergsmo (ed.), 2010, p. 30, *supra* note 2.

[110] UN Security Council Resolution 827 (1993) sets forth that the Tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.

[111] Angermaier, 2010, *supra* note 109.

rather than on low-level perpetrators, whose cases could be transferred to domestic courts.[112] In 2004, this strategy became binding on the Tribunal as UNSC Resolution 1534 established that the Prosecutor were to select only such cases for prosecution that targeted persons of the most senior level.[113]

The Statute of the ICTR established the tribunal's jurisdiction over persons responsible for serious violations of international humanitarian law ('IHL') committed in Rwanda and surrounding States in 1994.[114] The Prosecutor decided to focus on the most serious violations, and took as a starting point "the fact that the genocide in Rwanda was a result of a well-planned conspiracy by members of the government in power, the ruling party, the MRND and the senior military leadership".[115] Included in the violations under the jurisdiction of the ICTR is the crime of rape[116] and – based upon the evidence of widespread and systematic rape and other sexual violence that emerged throughout the investigations of the Office of the Prosecutor – the Prosecutor decided to consider this specific category of crimes for prosecution.[117]

The SCSL is, instead, a court with the mandate to prosecute a very limited number of persons and its statute sets forth that the Special Court shall prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law".[118] The cases of the special court all contain long lists of crimes covering the atrocities committed during the civil war, but the crimes that drew most attention were the cruel and widespread practices of sexual violence and child recruitment.

The widespread practice to recruit and use children in the Sierra Leonean conflict resulted in a situation where every single case of the Special Court involved those crimes. Thus, in the cases against three leaders of the Armed Forces Revolutionary Council ('AFRC'); three leaders of the RUF; and three leaders of the CDF,[119] the charges included these

[112] *Ibid*.
[113] UN Security Council Resolution 1534, 2004.
[114] The ICTR was established by United Nations Security Council resolution 955, 1994.
[115] Alex Obote-Odora, "Case selection and prioritization criteria at the International Criminal Tribunal for Rwanda", in Bergsmo (ed.), 2010, p. 56, *supra* note 2.
[116] Statute for the ICTR, Arts. 3(g) and 4(e).
[117] Obote-Odora, 2010, p. 59, *supra* note 115.
[118] Statute for the Special Court for Sierra Leone, Art. 1.
[119] One of the accused, Sam Hinga Norman, died before the end of the trial.

(and other) crimes. The same is true for the only case still ongoing before the SCSL; namely, the case against Charles Taylor, former President of Liberia.

The SCSL was the first international court to convict persons for the crimes of recruiting and using children in armed conflict. As illustrated above, the jurisprudence of the SCSL was highly controversial for concluding in 1996 that the acts of recruiting and using children in armed conflict were crimes entailing individual criminal responsibility under customary international law, when the court's temporal jurisdiction began.

The Special court was, moreover, the first court to consider "forced marriage" a crime against humanity. This crime is not explicitly included in its statute, but in the case of *Prosecutor v. Brima, Kamara, and Kanu* ('AFRC Case'), the Appeals Chamber reversed the Trial Chamber's decision to consider forced marriage only as a form of sexual slavery, and defined it as a separate crime against humanity, punishable under the statute as "other inhumane acts".[120]

The Statute of the SCSL contains a somewhat worrying provision, namely Article 7, which grants the court jurisdiction over persons above the age of 15 years. However, the Chief Prosecutor of the Special Court stated already at an early stage that he had no intention to indict anyone under the age of eighteen years.[121] Moreover, if read in combination with Article 1 of the statute, it seems highly unlikely that an indictment of anyone under the age of eighteen would have been possible.[122]

Sex crimes are codified in the Rome Statute both as war crimes and as crimes against humanity, depending on the context in which they take place. They include acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (in the case of crimes against humanity) or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (in the case of war crimes committed in an international armed conflict), or any other form of sexual violence also constitut-

[120] Frulli, 2008, *supra* note 67.

[121] Despite the high number of children participating in the Sierra Leone civil war, it is still unlikely that a person of such young age vested a role of supreme command or responsibility.

[122] The restrictive language of the Statute for the SCSL to prosecute only those "carrying the greatest responsibility" would have made it difficult to include charges against children. Moreover, the Court adopted a very restrictive interpretation of this Article.

ing a serious violation of Article 3 common to the four Geneva Conventions (in the case of war crimes committed in a non-international armed conflict).[123]

Crimes against children are, as illustrated in the first part of this section, defined in the Rome Statute as war crimes. Such crimes consist of the acts of conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities (in the case of war crimes committed in the context of an international armed conflict) or conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (in the case of war crimes committed in the context of a non-international armed conflict).[124]

The ICC is the first institution to integrate child and gender considerations within the institutional framework of the Court. Moreover, of the three cases that have so far been initiated before the Court, it is interesting to note that one case focuses exclusively on conscription, enlistment and use of children in armed conflict;[125] one case focuses, to a high degree, on sex crimes;[126] and one case contains charges of both these crimes.[127] Moreover, the case of *Prosecutor v. Bemba* has drawn a lot of attention, because it represents the first international trial in which the sitting judges are all women.

7.3.2.1. Added Value of Thematic Prosecutions

What is the interest in devoting special attention to sex crimes and crimes against children in international courts? In the jurisprudence of the ICTY

[123] Rome Statute for the International Criminal Court, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

[124] *Ibid*., Arts. 8(2)(b)(xxvi) and 8(2)(b)(vii).

[125] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*.

[126] International Criminal Court, *Prosecutor v. Jean-Pierre Bemba Gombo*. The charges against Bemba, who is the former President of the DRC, indicted by the ICC for crimes committed in the Central African Republic ('CAR'), consist of sex crimes, murder and pillaging.

[127] International Criminal Court, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. The charges in this case consist of: using children to participate actively in hostilities, sexual slavery and rape, inhuman treatment, outrages upon personal dignity, directing an attack against the civilian population, wilful killing, pillaging, and destruction of property.

and ICTR, the attention granted to sex crimes served the purpose of showing the extreme gravity of such crimes. Before the creation of those two tribunals, rape had been a frequent – but frequently ignored – practice in armed conflict, both as a strategy of ethnic cleansing and to undermine the strength of the men in a community (who would feel that they could not protect their women), and as an easy way of affecting the civilian population in civil wars and causing the greatest harm possible.

Looking at the case law of the SCSL, it can only be hoped that it too will have served, in the long run, to emphasise the extreme gravity of turning children into weapons of war. The example of Sierra Leone is certainly there to show what a vast destruction a country suffers when such a huge part of its young generations are actively involved in war, and how long the road to reconstruction is. Hopefully, however, the Court is also there to show that international criminal justice offers a way to fight such violence and that the most important thing is to hold those who recruit children accountable, while the children themselves must be treated mainly as victims in need of help to recover and reintegrate into society.[128]

Today the International Criminal Court is up and working and is, it seems, here to stay. Its statute grants it jurisdiction over the worst forms of sex crimes and over certain forms of recruitment and use of children in armed conflict. As has been illustrated in this chapter, many signs exist to indicate that the Court is taking gender and child issues seriously, and that the OTP intends to give special attention to crimes against women and children. Indeed, the initial case law of the Court also confirms this.

For the first time, we have an international criminal institution of a permanent character, which is construed in a way as to take into consideration the most vulnerable members of society. Moreover, a fair attempt is made to empower women and to grant gender equality within the functions of the Court. It is easy to imagine that the more women's roles in society are strengthened, the rarer the systematic attacks against women that we have seen – for example, in the former Yugoslavia and in the DRC – will be. This may be especially true for international crimes,

[128] This does not mean that the victims of the crimes that children have committed during an armed conflict should not have a chance to seek reparations for what they have suffered, but rather that such reparations should follow a pattern in which those victims are, just as the child recruits, seen as victims of those persons who are responsible for the war crimes of recruiting and using children in armed conflict (and any eventual other crimes such persons may have committed or ordered).

which often see high public officials as responsible for the systematic and massive commission of such crimes.

For what concerns children, the importance of rehabilitation and education is fundamental to avoid perpetuating the violence they have suffered and learned how to use. If many children are recruited and taught to fight and use arms and violence, while no sufficient efforts are made to turn them back into children again, the risks that those kids grow up to become warlords and/or criminals seem infinitely higher. In the clear-sighted words of a Haitian boy: "People see violence, they grow up with it, and they know it. They repeat it".[129] In this sense, the preventive impact that prosecutions can have may be much more important for these types of crimes than for other crimes that are often considered more serious, such as killings.

As this chapter has shown, sexual violence was defined as an international crime several years before child recruitment was. Several examples of this pattern, in which the protection of children follows in the footprints of the protection of women, can be found also in human rights law. The CEDAW, for instance, was adopted in 1979, ten years before the adoption of the CRC. Before 1998, no international court had ever had jurisdiction over the crimes of recruiting and using children in armed conflict. Thus, the definition of these crimes in the statutes for the SCSL and the ICC reflects customary international law at the time representing the beginning of their temporal jurisdiction (in the case of the SCSL) or at the time of their adoption (the case of the Rome Statute). Since then, the Optional Protocol to the CRC on the involvement of children in armed conflict has been adopted, prohibiting compulsory recruitment and direct participation in hostilities of all children under the age of 18 years. Perhaps with time, just as sex crimes were developed between the creation of the ICTY and the ICC, the definition of crimes against children will develop and protect all children – not only those under the age of 15 – from having to fight the wars of adults.

A difficulty present in the debate on child recruitment, which is non-existent with regard to sex crimes, is the eventual responsibility of the child. Very often, children involved in armed conflicts are seen as perpetrators who should be punished for their acts. This severely under-

[129] Quoted in the 10-years Strategic Review of the Machel Study, contained in UNGA Doc. A/62/228.

mines the gravity of the crimes committed against those children in the first place, and risks undermining the importance of rehabilitative mechanisms for children who have fallen victims of recruitment. A somewhat far-fetched but interesting comparison in the domain of sex crimes is the discourse on consent. This discourse has for many years undermined the gravity of sex crimes, somehow insinuating that the victims could have consented to the abuse.[130] The same type of questions is asked when facing children who have been used as combatants: What if they volunteered; does that not change things? What if they were not really forced to commit some of those atrocious acts? What if they even enjoyed it?

This is not the right place to answer these questions. However, a few brief remarks can be made. Indeed, this kind of reasoning exists and is not uncommon. But it is superfluous, and sometimes perhaps even counterproductive, in terms of international peace and justice. It moves the focus away from what is really important and places the emphasis on a secondary issue (how destroyed are these children?) In doing so, it represents yet another example of the re-victimisation of a certain group of members of society. By seeking to punish children who have been illegally included in armed groups or forces, we risk diminishing their already thin chances of ever finding their way back to a normal life. It causes their stigmatisation and further alienation from a society that has already let them down once: by not respecting its legal (and moral) obligations and ensuring that those children received the protection they were entitled by law.

7.4. Conclusion: Justifications for Thematic Prosecutions and Their Eventual Impact on Justice

Thematic prosecutions may be a positive step in the evolution of international criminal justice, but the meaning attributed to 'thematic' must be carefully reflected upon. In the case of *Prosecutor v. Lubanga*, a form of "thematicity" that risks limiting the over-all potential of international criminal justice was adopted. Crimes against children were prosecuted, while other equally serious crimes were left unpunished. Nevertheless, as this chapter has attempted to highlight, the exclusive prosecution of Lubanga for the crimes of recruiting and using children in armed conflict

[130] For an interesting article on this, see Anne-Marie de Brouwer, "Gacumbitsi Judgment", *supra* note 86.

did not represent a deliberate strategy of the OTP. Rather, the context in which the Lubanga investigation unfolded strongly influenced the case against him. Two arguments seem to have influenced the choice to try him solely for crimes against children. First, it is hard to deny that the overwhelming evidence of massive, and often brutal, child recruitment and the gravity of that crime played a role in selecting it for prosecution. Second, there was an important element related to the Court as such and its credibility. Failing to arrest the LRA members indicted in the situation of Uganda, Lubanga needed to be held accountable, even if that would mean prosecuting him for only a fraction of the crimes he may have been responsible for. Risking the disappearance of Lubanga and a possible subsequent failure to arrest him simply was not an option. In this sense, the principle of opportunity was used to its maximum. Although this may not represent an ideal prosecutorial strategy, the fact that it is a unique situation in the Court's developing case law thus far tells us that we should not be too hard on this relatively new and inexperienced institution.

Thematic investigation and prosecution for the crimes of recruiting and using children may increase the focus on children and the gravity of these crimes. This is a positive step towards the establishment of a strong deterrent power, which can contribute to the prevention of this practice. Nevertheless, if prosecuted exclusively, there is a risk of not showing the whole picture of abuses that children often fall victim to while associated with armed groups or forces. If the crimes are not properly contextualised, they risk not being properly understood and therefore not properly addressed by the Court.

Thematic prosecutions should only exceptionally imply that one or only a few crimes are prosecuted, with the remaining crimes granted impunity. In the interest of truth and justice, criminal proceedings should aim at reflecting the reality on the ground. This almost always means considering a range of serious crimes for prosecution. The "thematicity" should then lie not in the prosecution of some crimes to the exclusion of others but in the development of appropriate institutional capacities to address specific types of crimes properly. Sex crimes and crimes against children are both types of crimes that require a special knowledge and format to ensure that the goals of international criminal justice can be reached. Developing such capacities and efficiently prosecuting those crimes can reinforce the sense of importance accorded to them. This positive effect may spill over into the domestic legal systems of countries in

which international crimes take place, and ensure that victims of sex crimes and child recruitment are not subject to re-victimisation.

When faced with a situation in which a great number of the victims are survivors, special attention needs to be paid to the restorative potential of international criminal justice. The goal of restorative justice may in some cases justify the choice to prosecute sex crimes and crimes against children, and to invest the necessary resources in order to do so in a way that is sensitive to the particularities of those crimes. While crimes involving killings are universally recognised as crimes of the most serious nature, it seems important to work for an equal recognition of the gravity of sex crimes and crimes against children, which severely affect the future of an already war-torn society and its members. International criminal justice, with the ICC as a main actor, is perhaps the best forum to achieve this.

8

Looking Forward: The Prosecution of Sex Crimes in National Courts

Paloma Soria Montañez*

8.1. Introduction

Historically rape and other sexual offenses were considered violations of family honour or male honour. They were seen as private offenses and/or as collateral damages in conflict situations rather than as felonies, such as murder. Furthermore, depending on the context, gender crimes may lead to a breakdown or severe trauma not only for the victim, but for the whole community. Such an environment makes it more difficult for victims or witnesses to talk about these crimes. These and other reasons have contributed to a lack of investigation and prosecution of those felonies, including under international criminal law ('ICL'). As a consequence they are often committed with total impunity.[1]

Since the 1990s we have witnessed incredible efforts to increase awareness about gender crimes and to develop strategies to investigate

* **Paloma Soria Montañez** is staff attorney at Women's Link Worldwide's Madrid office specializing in human trafficking, migrant women's rights, intersectional discrimination and international gender crimes. She holds a law degree from the University of Málaga (Spain) and a Masters degree in International Solidarity Action in Europe from the Carlos III University in Madrid (Spain). She has given several lectures related to gender and international criminal law, human trafficking and intersectional discrimination, and authored various essays related to these issues. In 2009, she was a visiting attorney at the Center for Justice and Accountability in San Francisco, U.S., where she worked on integrating a gender perspective into the Center's litigation projects.

1 Kristen Boon, "Rape and forced pregnancy under the ICC Statute: Human dignity, Autonomy, and Consent", in *Columbia Human Rights Law Review*, 2001, vol. 32, pp. 627–628 (stating that despite the prohibition of rape and other acts of sexual violence as international crimes and their "extensive documentation", these crimes "were designated as moral crimes and outrages on honor, a classification that tended to focus on perceived violations of the victim's honor or dignity, rather than physical and mental trauma brought about by an assault").

and prosecute them in the international arena.[2] These efforts have led to the development of ground-breaking jurisprudence on gender crimes by the International Tribunals of the former Yugoslavia and Rwanda. These courts, for the first time, held individuals responsible for gender-based violence and sexual acts – leading to unique progress in the fight against impunity. International criminal tribunals investigated and prosecuted the crimes of rape as torture, rape as a crime against humanity, rape as genocide and rape as a war crime, as well as other gender-based crimes.[3] Furthermore, the prosecution of these crimes in both tribunals led to the inclusion of several gender crimes in the Rome Statute and the Statute of the Special Court of Sierra Leone. Such provisions opened the door to the investigation of these crimes by the International Criminal Court[4] and some international and hybrid courts, such as the Special Court of Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.[5]

---

2 Rhonda Copelon, "Gender crimes as war crimes: integrating crimes against women into international criminal law", in *McGill Law Journal*, 2000, vol. 46, no. 3, p. 219; Kelly D. Askin, "Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles", in *Berkeley Journal of International Law*, 2003, vol. 21, no. 2, p. 288.

3 For further acknowledgement in the development of the above mentioned jurisprudence, see Askin, 2003, *supra* note 2; Anne-Marie L. M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005, pp. 9–19; Angela M. Banks, "Sexual violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes", College of William and Mary Law School, 2005.

4 Dianne Luping, "Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court", in *Journal of Gender, Social Policy and The Law*, 2009, vol. 17, no. 2, p. 452 (stating "the impetus to effectively deal" with gender based crimes and advancements in the relevant law are reflected under the Rome Statute, the Rules of Procedure and Evidence of the Court, Elements of the Crimes, and the work of the Office of the Prosecutor of the International Criminal Court in this field).

5 The Statute of the Special Court of Sierra Leone includes the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as Crimes against Humanity under Art. 2(g). Several gender-based crimes were also included as violations of Art. 3 common to the Geneva Conventions and of Additional Protocol II under Art. 3(e). The Special Court has ruled in different decisions on the crime of rape as a Crime against Humanity. In *Prosecutor v. Issa Sesay, Morris Kallon and Augustine Gbao* ("RUF case"), the Trial Chamber set an important precedent condemning for the first time in an internationalized Court the crime of forced marriage as a crime against humanity. Special Court of Sierra Leone, *Prosecutor v.*

Importantly, alongside this rising awareness about sex crimes in the ICL field, we have also witnessed the development of International human rights Law as well as important jurisprudence from regional courts that enforce the obligation of States to investigate and prosecute these crimes.[6]

As such, we can affirm that States have the obligation to investigate and prosecute sex crimes that constitute genocide, crimes against humanity, war crimes, torture, or other international crimes. This is true for national courts undertaking this type of litigation where crimes that occurred within their own jurisdiction are being prosecuted, as well as for national courts investigating and prosecuting international crimes using the principle of universal jurisdiction.

It is also true that Article 1 of the Rome Statute affirms that the International Criminal Court's efforts are to be complementary to the work of national courts, which means that national jurisdictions have priority over international jurisdictions in the fight against impunity. For all of these reasons it is imperative that the international community now focus on national courts as the logical jurisdictions for prosecuting sex crimes. The international community must rise to the challenge of playing a

Issa Sesay, Morris Kallon and Augustine Gbao ("RUF case"), Judgment, 2 March 2009, paras. 1297, 1301, 1473, 1582. The Extraordinary Chambers in the Courts of Cambodia, created by the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, includes the crime of rape as Crime against Humanity under Art. 5. In 2009, the Extraordinary Chambers convicted in Case 001 the head of the Khmer Rouge for the offence of torture, including one instance of rape as crimes against humanity. *Case Kaing Guek Eav* ("Duch"), 001-18-07-2007-ECCC/TC; In Case 002, the Co-Investigating Justice determined that the defendants should be prosecuted for crimes against humanity, including rape. The rape charges stem from the arrangement of forced marriages and forced sexual relations, which are also charged as other inhumane acts.

6 Security Council Resolutions ('SCR') on Women, Peace and Security are examples of the commitment of the States to prevent, prosecute and condemn the commission of sex crimes in conflict situations. Thus, SCR 1325 (2000), 31 October 2000, in para. 11, "[…] emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls". Further, SCR's 1820 (2008), 19 June 2008, para. 4, and 1889 (2009), 5 October 2009, para. 3, stress the need to prosecute those responsible for crimes of rape and other forms of sexual violence which can constitute war crimes, crimes against humanity or constitutive acts with respect to genocide.

prominent role in fostering mechanisms to assist States to strength their capacities to combat impunity. Meanwhile States face the challenge of restoring confidence in the rule of law.

Some States are currently litigating human rights violations in national courts. This is an extremely important development in ICL as these national prosecutions open this arena for more investigations and prosecutions of international crimes, including gender crimes. On top of that, national courts do not have limited mandates, which allow more people to access justice and provide a unique opportunity to develop new jurisprudence in different countries that can contribute to the punishment of different human rights violations that occur in each context. The work of national courts also allows the prosecution of these crimes in States that have not ratified the Rome Statute, or do not accept the use of universal jurisdiction against them.

This chapter was presented during the Seminar "Thematic Investigation and Prosecution of International Sex Crimes", organized by the Forum for International Criminal and Humanitarian Law, Yale University and the University of Cape Town, which took place in Cape Town on 7–8 March 2011. At the seminar, we discuss the consideration of the selection and prioritization of investigation and prosecution of international gender crimes.

Taking all the above-mentioned factors into account this article will consider the thematic investigation and prosecution of international sex crimes in national courts from the point of view of a practitioner. In the first part of this article, I will present two case studies, Argentina and Guatemala, focusing on the prosecution of sex crimes in national courts in both countries. I will also discuss the option of prosecuting gender-based crimes under the universal jurisdiction principle in Spain. Finally, the article will present some proposals and ideas about thematic prosecutions in national courts with the intention of continuing the debate.

8.2. Prosecution of Sex Crimes in National Courts: Cases in Argentina and Guatemala

International courts have promoted and enabled the prosecution of gender crimes and developed important jurisprudence and guidelines regarding how to prosecute these crimes. More importantly, this has allowed for increasing awareness about the importance of considering gender when in-

vestigating human rights violations. Furthermore, international human rights law has reinforced the obligation of States to investigate and prosecute gender crimes. Now these efforts must be continued in national courts. Working with national courts will help to consolidate the efforts made in the international arena. It will lead to an increased awareness on the importance of including gender crimes, and it will foster new strategies and jurisprudence to investigate and prosecute sex crimes.

As part of my work as staff attorney at Women's Link Worldwide, an international organization working to promote gender equality in courts through the use of legal strategies, I have had the opportunity to develop and co-ordinate our work focused on International Gender Crimes. For a better understanding of the arguments I will present here, it is important to offer the definition that we use of international gender crimes. In situations of conflict, detention, or any other situations of imprisonment, men and women, girls and boys, may suffer sexual violence. When using the term sexual violence, including rape, we may consider how it was interpreted by the ICTY in the *Akayesu* case,

> [a]ny act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[7]

An analysis with a gender perspective of sexual violence requires the consideration of different forms of such violence, the aims with which that violence is used against men and women according to gender roles attributed to them in each context and society, and the person that perpetrates that violence, among other factors. Given all of this, when we talk about international gender crimes we are not referring to a new type of crime, but rather to the manner in which international crimes are interpreted with a gender perspective.

In our work focusing on international gender crimes, Women's Link aims to promote the investigation and prosecution of international gender crimes with a special focus on national courts litigating human rights violations. We also advocate for the consideration of the jurisprudence and legal strategies developed in international courts as examples and tools to promote the prosecution of gender crimes in national courts.

---

[7] International Criminal Tribunal of Rwanda, *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 688.

Our work has allowed us to participate in litigation for human rights violations in Argentina, Guatemala and Spain – in this last case through the use of the principle of universal jurisdiction. Based on our experience we can affirm that in most countries litigating human rights violations that occurred in a conflict situation, gender crimes are never or almost never investigated or tried. Yet the importance and interest in the consideration of these crimes is growing and finding its way onto the agenda of the human rights community in national contexts.

8.2.1. Case Study of Argentina: Undertaking the Prosecution of International Sex Crimes in National Courts

In the period from 1976 to 1983 an estimated 30,000 persons "disappeared" under the military dictatorship in Argentina in what is known as the "Dirty War". In 2005, more than 20 years after the end of State terrorism, the Supreme Court of Argentina definitively held that the amnesty laws, known as the '*obediencia debida*' and '*punto final*', were unconstitutional and therefore, null and void.[8] Today Argentina is one of the only countries in the world that is holding perpetrators of torture and crimes against humanity to account in its own judicial system, in large part due to the efforts of civil society.

As of December 2010, 820 people are being prosecuted, meaning that there is a court order opening a judicial process against a concrete individual. Another 212 people have been prosecuted, and of those 196 have been convicted and 21 acquitted.[9]

---

[8] On 24 August 2004, the Supreme Court of Argentina states in the case *Arancibia Clavel, Enrique* that crimes against humanity do not have a statute of limitations. After this decision, the Court stated in the case of *Simón, Julio Héctor* that amnesty laws were unconstitutional, and further denied the effect of any rules that could oppose the advance of processes or the prosecution and conviction of those responsible, or impede ongoing investigations. For detailed information on these processes and the actual prosecution of international crimes in Argentinean courts, see Mirna Goransky and María Luisa Piqué, "(The Lack of) Criteria for the Selection of Crimes Against Humanity Cases: The Case of Argentina", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 91–105.

[9] Unidad Fiscal de Coordinación y Seguimiento de las causas por violaciones a los Derechos Humanos cometidas durante el terrorismo de Estado, "Informe sobre el estado de las causas por violaciones a los derechos humanos cometidas durante el terrorismo de Estado", available at http://www.mpf.gov.ar/Accesos/DDHH/Docs/Estado_Causas

In 2009, Women's Link had the opportunity to travel to Argentina and meet with attorneys, prosecutors and judges that participate in human rights cases. We found a high interest in the consideration of gender crimes, but a lack of 'visibilization' and investigation of those crimes in existing litigation.

Nevertheless, in April 2010 the *Tribunal Oral en lo Criminal Federal de Santa Fé* (Federal Criminal Court of Santa Fe) issued the first decision for the crime of rape constituting torture as a crime against humanity.[10] Two months later, the *Tribunal Oral en lo Criminal Federal de Mar del Plata* (Federal Criminal Court of Mar del Plata) issued another decision, stating the rapes suffered by women in different detention centres in Argentina during the State terrorism were not isolated or occasional occurrences but systematic practices executed as part of the clandestine plan of repression and extermination, and thus constituted crimes against humanity.[11]

We began to work with some civil society organizations and with the Human Rights Unit of the Prosecutor's Office in Argentina to increase awareness about the occurrence of gender crimes, as well as the mechanisms available in international law for prosecuting them. One of the results of that joint work was the organization in August of 2010, together with the Center of Legal and Social Studies, and with the support of the Human Rights Unit, of the Seminar "International Criminal Law and Gender in the context of the process of justice for human rights violations

_Diciembre_2010.pdf, last accessed on 17 June 2011. With regard to statistics, it is worth noting data from a report analysing the sexual violence elements of the judgments from different international tribunals, with information through 9 March 2009, stated that of 75 completed cases prosecuted by the International Criminal Tribunal for the Former Yugoslavia, there were 24 in which judgments contain sexual violence findings and/or agreed facts. With regard to the International Criminal Tribunal of Rwanda, of 24 completed cases, there are 13 in which judgments contain sexual violence findings and/or agreed facts. Department of Peacekeeping Operations, United Nations, "Review of the sexual violence elements of the judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the light of Security Council Resolution 1820", pp. 29 and 46, available at http://www.icty.org/x/file/Outreach/sv_files/DPKO_report_sexual_violence.pdf, last accessed on 20 August 2011.

[10] Tribunal Oral en lo Criminal Federal de Santa Fé, *Barcos, Horacio Américo*, case no. 43/08, Judgment, 19 April 2010, p. 99.

[11] Tribunal Oral en lo Criminal Federal de Mar del Plata, *Molina, Gregorio Rafael*, case no. 2086, Judgment, July 2010, pp. 19–20.

committed during the military dictatorship in Argentina". Federal judges, prosecutors and attorneys from different regions of the country attended this Seminar that had an important impact both in legal circles and in the media. Since then Argentinean Courts have continued issuing more decisions condemning the crimes of rape as torture and rape as a crime against humanity.[12]

We continue to work together with the Human Rights Unit and with the Center of Legal and Social Studies, to support the prosecution of gender crimes. One of our collaborations was the creation of a memorandum about the crime of forced abortion, a crime that has never been investigated by international courts.[13]

8.2.2. Case Study of Guatemala: from the *Comisión de Esclarecimiento Histórico* to the Prosecution of International Crimes

From 1960 to 1996 Guatemala suffered an internal armed conflict that led to the killing, torture and other human rights violations of thousands of people, primarily indigenous Mayans, amounting to genocide. With the signing of the Peace Agreements in 1996, Guatemala established the *Comisión de Esclarecimiento Histórico* (Commission for Historical Clarification) sponsored by the United Nations, with the objectives of investigating the facts and human rights violations that took place during the armed conflict, issuing a report, and making recommendations to promote "peace and national harmony in Guatemala".[14] The Commission, while investigating human rights violations, had the opportunity to document

[12] Juzgado Federal no. 1 de Miguel de Tucumán, *Arsenales, Miguel de Azcuénaga CCD*, case no. 443/84, Judgment, 27 December 2010, pp. 171–178; Tribunal Oral en lo Criminal Federal no. 2 de la Ciudad Autónoma de Buenos Aires, *Miara, Samuel y otros*, case no. 1668 and *Tepedino, Carlos Alberto Roque y otros*, case no. 1673, Judgment, 22 March 2011, pp. 858–869; Juzgado Federal no. 1 de Miguel de Tucumán, *Fernandez Juarez, María Lilia y Herrera, Gustavo Enrique*, case no. 133/05, Judgment, 19 May 2011, pp. 53–68.

[13] For further information on our work, see Women's Link Worldwide, http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&dc=21, last accessed on 25 March 2012.

[14] "Guatemala: Memoria del silencio", available at the American Association for the Advancement of Science, http://shr.aaas.org/guatemala/ceh/ mds/spanish/toc.html, last accessed on 25 March 2012.

many facts of gender violence during the conflict. In the final report one of the chapters focused on sexual violence against women.

Some human rights violations committed during the internal armed conflict have been denounced in the Inter-American System. The Inter-American Court of Human Rights has condemned the State of Guatemala in different cases. In a decision issued on 27 January 2009 in the cases of Myrna Mark Chang, Maritza Urrutia, Masacre Plan de Sánchez, Molina Theissen and Tiu Tojín, all related to human rights violations that occurred during the internal armed conflict, the Court reaffirmed the State's obligation to investigate and put an end to the impunity and found that Guatemala still had not satisfied its obligations.[15]

In addition to the regional cases, a few proceedings are taking place in national courts denouncing the crimes committed. Landmark decisions include the 2009 conviction of Felipe Cusanero Coj for the crime of forced disappearance committed against six people, and the 2011 decision convicting four military officers for the crime of genocide involving the massacre in Las Dos Erres. In this last decision the Court considered that the gender violence committed against women during the massacre caused grave pain and suffering for the victims to this day.

At the moment, some non-governmental organizations litigating before national courts are considering the inclusion of the investigation and prosecution of sex crimes in genocide cases. To this end, Women's Link has filed an expert report in the case against Héctor Mario López Fuentes, recently detained and awaiting trial in Guatemala.

8.2.3. Investigation and Prosecution of Sex Crimes Under the Principle of Universal Jurisdiction: Litigation in Spain

States are historically reluctant to prosecute international crimes in national courts and to prosecute their own nationals. This is the reason why, together with international and hybrid courts, some States use the principle of universal jurisdiction to develop a national legal and institutional capacity to investigate and prosecute international crimes committed by foreign citizens in foreign countries in their national courts.[16] Under the

[15] Inter-american Court of Human Rights, *Bámaca Velásquez v. Guatemala*, Monitoring compliance of provisional measures, Judgment 27 January 2009, para. 23.

[16] Morten Bergsmo, "The Theme of Selection and Prioritization Criteria and Why it is Relevant", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core In-*

principle of universal jurisdiction, any State is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime or the nationality of the author or of the victim.[17]

On 25 January 2008, Women's Link filed the first complaint denouncing a gender-based crime under the principle of universal jurisdiction in the Spanish National Court.[18] The Spanish National Court is the tribunal in Spain that has jurisdiction to investigate and try international crimes that occurred outside of Spain. The complaint denounced the crime of rape as torture at the hands of state agents suffered by a Spanish citizen in San Salvador Atenco, México, in 2006. It is known as the 'Atenco case'.[19]

Currently continuing our work with universal jurisdiction cases in Spain, Women's Link is leading a legal strategy to make further progress in the investigation and prosecution of sex crimes in the Guatemala case that is being investigated by Judge Pedraz at the Spanish National Court for the crimes of genocide, torture and terrorism.[20] Last June, Women's Link filed, for the first time in a universal jurisdiction case pending before the Spanish National Court, an amended complaint in the Guatemala case asking for the investigation and prosecution of gender crimes that took place in Guatemala during the conflict, specifically the crime of rape as torture, and the acts of rape, measures intended to prevent births within

ternational Crimes Cases, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 7–8, *supra* note 8.

17 Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2008, p. 338.

18 Until very recently, the law regulating Universal Jurisdiction in Spain was one of the most progressive in the world, allowing a very wide interpretation of the concept of universal jurisdiction. Many cases were filed at the Spanish National Court, beginning in 1998. The most well-known was the arrest of General Pinochet ordered by Judge Baltasar Garzón. In 2005, the Constitutional Court in Spain interpreted the national law on Universal Jurisdiction to be "absolute" and thus not requiring any link to Spain in order to file at the Court in that country. There are currently cases before the Spanish National Court regarding Guatemala, Rwanda, Tibet, Israel, El Salvador, and more. Despite all of these prosecutions, before we filed the Atenco complaint, a gender crime had never been brought before this court.

19 For further information about the case, see Women's Link Worldwide, http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_caso&dc=20&lang=en, last accessed on 17 June 2011.

20 The present project is being implemented together with the organization Center for Justice and Accountability.

the group, and forced displacement as genocide. Furthermore, and also for the first time before the National Court, two expert witnesses testified about gender crimes.[21]

In July 2011, Judge Pedraz issued a historic resolution asking for the prosecution of gender crimes as genocide in order to satisfactorily perform the tribunal's duty to investigate, prosecute and punish international crimes. The Judge also stated that the facts regarding the gender crimes included in the amended complaint are now integrated into the general facts relating to the crimes of genocide, but nevertheless, it is necessary to charge them as their own crimes so that they do not remain unpunished.[22]

8.2.4. Thematic Investigation and Prosecution of Sex Crimes in National Courts: Some Thoughts to Continue the Debate

As mentioned at the beginning of this article, States have a responsibility to prevent, investigate and prosecute perpetrators of international crimes. This mandate includes the prevention, investigation and prosecution of sex crimes, meaning that courts must take into account what happened both to men and women during a particular conflict, how violence was executed in a different way taking into account the role of men and women in the context and society where the crimes occurred, and never assuming that sex crimes or gender crimes only happen to women.

An overview of the situation in national courts shows us that sex crimes are almost never investigated under ICL, although increasingly there are these sorts of initiatives. The work in Argentina, Guatemala and Spain allow us to make some observations regarding the thematic investigation and prosecution of international sex crimes in national courts.

The first consideration we must take into account is that the lack of efforts to include sex crimes in existing human rights trials is a missed opportunity. As we all know, the investigation and prosecution of human

[21] Patricia Viseur Sellers testified about States' responsibility to prosecute gender crimes under international legal norms and according to the relevant international jurisprudence; and María Eugenia Solís, Guatemalan lawyer expert on gender violence, bore witness to the concrete phenomena of gender violence against Mayan women during the armed conflict in Guatemala.

[22] Audiencia Nacional de España, Auto Diligencias Previas 331/1999, Juzgado de Instrucción Nº 1, 26 July 2011, available at Women's Link Worldwide, http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_proyectos&tp=proyectos&dc=22, last accessed on 23 March 2012.

rights violations requires huge effort, resources, trained judges, prosecutors and attorneys, and viable jurisdictions. Once all these factors are in place allowing for such prosecutions, to exclude gender crimes is, without a doubt, a lost chance.

Taking into account the material and human resources that must be invested in the litigation of human rights violations, we must consider if thematic prosecutions make sense in the context of national courts. Instigating a thematic prosecution in a national court would mean that the investigation and prosecution of other serious crimes may be set aside. Furthermore, in order to justify the legal strategy of thematic prosecution, it would be necessary to be able to explain why some crimes are considered more serious than others. While it is true that in some conflicts there may be evidence that one crime has been committed more commonly that others, it is not productive to rate human rights violations. Thus justifying investigating some crimes and not others may prove to be highly controversial, including amongst civil society.

Importantly, integrated prosecution of gender crimes can help raise public awareness not only regarding sex crimes under international law, but about gender violence in general. Thus, it is desirable that gender crimes be prosecuted at the same time as all other crimes, so that the investigation of these crimes become an integral part of the prosecution of human rights violations in general.

One way to ensure integrated prosecution would be to have gender advisors in each tribunal or prosecutor's office. Gender advisors would allow for the secure compilation of evidence and the development of gender inclusive policies, protocols or practices. It would also permit the appropriate consideration of the facts in each context, helping to determine correctly what crimes should be treated as genocide, crimes against humanity, torture or war crimes. On top of this, special measures relating to security and protection would apply for victims and witnesses of these crimes. It would also help to expand the kind of evidence that could be admitted and considered to prove these crimes and the implementation of best practices with regard to the evaluation of the evidence in gender crimes in general.

An alternative option for the effective mainstreaming of gender crimes is to have trained prosecutors and judges, so that the abovementioned skills can be developed and implemented by the members of the tribunal or the prosecutor's office. Also, it is important that practition-

ers have knowledge regarding gender roles in a given context in order to adequately charge crimes.

Another important consideration is the impact of including gender crimes in all national reparations processes. If sex crimes are not included in the prosecution of international crimes, it is impossible for reparations to be for all of the victims, since the specific crimes targeting women and men based on gender would be left out of the reparation process.

In conclusion, we can affirm that the investigation and prosecution of international sex crimes is an increasing reality today. The ideas outlined here must be analysed in context, attending to the needs of every country litigating human rights violations. The most important point is that once a country assumes the challenge of prosecuting those who have committed international crimes, gender crimes must be considered so as to combat the culture of impunity and seek justice and reparations for all of society.

9

Contextualising Sexual Violence in the Prosecution of International Crimes

Valerie Oosterveld*

Sexual violence taking place during conflict or mass atrocities is usually part of a wider picture of complex victimization. Rape, sexual slavery, sexual mutilation, and other similar acts are often accompanied by, or intersect with, other prohibited acts. For example, sexual violence crimes may have occurred alongside or be used to facilitate the crime against humanity of murder, enslavement, torture or persecution. Further, seemingly gender-neutral prohibited acts may have been carried out in gender-specific ways or may have gendered outcomes. For these reasons, conscious contextualization of sexual violence within international criminal prosecutions is crucial: by pursuing investigations and prosecutions in which sexual violence is explored within the context of other genocidal acts, crimes against humanity or war crimes, both the serious nature of sexual violence and the potentially gendered nature of other crimes can be highlighted and understood.

This chapter explores the value of pursuing the prosecution of sexual violence within the context of related charges of genocide, crimes against humanity or war crimes. It begins by arguing that there may be specific factual circumstances in which exclusive, or nearly exclusive, prosecutorial focus on sexual violence charges may be valuable. However, generally, sexual violence charges should be situated within a narrative explaining the multitude of violations in a given atrocity scenario. This approach is more reflective of the realities of those who suffered the sexual violence crimes: they are not only, for instance, survivors of rape, but

* **Valerie Oosterveld** is a law professor at the University of Western Ontario. She served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade, was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly States Parties. She teaches International Criminal Law, International Human Rights Law, International Organizations and Public International Law. She specializes on gender issues within international criminal justice.

also usually simultaneous victims of other serious acts such as pillage, cruel treatment or enslavement. Each violation has a place within the narrative. A comprehensive understanding of the violations helps to explain the depth of harm caused to the victims and, in turn, can and should inform sentencing. This chapter then turns to an exploration of two recent positive examples, within international and internationalized tribunals, of nuanced contextualization of sexual violence crimes. It concludes by discussing the need for heightened gender competence and gender expertise within all offices, whether international or domestic, focused on the investigation and prosecution of genocide, crimes against humanity and war crimes, as well as among counsel for victims and within judiciaries.

9.1. Prosecution and Contextualization of Sexual Violence Crimes

When faced with a multitude of violations of international criminal law, there are a number of interrelated reasons for selecting acts of sexual violence for prosecution. First, these acts are serious violations of physical and/or psychological integrity and are therefore similar in harm and effect to other prohibited acts of genocide, crimes against humanity, and war crimes involving grave personal injury.[1] Prosecuting them assists in exposing the depth of harm to victims, their families and their communities.[2] Second, historically, sexual violence offences directed against girls and women were ignored, mislabeled as an inevitable consequence of war, or deemed as less important than other forms of violence.[3] Sexual violence directed against men and boys was similarly silenced.[4] More recently, these views of sexual violence have been demonstrated to be not only the result of discriminatory and incorrect assumptions, but also harmful to the

1 ICTR, *Prosecutor v. Emmanuel Rukundo*, Judgment (Judge Pocar's Partially Dissenting Opinion), 20 October 2010, paras. 4, 9.

2 On harms to families and communities, see Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay et al.*, Judgment, 2 March 2009, para. 1349. On emotional harms to victims, harms to the victim's home and personal spaces, harms to the victim's children and to those to whom female victims are intimately connected, 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, p. 426.

3 Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff Publishers, The Hague, 1997, p. 377.

4 Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict", in *European Journal of International Law*, 2007, vol. 18, no. 2, pp. 255–256.

discovery of the truth of what actually happened in any given conflict or atrocity scenario.[5] In other words, the discrimination inherent in the perpetration of acts of sexual violence was compounded by discriminatory lack of recognition of these acts within international and domestic criminal prosecutions. Thus, the prosecution of sexual violence crimes today demonstrates a break with these past mistakes and therefore a break in this discriminatory chain. Prosecution publicly 'surfaces'[6] sexual violence and its harm and denotes how conflict has gender-specific impacts upon individuals, communities and nations.[7]

The third justification for the prosecution of sexual violence crimes occurring within genocide, war, or other situations of atrocity is explored by Margaret deGuzman in this volume: there is an important expressive function inherent in the prosecution of sexual violence crimes. The prosecution of sexual violence crimes serves to express to the international community generally that these acts are illegal and those who committed or permitted them are to be held accountable and condemned.[8] As Doris Buss explains:

> In international criminal prosecutions, rape and other forms of sexual harm are identified *as harms*, they are prosecuted *as crimes*, and they result in punishment through years of incarceration for those found guilty.[9]

Critically, prosecution of these acts also illustrates to the victims and their communities that their suffering was the result of illegal activity.[10] This naming is an important step in the dismantling of discriminatory stereotypes – and stigma – that surround raped women, girls, men, and

---

5 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, Manchester, 2000, pp. 251–252, 328, 334. See also Kelly D. Askin, "The Jurisprudence of the International War Crimes Tribunals: Securing Gender Justice for Some Survivors", in Helen Durham and Tracey Gurd (eds.), *Listening to the Silences: Women and War*, Martinus Nijhoff Publishers, New York, 2005, pp. 126, 152–153.

6 This important notion of "surfacing" gender-based violence in conflict was introduced by Rhonda Copelon in "Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law", in *Hastings Women's Law Journal*, 1994, vol. 5, pp. 243–265.

7 Doris Buss, "Performing Legal Order: Some Feminist Thoughts on International Criminal Law", in *International Criminal Law Review*, 2011, vol. 11, p. 412.

8 Buss describes this as "social meanings communicated and interpreted through legal processes". *Ibid.*, p. 411.

9 *Ibid.*, p. 414.

10 Buss notes that this may also be seen as "political recognition". *Ibid.*, p. 414.

boys in many societies.[11] Fair and accurate labeling of crimes is one of the underlying goals of international criminal law,[12] and this labeling must include the public labeling of sexual violence crimes.

These justifications can support the choice of prosecuting sexual violence crimes among charges for other acts or on their own. There are very strong justifications for the prosecution, in a contextual manner, of sexual violence crimes among charges for other acts. Thus, this choice will be explored first. One reason for choosing to prosecute sexual violence crimes among other charges is that individuals who suffer sexual violence crimes often also suffer other forms of violation. These other forms of harm may have facilitated the carrying out of the sexual violence (for example, illegal detention), may have accompanied the sexual violence (for example, torture or murder), may have surrounded the sexual violence (for example, sexual violence occurring amidst pillage), or may have preceded or followed the sexual violence.

Second, sexual violence crimes may have been just one aspect of the larger gendered nature or outcomes of a particular episode in a conflict or mass violation. When determining or telling the story of a particular episode in a conflict or mass atrocity and the role of the accused in that episode, it is important to be aware of the intersection of gender, rather than just sexual violence, with that scenario. Gender is a complex and multilayered concept, involving socially-constructed ideas of 'maleness' and 'femaleness' that can vary across cultures and over time.[13] If investi-

---

[11] This stigma was described by the Special Court for Sierra Leone in *Prosecutor v. Issa Hassan Sesay et al.,* para. 1349, *supra* note 2.

[12] Darryl Robinson, "The Identity Crisis of International Criminal Law", in *Leiden Journal of International Law*, 2008, vol. 21, p. 942.

[13] See United Nations Entity for Gender Equality and the Empowerment of Women, "Gender Mainstreaming: Concepts and Definitions", available at http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm, last accessed on 14 October 2011, which defines the term 'gender' as:

> […] the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and valued in a women or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned,

gators and prosecutors are sensitive to how assumptions about gender underlie the choice of crime or explain targeting, then they will better understand both the role of sexual violence crimes and the role of seemingly gender-neutral crimes within a conflict or mass violation. For example, men and boys may be targeted for certain forms of violence for reasons related either to overarching assumptions about 'maleness' – for example, an assumption by the perpetrators that all males are inclined to pick up weapons and fight if given the opportunity – and/or assumptions about how the means of targeting will affect the victims and be received by males and females in the victims' communities. Similarly, women and girls are also targeted on the basis of assumptions about 'femaleness', usually related to the subordinate position of women and girls, and/or because of how such victimization will be received in the victims' communities.[14]

Some examples might be helpful here. In some cases before the International Criminal Tribunal for Rwanda ('ICTR'), the evidence demonstrated that men and boys were killed in different ways than women and girls, with men being targeted for direct machete attacks and women and girls for rape or sexual mutilation leading to death.[15] In the International Criminal Tribunal for the former Yugoslavia ('ICTY'), some cases illustrate different treatment for detained men and women,[16] or different acts

> activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.

[14] Ní Aoláin, Haynes and Cahn, 2011, p. 429, *supra* note 2:

> […] the horrors that many women experienced during conflict are augmented by the insight that their cultural and social mores were as much the target of sexual violation as their physical bodies. Men do not generally experience systematic sexual violation in this way, and the cultural constructs of harm to men's bodies have differing social meanings in the theatre of war. Not only do combatants target a women's body but, equally, in the fray is the body politic she represents.

[15] See, for example, ICTR, *Prosecutor v. Théoneste Bagosora et al*., Transcript, 3 February 2004, pp. 51–52 (Examination-in-Chief of Major Brent Beardsley).

[16] For example, in the Čelebići prison camp in Bosnia and Herzegovina, male and female detainees were mistreated and sometimes that mistreatment took gender-specific forms such as rape of women and suffocation of men: ICTY, *Prosecutor v. Zdravko Mucić et al*., Judgment, 16 November 1998, paras. 936–937, 957–962, 970–977.

being directed against men and against women in order to eliminate a cultural community.[17] That said, different outcomes are not necessary for the identification of the gendered nature of crimes. The exploration of forced marriage by the Extraordinary Chambers in the Courts of Cambodia is a good example. The Khmer Rouge believed that marriage was a necessary precursor to procreation and thus forced individuals to marry in order to increase the population of ideal citizens.[18] The negative effects experienced by both male and female victims of this act were sometimes gender-differentiated, but often were similar.[19] And yet the act of forced marriage is a gendered act because it is based on societal norms of 'femaleness' and 'maleness'.

Third, harms are connected.[20] Therefore, the victim of sexual violence is often also a victim of a number of other violations, and she or he often feels that all of these wrongs should be addressed in some manner.[21] The victim's subjective experiences are multifaceted: harms are not easily divided into pieces that can be measured independently.[22] Prosecutions in

[17] For example, in Eastern Bosnia, able-bodied Bosnian Muslim men and boys between the ages of 15 and 65 were targeted for death, while Muslim women and girls, as well as young Muslim boys and senior males, were targeted for forcible transfer away from their homes. This differential treatment had profound implications, both for those murdered and for the survivors: ICTY, *Prosecutor v. Vujadin Popović et al*., Judgment, 10 June 2010, paras. 779, 841, 844, 846–847, 856–862, 883–886.

[18] Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith* (Case 002), Closing Order, 15 September 2011, paras. 216–220, 1442–1447.

[19] *Ibid.*

[20] Ní Aoláin, Haynes and Cahn, 2011, p. 426, *supra* note 2.

[21] *Ibid*., pp. 430–432, 442.

[22] This was the experience of female victims and witnesses of sexual violence in the Special Court for Sierra Leone's trial in *Prosecutor v. Moinina Fofana and Allieu Kondewa* (commonly referred to as the Civil Defence Forces case). As a result of a series of questionable motions decisions by the majority judges, these victim-witnesses were asked to bifurcate their evidence into non-sexual violence and sexual violence evidence, with the latter evidence excluded from the proceedings. These women suffered psychological distress as a result of being unable to describe the full nature of the harms done to them; See Michelle Staggs Kelsall and Shanee Stepakoff, "'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone", in *International Journal of Transitional Justice*, 2007, vol. 1, pp. 355–374. It is also crucial to note here that not all of the wrongs experienced by victims may qualify as international crimes; addressing the totality of harms therefore

international criminal tribunals have, for the most part, been broadly contextual insofar as they have tended to focus on a representative sampling of serious violations[23] in a particular geographic area within a specific time period.[24] However, these prosecutions have not always placed the sexual violence crimes in nuanced context (when sexual violence has actually been reflected in indictments or arrest warrants)[25] by examining the interrelationships between the sexual violence and the other violations, nor have they always explored how the harms caused by sexual violence can be compounded by other violations, and *vice versa*.

It is important to note that nuanced contextualization as advocated in this chapter, while providing definite advantages in explaining the gendered nature of violations and better telling the victims' stories, has its inherent limits. Feminist theory highlights that violence against women and girls happens in a larger social and global context underpinned by gender, and other, inequality.[26] The individualized international criminal trial tends not to address this overarching context.[27] This means that the role of such discrimination in creating the room for sexual violence during conflict is largely left unexplored. Thus individualized international criminal justice "can also dangerously distract international attention from the large-scale, systemic failures that underpin conflict".[28] In addition, some

requires multifaceted responses beyond the criminal trial: Ní Aoláin, Haynes and Cahn, 2011, p. 426, *supra* note 2.

23 This is reflected by the use of gravity criteria by the ICC Office of the Prosecutor. See Paul Seils, "The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 72.

24 On the use of geographic sampling by the ICTR, see Alex Obote-Odora, "Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 59–60.

25 Sexual violence has not always been charged even when it forms an important part of the context, or it has been charged but the charges have not been (effectively) pursued: Ní Aoláin, Haynes and Cahn, 2011, pp. 437–440, *supra* note 2. See also Beth Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, pp. 375, 381–382.

26 Charlesworth and Chinkin, 2000, pp. 4, 12–14, *supra* note 5.

27 Buss, 2011, p. 416, *supra* note 7.

28 *Ibid*., p. 419.

of the violations suffered by victims may not qualify as international crimes, and yet may be felt just as keenly by those victims. While harms to the body may be recognized as crimes, "emotional harms, harms to the home and personal spaces, harms to children and to those with whom women are intimately connected" may not be.[29] Addressing the entirety of the harms therefore requires multifaceted responses beyond the criminal trial.[30]

Having made the argument for a nuanced contextualization of sexual violence charges, there are times when a particular prosecution may usefully focus exclusively, or nearly exclusively, on sexual violence. To date, such thematic prosecutions have been relatively rare.[31] Of the concluded proceedings for 126 accused,[32] the ICTY has focused only two trials exclusively on acts of sexual and gender-based violence.[33] At the International Criminal Court ('ICC'), two cases focus predominately on crimes of sexual and gender-based violence.[34] The experiences of the ICC and ICTY to date illustrate that a sexual violence-specific thematic prosecution may make sense in certain factual circumstances: for example, when the aspect of the conflict being investigated demonstrates that a representative sample of the most serious crimes will naturally focus on a range of sexual violence crimes; where the best evidence for a particular accused bearing the greatest responsibility is focused on sexual violence; or where there are a number of prosecutions focused on a particular attack or geographic time period and these prosecutions are chosen to highlight a diversity of experiences, including those of sexual violence.

In sum, while there are times when a prosecution focused largely or exclusively on sexual violence is useful or necessary, at other times it is helpful to integrate sexual violence charges among charges for other vio-

29 Ní Aoláin, Haynes and Cahn, 2011, p. 426, *supra* note 2.

30 *Ibid.*

31 It may therefore be premature to analyze the merits or demerits of sexual violence-only prosecutions.

32 ICTY, "Key Figures", available at http://www.icty.org/sections/TheCases/KeyFigures, last accessed on 27 September 2011.

33 ICTY, *Prosecutor v. Anto Furundžija*, Judgment, 21 July 2000 and 10 December 1998; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragolub Kunarac et al*., Judgment, 12 June 2002 and 22 February 2001.

34 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Warrant of Arrest, 23 March 2008, para. 21; ICC, *Prosecutor v. Callixte Mbarushimana*, Warrant of Arrest, 28 September 2010, paras. 7(iii), 10(vii), 10 (viii).

lations occurring in the same attack or geographical area, in order to place the sexual violence crimes and, indeed, all of the violations, in context, to best explain the cumulative harms faced by victims.

9.2. Contextualization of Sexual Violence Crimes: A Method

Contextualization of sexual violence crimes helps to explain the serious nature of sexual violence and the potentially gendered nature of other crimes. Such contextualization makes sense, given the practice often followed within international criminal tribunals of prosecuting a representative sample of serious incidents. For example, the ICC's Office of the Prosecutor has indicated that its goal is "to provide a sample that reflects the gravest incidents and the main types of victimization" in selecting incidents for trial.[35] As established above, sexual violence is serious and is often present alongside other forms of victimization. It therefore follows that sexual violence crimes should be included in the sample of grave incidents in a given crime scenario, such as an attack on civilians.

Contextualization is important and necessary, but there are not many good examples to date of nuanced contextualization within international criminal law. One exception can be found in the ICC's *Mbarushimana* indictment. Callixte Mbarushimana is alleged to have been a very senior member of the Forces Démocratiques pour la Libération du Rwanda, "the most recent incarnation of Rwandan rebel groups established by former *génocidaires* who fled Rwanda after the 1994 genocide", and therefore accused of contributing to the implementation of a common plan to carry out the group's atrocities.[36] The group is accused of carrying out a series of attacks in the Kivu provinces of the Democratic Republic of the Congo in 2009 involving murders, rapes, gender-based persecution, torture, other inhumane acts, inhuman treatment, and destruction of prop-

[35] ICC, Office of the Prosecutor, "Prosecutorial Strategy 2009–2012", para. 20, available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf, last accessed on 15 October 2011.

[36] ICC, Office of the Prosecutor, Press Release, "New ICC Arrest: Leader of Movement Involved in Massive Rapes in the DRC is Apprehended in Paris", 11 October 2010, available at http://appablog.wordpress.com/2010/10/11/new-icc-arrest-leader-of-movement-involved-in-massive-rapes-in-the-drc-is-apprehended-in-paris/, last accessed on 15 October 2011.

erty.[37] The Prosecutor has placed the sexual violence crimes – rape, sexual torture and sexual mutilation – within the context of other acts, showing how they are interlinked.[38] At the same time, he also intends to demonstrate the role of mass sexual violence in the group's strategic aims to gain political power.[39] In other words, he plans to look at sexual violence up close, through witness testimony of specific acts, and from afar, by examining the effect of sexual violence crimes in subjugating the civilian population.

Another helpful example of contextualization can be found in the judgment of the Trial Chamber of the Special Court for Sierra Leone in *Prosecutor v. Sesay and Others*.[40] In that judgment, the judges examined the evidence of sexual violence and concluded that this violence was "not intended merely for personal satisfaction or a means of sexual gratification for the fighter".[41] Rather, the Revolutionary United Front adopted a "calculated and concerted pattern […] to use sexual violence as a weapon of terror" against civilians, resulting in an "atmosphere in which violence, oppression and lawlessness prevailed".[42] The Revolutionary United Front used "perverse methods of sexual violence against women and men of all ages", including "brutal gang rapes, the insertion of various objects into victims' genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees".[43] These methods also involved the routine capture and abduction of women and girls, who were then forced into prolonged exclusive conjugal relationships with rebels as so-called "wives".[44] The Trial Chamber further argued,

> [T]he savage nature [of the sexual violence] demonstrates that these acts were committed with the specific intent of spreading fear amongst the civilian population as a whole, in order to break the will of the population and ensure their submission to AFRC/RUF control.[45]

---

37 *Prosecutor v. Callixte Mbarushimana*, paras. 2, 7, 10, *supra* note 34.

38 ICC, *Prosecutor v. Callixte Mbarushimana,* Transcript, 19 September 2011, pp. 17–18, 22, 25.

39 ICC, Office of the Prosecutor, 2010, *supra* note 36.

40 *Prosecutor v. Issa Hassan Sesay et al*., *supra* note 2.

41 *Ibid*., at para. 1348.

42 *Ibid.*, at para. 1347.

43 *Ibid.*, (footnotes in original not included).

44 *Ibid.*, para. 1351.

45 *Ibid.*, para. 1348.

Combined with other forms of violence by the Revolutionary United Front, the sexual violence "effectively disempowered the civilian population and had a direct effect of instilling fear on entire communities".[46] The Revolutionary United Front relied on the cascading effect of their sexual and non-sexual violations: their crimes not only "abused, debased and isolated the individual victim", but also demonstrated that the male members of the civilian community "were unable to protect their own wives, daughters, mothers and sisters", and "deliberately destroyed the existing family nucleus" by relying upon the societal stigma associated with sexual violence to ensure that "[v]ictims of sexual violence were ostracized, husbands left their wives, and daughters and young girls were unable to marry within their community".[47] In turn, these effects undermined "the cultural values and relationships which held the [Sierra Leonean] societies together".[48] The Trial Chamber concluded that "rape, sexual slavery, 'forced marriages' and outrages upon personal dignity, when committed against a civilian population with the specific intent to terrorise, amount to acts of terror".[49]

Through this reasoning, the Trial Chamber placed the sexual violence in context by examining: who were the targeted victims (largely civilian women and girls, but also men and boys)[50]; what other acts often took place alongside the sexual violence; how these victims were affected by the sexual violence and how that victimization was compounded by pre-existing societal discrimination; how the experience of these victims was also compounded by other violations; and how the perpetrators relied on the compounding effects of sexual violence combined with other violence and discrimination. In order to do this, the Trial Chamber had to look at sexual violence up close, by examining witness testimony of specific acts, and from afar, by examining the terrorizing effect of those crimes on the entire civilian population. By looking closely at individual

[46] *Ibid.* See also para. 1351, which refers to the pattern of sexual enslavement as a "deliberate system intended to spread terror".

[47] *Ibid.*, paras. 1349–1350. See also the reference in para. 1349 to the Revolutionary United Front's "calculated consequences" of sexual violence.

[48] *Ibid.*, para. 1349.

[49] *Ibid.*, para. 1352. This holding was upheld by the Appeals Chamber: Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay et al.*, Judgment, 26 October 2009, para. 990.

[50] *Prosecutor v. Issa Hassan Sesay et al*., paras. 1207–1208, 1304–1305 (on the sexual mutilation of male genitals and forced sex by male civilians), *supra* note 2.

acts and looking more widely at patterns and overarching effects, the actual role and consequences of gender-based violence were more deeply explained than if only the individual acts were examined.[51]

There may be a concern that contextualization of sexual violence crimes could result in trivializing or otherwise losing sight of them among the other violations. However, the type of nuanced and gender-sensitive contextualization advocated in this chapter is meant to avoid such a scenario. If good contextualization practices are followed, then the correct questions are asked and answered by investigators, prosecutors, victims counsel and judges to not only reveal the sexual violence crimes, but also the connection between these crimes and the other indicted violations, as well as the cumulative harm.

9.3. Enhanced Gender Competence and Gender Expertise

The type of gender-sensitive contextualization advocated in this chapter has rarely been achieved within international and internationalized tribunals. Simply investigating and including sexual violence charges in an indictment is not enough. Bringing evidence of sexual violence is also not enough. A clear example of this unfortunately occurred in the appeals judgment of the ICTR in *Prosecutor v. Emmanuel Rukundo*. In that judgment, it appears that the majority judges failed to understand a particular sexual assault in context and ended up relying on a regressive, decontextualized characterization of the sexual violence. Rukundo, an ordained priest and military chaplain for the Rwandan Armed Forces, had been convicted at trial of committing genocide by causing serious mental harm to a young Tutsi woman when he sexually assaulted her in May 1994 at a seminary in Gitarama Prefecture.[52] The victim had testified that, when he arrived at the seminary, she had asked Rukundo to hide her in his room as she feared for her life.[53] He told that he could not help her as her entire family had to be killed.[54] She helped him carry some items to his room, in the hope that he would change his mind. Once in the room, he locked the

[51] Valerie Oosterveld, "The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments", in *Cornell International Law Journal*, 2011, vol. 44, no. 1, p. 70.

[52] *Prosecutor v. Emmanuel Rukundo,* 2010, para. 227, *supra* note 1. See also ICTR, *Prosecutor v. Emmanuel Rukundo,* Judgement, 27 February 2009, paras. 4, 574–576.

[53] *Ibid.*, paras. 373, 384.

[54] *Ibid.*, para. 373.

door, placed his pistol on the table, forced the victim onto his bed, opened the zipper to his trousers, and tried to spread her legs and have sexual intercourse. She resisted and instead he rubbed himself against her until he ejaculated. She testified that she felt that she could not escape because he had physically pinned her down and because he was "in a position of authority and had a gun".[55] A majority of the Trial Chamber interpreted this evidence in light of the "highly charged, oppressive and other circumstances surrounding the sexual assault", especially the context of mass violence directed against Tutsis in the area and the specifics of Rukundo's words prior to the assault, and entered a conviction.[56]

A majority of the Appeals Chamber overturned this conviction, finding the "general context of mass violence" against Tutsis to be irrelevant to genocidal intent with respect to this incident.[57] The majority judges characterized Rukundo's actions against the young woman as "unplanned and spontaneous": "an opportunistic crime that was not accompanied by the specific intent to commit genocide".[58] In doing so, the judges in effect placed a higher burden of proof on the linkage of sexual violence to genocidal intent than they had for other types of prohibited genocidal acts. They found that the sexual assault was "qualitatively different" from Rukundo's other acts of genocide (such as the search for, and subsequent assault or murder of, Tutsis) and therefore separate from and unlinked to those other acts.[59] In other words, the majority appeals judges succumbed to a time-worn but incorrect view of sexual violence as somehow "private" (because it deals with "intimate aspects of our bodies and minds"[60]) and therefore distinguishable from and unlinked to other forms of violence. They decontextualized the sexual violence. Unfortunately, this is not the first time decontextualization of sexual violence has hap-

55 *Ibid.*

56 *Ibid.*, at paras. 388, 576.

57 *Prosecutor v. Emmanuel Rukundo,* 2010, para. 236, *supra* note 1.

58 *Ibid.*

59 *Ibid.*

60 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, p. 612.

pened at the ICTR as this was also an issue in *Prosecutor v. Juvénal Kajelijeli*.[61]

Judge Pocar issued a strong and convincing partially dissenting opinion in *Prosecutor v. Emmanuel Rukundo* that illustrated a gender-sensitive contextual understanding of the situation. In his view, Rukundo's words "clearly conveyed Rukundo's knowledge that his victim was Tutsi and that she and the other members of her family should be killed for this reason alone".[62] These words were to be considered in the context of: (1) violence in the surrounding area in which Tutsis were being hunted down; (2) the victim's state (she was "dirty and hungry and her place of refuge was not safe"); (3) her previous knowledge of and trust in Rukundo; (4) the fact that Rukundo was armed; and (5) the use of force by Rukundo against her to commit a sexual act.[63] Judge Pocar felt that the majority's classification of the assault as an opportunistic crime indicated that the majority "does not fully appreciate the seriousness of the crime" and misunderstands the distinction between motive and intent: even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the requisite intent or that his conduct does not cause severe pain and suffering.[64] While Judge Pocar's analysis did not undo the damage, caused by the majority judges, to the analysis of harm by Rukundo, to the victim whose evidence (and violation) was deemed unrelated to the genocide, and to international criminal law's understanding of gender, it does provide a model for gender-sensitive contextual analysis. Judge Pocar answered these key questions: What does the evidence show happened to the victim? What was the effect? What was the situation of the victim at the time of the violation? Was the victim's vulnerability to the sexual violence linked to the overarching context? Are there linkages between the sexual violence and other prohibited acts? Was the perpetrator acting with intent linked to that overarching context?

---

61 Compare the consideration and interpretation of the evidence by a majority of the Trial Chamber with that of dissenting Judge Ramaroson: ICTR, *Prosecutor v. Juvénal Kajelijeli*, Judgment and Sentence, 1 December 2003, paras. 679–683, 917–925; and International Criminal Tribunal for Rwanda, *Prosecutor v. Juvénal Kajelijeli*, Dissenting Opinion of Judge Arlette Ramaroson, 1 December 2003, in its entirety, including the discussion in para. 99 of the context of the sexual violence.

62 *Prosecutor v. Emmanuel Rukundo,* 2010, para. 3 of Judge Pocar's Partially Dissenting Opinion, *supra* note 1.

63 *Ibid.*, paras. 5–8.

64 *Ibid.*, para. 10.

To be clear, to argue for a gender-sensitive contextual analysis of sexual violence during genocide, crimes against humanity or war crimes is not to somehow argue for an easing of the standards of proof for these acts: in fact, in cases of sexual violence, the international tribunals have often required more (rather than less) evidence than is actually required, particularly when it comes to an analysis of the evidence for purposes of individual or superior criminal responsibility.[65] Rather, the argument for contextual analysis is an argument for a better, deeper, more nuanced understanding of when, why and how sexual violence takes place during genocide, war or other forms of atrocity. Investigations, prosecutions and judicial deliberations should examine *actus reus* and *mens rea* through the lens of the questions inherently asked by Judge Pocar. This requires increased gender competence and gender expertise within investigators, prosecutors, victims' counsel and judges tasked at the international, regional and domestic levels with examining international crimes. The term 'gender competence' refers to "the capacity to identify where difference on the basis of gender is significant, and act in ways that produce more equitable outcomes for men and women".[66] Gender competence should be present in all investigators, prosecutors, victims' counsel and judges. Indeed, this competence should be present at the hiring or appointment stage, at least for some positions.[67] Since this is not presently the case at the international tribunals,[68] increased training is urgently needed and must be maintained over time and despite staff turnover. Gender competence increases the capacity of investigators and prosecutors to uncover how gender-based violence is part of a continuum of violence. Gender expertise is also needed, in addition to institution-wide gender competence.

[65] Susana SáCouto and Katherine Cleary, "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, pp. 353–358.

[66] Monash University Medicine, Nursing and Health Sciences, "Gender Competence", available at http://www.med.monash.edu.au/gendermed/competence.html, last accessed on 14 October 2011.

[67] "Awareness of the seriousness of sexual violence should be a precondition of work in the investigation of international crimes"; see Agirre Aranburu, 2010, p. 627, *supra* note 60.

[68] Women's Initiative for Gender Justice, "Gender Report Card on the International Criminal Court 2010", pp. 50–51, 62–64, available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf, last accessed on 14 October 2011. See also Van Schaack, 2009, pp. 367, 375, 385 and 406, *supra* note 25.

That is, there should be at least some investigators, prosecutors, victims' counsel and judges who have experience and applied knowledge that goes much deeper than gender competence, in order to put into place a workable "gender strategy".[69] For example, Xabier Agirre Aranburu has outlined the importance of having, on staff, investigators trained in gathering and analyzing pattern evidence of sexual violence.[70]

The benefits of increased gender competence and deeper gender expertise are clear: the presence of both are likely to lead to a better and more nuanced understanding of when, why and how sexual violence takes place during genocide, war or other forms of atrocity. This fuller understanding helps to explain the interconnected and cumulative nature of harms in any given conflict or scenario of mass violation, and therefore allows for a better evaluation of appropriate sentencing. It also creates a more accurate portrayal of what occurred in a particular situation, explaining not only the effect on the victim(s) but also the intent of the perpetrator(s). The stronger this capacity, the more we will understand that gender-based violence is not only about violence directed toward women: it is about why and how men, women, girls and boys are targeted for different crimes.

9.4. Conclusion

Janet Halley has argued that an emphasis on the prosecution of rape during conflict

> can background other bad things: to import the idea that 'rape is a fate worse than death' into the setting of armed conflict - for example, to declare that the panoramic violence of the Yugoslav conflict was a 'war against women' - is to background the death

[69] On the necessity for gender strategies within international criminal tribunals, see Patricia Viseur Sellers, "Gender Strategy is Not a Luxury for International Courts", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, pp. 303–325. On the necessity of gender competence and gender expertise among investigative and prosecutorial staff, see ICTR, "Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda", 2008, paras. 17–30, 36, 47, available at http://www.endvawnow.org/uploads/browser/files/Best%20Practices%20Manual%20Sexual%20Vio%20Int%20Criminal%20Manual%20Rwanda.pdf, last accessed on 15 October 2011.

[70] Aranburu, 2010, p. 627, *supra* note 60.

> that armed conflict brings to people generally, and specifically to the death it brings to men.[71]

While this assumption can be both questioned and decisively countered,[72] it is also true that nuanced and gender-specific contextualization directly addresses this concern by foregrounding both murder and rape. Indeed, such contextualization explores the linkages between murder and rape, the harms stemming from each, and the compounded harms coming from both together. In so doing, it addresses victimization from the point of view of the perpetrator by asking whether and how these forms of violation fit together, and from the point of view of the victim by examining the place of each crime in the individual and overall victimization.

Sexual violence is a crime rooted in a specific social construction of gender roles and in discrimination, especially the social, economic and political subordination of women and girls. It is therefore a specific expression of gender-based discrimination. There may be situations in which a prosecution focused only on sexual violence crimes may be useful or natural: for example, when prosecuting an attack in which sexual violence was the dominant form of violation. At other times, however, the placement of sexual violence crimes within a larger context of other genocidal acts, crimes against humanity or war crimes, better explains the sexual violence. It may also better explain the other forms of violence, which may also similarly be expressions of gender-based discrimination while appearing on their surface to be gender-neutral. By exploring the linkages between the crimes, the gendered nature of these crimes (and not only of the sexual violence) may become clearer. Undertaking a truly gender-sensitive form of contextualization requires improved gender competence and deeper gender expertise within all tribunals and courts tasked with prosecuting genocide, crimes against humanity and war crimes. Gender competence and expertise must be present from the point of the initial investigations through to the phases of judgment and sentencing, so as to better uncover and explain the role of gender in serious crimes today.

---

[71] Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict", in *Melbourne Journal of International Law*, 2008, vol. 9, p. 80.

[72] See, for example, a critique by Maria Grahn-Farley, "The Politics of Inevitability", in Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?*, Hart Publishing, Oxford, 2011, pp. 109–129.

10

Going Beyond Prosecutorial Discretion: Institutional Factors Influencing Thematic Prosecution

Neha Jain*

10.1. Introduction

International criminal courts are charged with a singular task: establishing accountability for crimes that far exceed routine instances of criminal conduct in their horrific nature and brutality that involve participation by thousands of persons spread over large geographical regions and long time periods. Given that these courts operate within significant pressures of time, personnel, and budgets, they cannot be expected to pursue each and every incidence of violence that would fall within their jurisdiction. Some element of selection and prioritization, which is not uncommon even for most domestic criminal courts, is thus rather inevitable in the practice of international criminal courts. There has been little discussion however of how this selectivity may be justified. Can international courts legitimately prioritize offences such as international sex crimes, or the recruitment of child soldiers, if this may mean that crimes such as mass killings go unpunished?

In this chapter, I offer a pluralistic account of the international criminal trial that posits the importance of institutional and structural factors that may differ between tribunals and that have a bearing on the validity of thematic prosecutions, particularly investigations and prosecutions of international sex crimes. I argue that three such factors will be particularly influential in seeking justifications for the practice of thematic prosecutions. The first is the status of the court – whether it is a post-conflict tribunal or one that may intervene in situations of on-going conflict. This status will influence what aims the tribunal may legitimately strive to-

* **Neha Jain**, Georgetown University Law Research Fellow and Adjunct Professor B.A., LL.B. (Hons.), National Law School of India University; BCL (Masters in Law), MPhil in Law, DPhil (Phd) in Law, Oxford University.

wards – retributive, expressive, or deterrent. The second factor is the court's role in post-conflict peace-building and the establishment of the rule of law. If the court is primarily set up to serve this instrumental goal, it may be able to expressly pursue didactic goals and prioritize investigation and prosecution of sex crimes. The third factor is the extent of civil party involvement in the tribunal proceedings. If victim participation can be considered desirable either because it promotes restorative justice or assists in the determination of truth by the tribunal, the enhanced role of the victim will influence the extent to which sex crimes will be prioritized by the court.

I will address each of these arguments by focusing on the rather unique scenario presented by the charge of forced marriages before the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). The procedural history of the crime of forced marriages before the ECCC presents an interesting case study for several reasons. First, the crime was not included in the first Introductory Submission filed by the Co-Prosecutors before the Office of the Co-Investigating Judges ('OCIJ'). It is only after the Lawyers acting for Civil Parties filed applications that specifically alleged the commission of forced marriages and other sexual crimes by the Khmer Rouge that the charge was seriously taken up by the tribunal.[1] Second, the scarce investigative, prosecutorial and judicial resources that would be need to be devoted to prosecuting forced marriages before the ECCC echo concerns similar to those that any debate on thematic prosecutions must address.

10.2. Forced Marriages at the ECCC

10.2.1. Background to the Proceedings on Forced Marriages

To properly appreciate the relevance of the charge of forced marriages to the issue of thematic prosecutions, it is useful to have some background on the Khmer Rouge regime and the kinds of crimes that the ECCC will have to consider. The victory of the forces of the Communist Party of Kampuchea (popularly known as the 'Khmer Rouge') over Phnom Penh

[1] See Civil Parties' Co-Lawyers' Request for Supplementary Preliminary Investigations, 001/18-07-2007-ECCC/TC, 9 February 2009, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E11_EN.pdf, last accessed on 25 March 2012 (hereinafter 'First Request').

on 17 April 1975 marked the establishment of a four year long reign of terror over Cambodia.[2] The Khmer Rouge came to power with the aim of establishing a socialist, fully independent and socially and ethnically homogeneous Cambodia. In its ruthless pursuit of this mission, it attempted to abolish all pre-existing economic, social and cultural institutions, transform the Cambodian population into a collective workforce, and suppress all elements that were perceived as a threat to the new order.[3] Purges were carried out against ethnic minorities, intellectuals, Buddhists, foreigners, supporters of the former Prime Minister Lon Nol, and the urban "capitalist" class dubbed the "new people".[4] The regime evacuated cities; abolished money, private property and religion; and set up rural collectives in which thousands died of disease, starvation and overwork. Estimates of the dead range from 1.7 million to 3 million, out of a 1975 population estimated at 7.3 million.[5] Vietnam's invasion of Cambodia in late December 1978 signaled the end of the regime, and Heng Samrin was installed as head of state in the new People's Republic of Kampuchea ('PRK'). The Khmer Rouge and the Vietnamese continued to clash throughout the 1980s, and a comprehensive settlement was achieved only in October 1991 with the signing of the Paris Agreements.[6]

---

2 The Group of Experts for Cambodia, "Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135", paras. 14–15, UN Doc. S/1999/231, A/53/850, 16 March 1999 (hereafter 'Report of the Group of Experts').

3 David P. Chandler, *Brother Number One: A Political Biography of Pol Pot*, Westview, 1999, p. 3; Serge Thion, "The Cambodian Idea of Revolution", in David P. Chandler and Ben Kiernan (eds.), *Revolution and Its Aftermath in Kampuchea: Eight Essays*, Yale University Southeast Asia Studies, 1983, p. 10; Time Magazine, *Cambodia: Long March from Phnom Penh*, 19 May 1975, available at http://www.time.com/time/magazine/article/0,9171,945394-1,00.html, last accessed on 5 November 2011.

4 Ben Kiernan, "External and Indigenous Sources of Khmer Rouge Ideology", in Odd Arne Westad and Sophie Quinn-Judge (eds.), *The Third Indochina War: Conflict Between China, Vietnam and Cambodia 1972–79*, Routledge, 2006, pp. 187, 192–193; Dan Fletcher, *A Brief History of the Khmer Rouge*, Time Magazine, 17 February 2009, available at http://www.time.com/time/world/article/0,8599,1879785,00.html; Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*, Yale University Press, 2002, pp. 251–309.

5 United States Department of State, "Background Note: Cambodia", 2009, available at http://www.state.gov/r/pa/ei/bgn/2732.htm, last accessed on 1 April 2012 (hereafter 'Background Note: Cambodia').

6 *Ibid*.; Report of the Group of Experts, 1999, *supra* note 2, paras. 36–40.

The initial impetus for the ECCC came in the form of a letter addressed by the two co-Prime Ministers of Cambodia to the UN Secretary General, requesting the international community's assistance in establishing the truth about, and accountability for, the crimes committed during the Khmer Rouge regime.[7] In response, a committee of a Group of Experts was formed to look into the nature of the crimes and explore options for prosecution. The Report of the Group of Experts acknowledged that though the Khmer Rouge could no longer be considered a fighting force, it still retained a key position in domestic politics with several of its former members occupying important positions in Cambodia's two major political parties.[8] It therefore emphasized the twin goals of individual accountability and national reconciliation in its choice of the category of persons who should be targeted for investigation as well as the modalities of bringing them to justice. The Report recommended that the proposed tribunal focus on those most responsible for the atrocities committed during the regime and envisaged about twenty to thirty persons being indicted by the prosecutor.[9] It also recommended that the trials should take place before an international tribunal, similar to the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR').[10] While it did not disfavor the possibility of a truth and reconciliation commission that would operate parallel to the tribunal, it clearly prioritized the latter, which it hoped would in any event bring to light the range of atrocities perpetrated by the Khmer Rouge and contribute to knowledge and reconciliation through the trial process.[11]

The Cambodian government rejected the recommendation to establish an international tribunal, but after prolonged negotiations,[12] a compromise was reached whereby the ECCC would be set up as a tribunal within the Cambodian system and controlled by Cambodians, but involving significant UN participation.[13] The ECCC has been established as an

7 Report of the Group of Experts, 1999, *supra* note 2, para 5.

8 *Ibid*., paras. 95–98.

9 *Ibid*., paras. 102–111.

10 *Ibid.*, paras. 122–184.

11 *Ibid*., paras. 199–209.

12 George Chigas, "The Politics of Defining Justice After the Cambodian Genocide", in *Journal of Genocide Research*, 2000, vol. 2, no. 2, pp. 245, 256–257.

13 Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", in *Criminal Law Forum*, 2001, vol. 12, pp. 185, 188–190.

independent institution within the Cambodian judiciary[14] by a statute passed by the Government of Cambodia,[15] which incorporates the provisions of the 2003 Agreement between Cambodia and the UN.[16] It has a majority of national judges both at the Trial Chamber (three Cambodian and two foreign) and the Supreme Court Chamber (four Cambodian and three foreign) level.[17] Decisions have to be adopted as far as possible, by unanimity, and in the absence of that, by a "super-majority rule", that is, at least four out of the five Trial Chamber judges and five out of the seven Supreme Court Chamber judges must have voted in favor of the decision.[18] The prosecution team is headed by co-equal Cambodian and international prosecutors.[19] All judicial investigations are the responsibility of two co-investigating judges: one Cambodian and one international.[20] All disputes between the national and international co-prosecutors and co-investigating judges are settled by a Pre-Trial Chamber that has a majority of national judges and must adopt decisions in accordance with the super-majority rule.[21]

The ECCC Trial Chamber rendered its first judgment in July 2010[22] against Duch, who was Deputy Chairman and then Chairman of S-21, an

[14] *Prosecutors v. Kang Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Decision on Appeal Against Provisional Detention Order of Kang Guek Eav alias "Duch", 3 December 2007, para. 19.

[15] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.–Cambodia, Art. 2, 6 June 2003, available at http://www.eccc.gov.kh/english/agreement.list.aspx, last accessed on 23 October 2009 (hereinafter 'Framework Agreement').

[16] Sarah M. H. Nouwen, Research Paper, "'Hybrid courts': The Hybrid Category of a New Type of International Crimes Courts", in *Utrecht Law Review*, 2006, vol. 2, pp. 190, 200.

[17] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Art. 9, NS/RKM/1004/006, 27 October 2004, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_ 27_Oct_2004_Eng.pdf, last accessed on 3 November 2009 (hereafter 'ECCC Law').

[18] *Ibid.*, Art. 14.

[19] *Ibid.*, Art. 16.

[20] *Ibid.*, Art. 23.

[21] *Ibid.*, Arts. 20 and 23.

[22] Kaing Guek Eav *alias* Duch, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, available at http://www.cambodiatribunal.org/images/CTM/20100726 judgement case 001_eng_public.pdf, last accessed on 25 March 2012 (hereinafter 'Judgement').

infamous Khmer Rouge security center that conducted interrogations and executions of perceived enemies of the regime from 1975 to 1979.[23] For his role as commandant of S-21, the Trial Chamber found Duch guilty of crimes against humanity (including murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts) and grave breaches of the 1949 Geneva Conventions (including willful killing, torture and inhumane treatment, willfully causing great suffering or serious injury to body or health, willfully depriving a prisoner of war or civilian of the rights of fair and regular trial, and unlawful confinement of civilians).[24] The ECCC has indicted four other suspects, all of whom were high-ranking members in the Democratic Kampuchea ('DK') government.[25]

10.2.2. Litigating Forced Marriages Before the ECCC

In order to understand how the charge of forced marriages came to be included in the proceedings before the ECCC, it is important to understand the largely civil law influenced trial process at the court. The Internal Rules of the ECCC specify that all prosecutions are the responsibility of the ECCC Co-Prosecutors. Once the Co-Prosecutors have reason to believe that crimes within the ECCC's jurisdiction have been committed, they set the stage for a judicial investigation by forwarding an "Introductory Submission" to the Office of the Co-Investigating Judges ('OCIJ').[26] This statement must contain the relevant facts, offences and legal provisions, and the names of the accused, as applicable. It is accompanied by evidentiary material in support of its claims.[27] The OCIJ conducts a judicial investigation on the basis of this Introductory Submission and other Supplementary Submissions filed by the Co-Prosecutors.[28] The issuance

23 Judgement, 2010, *supra* note 22, p. 111.

24 *Ibid*., p. 567.

25 The other four indicted persons are: Khieu Samphan, the DK regime's former head of state; Ieng Sary, the former Deputy Prime Minister and Minister for Foreign Affairs; Sary's wife Ieng Thirith, the former Minister for Social Affairs; and Nuon Chea, the former Deputy Secretary of the Communist Party of Kampuchea, see further http://www.eccc.gov.kh/en/case/topic/2, last accessed on 25 March 2012.

26 Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 53(1), Rev. 6, 2010, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv6-EN.pdf, last accessed on 28 October 2011 (hereinafter 'ECCC Internal Rules').

27 *Ibid*., Rule 53(1)–(2).

28 *Ibid*., Rule 55(2).

of a Closing Order concludes the investigation, and either dismisses the case against the charged person, or indicts him and forwards the case to trial.[29] As mentioned earlier, the first Introductory Submission by the Co-Prosecutors did not contain any mention of the crime of forced marriages. Forced marriage charges were first introduced in the proceedings by the Lawyers for Civil Parties who filed a Request for Supplementary Preliminary Investigations[30] under Rule 49 of the Internal Rules.[31]

In this Request, the Civil Parties' Lawyers argued that the Khmer Rouge followed a policy of conducting mass forced marriages in Cambodia between persons who were mostly strangers, with a view to controlling the reproductive capacity and the birth of children who would support the revolution.[32] These marriages eschewed traditional Khmer rituals associated with the wedding ceremony and individuals were coerced into marrying persons of the Khmer Rouge's choosing on pain of punishment,

[29] *Ibid*., Rule 67(1).

[30] First Request, 2009, *supra* note 1.

[31] Rule 49. Exercising Public Action

1. Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint.
2. The Co-Prosecutors shall receive and consider all written complaints or information alleging commission of crimes within the jurisdiction of the ECCC. Such complaints or information may be lodged with the Co-Prosecutors by any person, organisation or other source who witnessed or was a victim of such alleged crimes, or who has knowledge of such alleged crimes.
3. A complaint referred to in this Rule may also be prepared and/or lodged on behalf of a Victim by a lawyer or Victims' Association. Copies of all such written complaints shall be kept with the Office of Administration and may be translated into the working languages of the ECCC, as needed.
4. Such complaints shall not automatically initiate criminal prosecution, and the Co-Prosecutors shall decide, at their discretion, whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges. The Co-Prosecutors shall inform the complainant of the decision as soon as possible and in any case not more than 60 (sixty) days after registration of the complaint.
5. A decision not to pursue a complaint shall not have the effect of *res judicata*. The Co-Prosecutors may change their decision at any time in which case the complainant shall be so informed as soon as possible and in any case not more than 30 (thirty) days from the decision.

[32] First Request, 2009, *supra* note 1, pp. 4, 7, 29.

or even death.[33] The marriages had elements of the crimes of rape, enslavement, forced pregnancy and forced marriages as "other inhumane acts" already recognized in international law.[34] While the practice of such marriages was widespread during the DK regime and the evidence on the case file corroborated this finding, they had not been properly investigated by the ECCC and did not form part of the Introductory Submission.[35] The Civil Parties' Lawyers thus urged that witnesses should be interviewed and a Supplementary Submission filed so that new charges could be brought against the accused for forced marriages and related sexual crimes. This would fulfill the ECCC's mandate of ascertaining the truth and bringing justice to the victims, especially given the large number of the victims of this crime and its negative effect on Cambodian society. It would also be in keeping with the recognition of gender crimes and their devastating impact on societies by other international tribunals.[36]

This Request led to a flurry of activity by the ECCC. On 17 March 2009, the OCIJ forwarded the case file of the judicial investigation to the Office of the Co-Prosecutors for its opinion on the need for a supplementary submission concerning the civil parties' claims of forced marriages.[37] On 30 April 2009, the Co-Prosecutors filed a Supplementary Submission requesting and authorizing further investigations by the OCIJ into four civil party complaints that alleged victimization on account of forced marriages and other non-consensual sexual relations. They also authorized investigation into any other facts referencing forced marriages that would facilitate proving the ECCC's jurisdiction or the mode of the liability of the four accused (Duch's case file had been separated from the other accused earlier and labeled Case File 001).[38] Shortly thereafter, on 15 July 2009, the Civil Parties' Lawyers filed their Second Request for Investigative Actions[39] under Rule 55(10) of the Internal Rules[40] concerning the

[33] *Ibid*., pp. 4, 38.
[34] *Ibid*., pp. 6, 20–32.
[35] *Ibid*., pp. 1–3.
[36] *Ibid*., pp. 42–45.
[37] Civil Parties' Co-Lawyers' Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC/OCIJ, 15 July 2009, p. 3, available at http://www.eccc.gov.kh/en/documents/court/civil-parties39-co-lawyers39-request-investigative-actions-concerning-forced-marriage, last accessed on 7 April 2012 (hereafter 'Second Request').
[38] *Ibid*., p. 3.
[39] *Ibid*.

existence of forced marriages under the Khmer Rouge and their appropriate legal classification, arguing that given the gravity of these crimes, immediate investigation was required.[41] The Civil Parties outlined the legal elements of the crime of forced marriages, noted that they are as grave as enumerated crimes against humanity and may indeed include some of them such as enslavement, rape and torture, and that they have been recognized as a crime against humanity of 'other inhumane acts' by international tribunals.[42] They reiterated and expanded upon the factual evidence pointing to the occurrence of widespread forced marriages under the Khmer Rouge as a matter of State policy.[43] The Request urged that the OCIJ has discretion to determine the scope of judicial investigations. If they have knowledge of conduct that could constitute a crime under the ECCC's jurisdiction, the duty to investigate such conduct is also inherent in civil law systems of criminal law such as the Cambodian criminal law system on which the procedural law of the ECCC is based.[44]

The OCIJ's public statement on the scope of the judicial investigations in Case File 002 against the four accused issued on 5 November 2009 marked the first significant victory for the Civil Parties.[45] In this statement, the OCIJ included "forced marriage throughout Democratic Kampuchea" within the scope of its investigations.[46] Emboldened by this acknowledgement, the Lawyers for Civil Parties' filed a Fourth Investiga-

[40] At any time during an investigation, the Co-Prosecutors, a charged person or a civil party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.

[41] Second Request, 2009, *supra* note 37, p. 1.

[42] *Ibid*., pp. 5–8.

[43] *Ibid.*, pp. 9–14, 16–17

[44] *Ibid*., p. 30.

[45] Office of the Co-Investigating Judges, Statement from the Co-Investigating Judges, Judicial Investigation of Case 002/19-09-2007-ECCC/OCIJ and Civil Party Applications, 05 November 2009, available at http://www.cambodiatribunal.org/images/CTM/eccc%20press%20release%205%20nov%202009%20eng.pdf, last accessed on 28 October 2011 (hereinafter 'OCIJ Statement').

[46] *Ibid*., p. 5.

tive Request on 4 December 2009,[47] identifying and requesting the investigation of particular witnesses in specific locations, obtaining expert advice on the crime of forced marriages by named expert witnesses, and that interviews be conducted by gender trained female staff.[48] The OCIJ issued its Order on the Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations[49] granting the request to conduct investigations into forced marriages throughout Cambodia and inviting *amici curiae* briefs on the subject, while declining to appoint experts or only female investigators.[50] On 15 September 2010, the OCIJ issued its Closing Order in Case 002[51] indicting the four accused for violations of the 1956 Cambodian Penal Code, genocide, grave breaches of the Geneva Conventions, and crimes against humanity including rape and other inhumane acts (stemming from the allegations of forced marriage and forced sexual relations).[52]

The proceedings on forced marriages before the ECCC raise questions similar to those that any international tribunal pursuing a policy of thematic prosecutions will confront. The ECCC is an *ad hoc* tribunal that has been plagued by political problems, lack of co-operation from the Cambodian government, limited resources, and ongoing budgetary woes. Operating within these constraints, it has been tasked with establishing accountability for a panoply of extremely serious international crimes, including the "crime of crimes" of genocide. Given its precarious position and the burden it has to discharge of prosecuting what would without doubt be considered some of the most horrendous crimes ever litigated

47 See Co-Lawyers' for the Civil Parties' Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes, 002/19-09-2007-ECCC/OCIJ, 4 December 2009, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D268_Redacted_EN.pdf, last accessed on 28 October 2011 (hereinafter 'Fourth Request').

48 *Ibid*.

49 Office of the Co-Investigating Judges, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC/OCIJ, 18 December 2009, available at http://www.eccc.gov.kh/en/documents/court/order-request-investigative-action-concerning-forced-marriages-and-forced-sexual-rel , last accessed on 28 October 2011.

50 *Ibid*., pp. 12–15, 18.

51 Office of the Co-Investigating Judges, Closing Order, Case no. 002/19-09-2007-ECCC/OCIJ, 15 September 2010, available at http://www.eccc.gov.kh/en/documents/court/closing-order, last accessed on 28 October 2011 (hereinafter 'Closing Order').

52 *Ibid*., p. 1613.

before an international tribunal – including widespread murders, acts of torture and genocide – what lessons can we learn from the prominent position that the crime of forced marriages, which some would consider a "less serious offence", now occupies in the proceedings?

I argue that the charge of forced marriages before the Khmer Rouge tribunal points to important institutional and structural factors that constrain or encourage the prosecution of sex crimes, or indeed other crimes that would be deemed "less serious" before international tribunals. These factors moreover have deeper implications for the project of international criminal justice – what is the primary purpose of criminal tribunals in a particular situation of mass atrocity; how should tribunal justice accommodate the interests of various affected actors in the aftermath of mass atrocity; and what role can legal institutions have in societal change, especially in post-conflict societies? I will address each of these in turn.

10.3. The Differing Challenges of *Ex Post* and *Ex Ante* Tribunals

10.3.1. Different Goals of International Courts

At first glance, the statement that the goal of international criminal tribunals is to achieve accountability for international crimes appears a truism. Once one examines this claim a little more closely, the cracks beneath the surface become apparent. While bringing to justice alleged perpetrators of international crimes is undoubtedly a mandate of all international tribunals,[53] it applies with more force in the case of *ex post* tribunals such as the ECCC. These are courts that are set up in the aftermath of conflict to establish accountability for the crimes that were committed in a particular region[54] and while they may have other objectives, such as preventing a recurrence of violence or helping achieve political and social stability[55] –

[53] See, *e.g.*, United Nations Security Council (hereinafter 'UNSC') Res. 827 (1993); UNSC Res. 955 (1994); "Report of the Secretary General Pursuant to Para 2 of Security Council Resolution 808 (1993)", S/25704, 3 May 1993, para 26; Report of the Group of Experts, *supra* note 2, paras. 102–106; Rome Statute to the International Criminal Court, Preamble, 17 July 1998, 2187 United Nations Treaty Series (hereinafter 'UNTS') 90.

[54] On the distinction between *ex post* and *ex ante* tribunals, see Mahnoush A. Arsanjani and W. Michael Reisman, "The Law-in-Action of the International Criminal Court", in *American Journal of International Law*, 2005, vol. 99, pp. 385.

[55] On the various goals put forward by international tribunals and their advocates, see Minna Schrag, "Lessons Learned from ICTY Experience", in *Journal of International*

the goal of accountability introduces a strong "backward looking" element into the tribunal proceedings. In contrast, tribunals such as the ICC are also *ex ante* courts[56] – the situations referred to the ICC may be situations of on-going violence; violence that occurred in the very recent past; or conflict that took place some years ago.[57] The reasons for referral to the ICC may also differ greatly. For instance, even though the deterrent capacity of international criminal tribunals has been called into question,[58] there is at least a plausible argument to be made that ICC referrals can have deterrent effects in situations of on-going conflict where the perpetrators of atrocities continue to wield political power and the ICC must strike a delicate balance between the demands of retributive justice on the one hand and peace and stability on the other.[59] Akhavan gives the examples of three recent interventions by the ICC, in the situations in Cote d'Ivoire, Uganda, and Darfur. In Cote d'Ivoire, the threat of ICC prosecution for incitement of violence against civilians and ethnic, religious or racial communities[60] was touted as a significant factor in stopping the government-controlled media's radio and television broadcasts of messages of hate, and potentially preventing the mob violence from escalating into

Criminal Justice, 2004, vol. 2, pp. 427, 428; Justin Levit, "Developments in the Law – International Criminal Law", in *Harvard Law Review*, 2001, vol. 114, pp. 1961–1974.

56 Arsanjani and Reisman, *supra* note 54, p. 385.

57 See for instance, the different stages at which ICC referrals have been invoked in the situations in Kenya and Libya: UNSC Res. 1970 (2011) referring the situation in Libya to the ICC; and Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ICC-01/09, 31 March 2010, available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/chambers/pretrial%20chamber%20ii/19?lan=en-GB, last accessed on 28 October 2011.

58 See, *e.g.*, Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanford Journal of International Law*, 2007, vol. 43, pp. 39, 72; Mirjan Damaška, "What is the Point of International Criminal Justice?", in *Chicago Kent Law Review*, 2008, vol. 43, pp. 329, 344–345; Levit, *supra* note 55, pp. 1963–1966.

59 Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism", in *Human Rights Quarterly*, 2009, vol. 31, no. 3, pp. 624, 627.

60 Juan E. Mendez, United Nations, "Statement of the Special Advisor on the Prevention of Genocide", 15 November 2004.

genocide.[61] In the case of Uganda, referral of the situation concerning atrocities perpetrated by the Lord's Resistance Army to the ICC is considered a crucial factor in Sudan ceasing to harbour the LRA. This deprived the LRA of important bases in south Sudan, resulting in a rapid de-escalation of violence in Northern Uganda and ultimately forcing its leader, Joesph Kony, to come to the negotiating table.[62] Even in Sudan, the Security Council's referral of the situation in Darfur to the ICC has strained the relationship between the government and the Janjaweed militia and forced the Sudanese authorities to include the issue of accountability for the crimes committed in Darfur into the political calculus.[63] This ability of a tribunal such as the ICC to intervene in situations of impending or prevailing conflict inevitably means that the proceedings before the tribunals can be relatively forward looking in their aims – that is, while retributive justice as an end in itself may be one of the aims, and an important one at that, other demands such as deterrence or even communication of condemnation may take precedence.

This difference in prioritisation of aims would have important consequences for which crimes take precedence when making decisions on the allocation of limited resources for investigation and prosecution. In tribunals such as the ECCC, it could well be argued that, if the tribunal is essentially seeking retributive justice as a primary goal of the trial, the crime of forced marriages could be more readily relegated to nearer the bottom of the prioritisation hierarchy. Retributivism holds "not only that we must not punish the innocent, or punish the guilty more than they deserve, but that we should punish the guilty to the extent that they deserve".[64] While there are several versions of retributive justice extant – the absolutist, the threshold and the consequentialist[65] – by almost any of these measures, some of the other crimes before the ECCC would take priority. For the absolutist retributivist, since limited resources would make punishment of all criminals impractical, his compromise would be to pun-

[61] Akhavan, 2009, *supra* note 59, pp. 639–640.

[62] *Ibid*., pp. 641–644.

[63] *Ibid*., pp. 649–650.

[64] "Legal Punishment", in *Stanford Encyclopaedia of Philosophy*, available at http://plato.stanford.edu/entries/legal-punishment/, last accessed on 5 November 2011.

[65] See Michael T. Cahill, "Retributive Justice in the Real World", in *Washington University Law Review*, 2007, vol. 85, pp. 815, 848–853.

ish the maximum number of offenders regardless of the seriousness of the crime.[66] In the case of international tribunals like the ECCC, this consideration is to some extent already foreclosed by their jurisdictional mandate to focus on senior leaders and those most responsible for the crimes in question. For the consequentialist retributivist who wants to maximise the total amount of deserved punishment, the decisive factor would be the per-unit cost of the deserved punishment.[67] This cost is however difficult to calculate in the concrete circumstances of the crime.[68] For the threshold retributivist, it would be important to establish a ranking of crimes according to their seriousness and punish them in sequence, departing from this hierarchy only in limited cases.[69] According to the dessert-based approach to retribution, the seriousness of the harm is calculated based on the conduct's degree of harmfulness and the actor's culpability.[70] In the case of crimes before the ECCC, given that the accused have been charged with genocide,[71] which requires conduct carried out with the specific intent of destroying an enumerated group,[72] the crimes that form part of the genocide charge (and of which forced marriage does not form part) could arguably be considered more serious. This criterion would moreover not be particularly helpful in prioritisation decisions involving crimes within the same category of crimes – say murder and rape as instruments of genocide, such as in the case of the prosecution of rape by the ICTR.[73] Similarly, while quantification of the quality and extent of harm suffered is a task fraught with perils, especially in the context of international crimes where there is a minimum threshold of gravity and suffering implied in the very

66 *Ibid*., p. 849.

67 *Ibid*., p. 851.

68 *Ibid*., pp. 851–852.

69 *Ibid.*, p. 850.

70 See, *e.g.*, Andrew Von Hirsh and Nils Jareborg, "Gauging Criminal Harm: A Living Standard Analysis", in *Oxford Journal of Legal Studies*, 1991, vol. 11, no. 2.

71 Closing Order, 2010, *supra* note 51, p. 1613.

72 On genocide and the requirement of specific intent, see William Schabas, *Genocide in International Law*, Cambridge University Press, 2000, pp. 217–225; Antonio Cassese, *International Criminal Law*, Oxford University Press, 2008, p. 137. This has been challenged in recent literature, see, *e.g.*, Claus Kress, "The Darfur Report and Genocidal Intent", in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 562–578.

73 On rape being prosecuted as genocide by the ICTR, see *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998, pp. 732–733. For a thoughtful analysis of this practice at the ICTR, see Doris E. Buss, "Rethinking 'Rape as a Weapon of War'", in *Feminist Legal Studies*, 2009, vol. 17, p. 145.

nature of the crime, it would not be difficult to construct an argument that loss of life on a genocidal scale is more harmful than forced marriages, despite their widespread nature. Thus, while courts have refrained from constructing a hierarchy of crimes,[74] given the status of genocide as the "crime of crimes" and the moral weight such a label carries,[75] the retributivist approach may favour prioritisation of all crimes that occur within a certain context – such as intent to destroy the group (genocide) rather than as a widespread attack against a civilian population (crimes against humanity). The concerns of feminists that the recognition of rape as an independent sexual crime that harms all women in times of conflict as well as in peacetime would be subsumed by its prosecution as an instrument of genocide[76] should at least make us cautious towards advocating such a solution. Moreover, if the contextual element for the crimes remains the same – that is, all the individual crimes occur as crimes against humanity – a retributive posture may rarely prioritise sex crimes, or indeed any other crimes, over those that involve loss of life.

In the case of a tribunal such as the ICC, since the pursuit of aims other than retributive justice may take precedence, the Prosecution's decision to prioritise the attack by Sudanese rebels on African Union Peacekeeping troops, resulting in the deaths of twelve peacekeepers and serious

---

74 See Jennifer J. Clark, "Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda", in *Georgetown Law Journal*, 2008, vol. 96, pp. 1685, 1697, referring to the jurisprudence of the ICTY and the ICTR rejecting a hierarchy of crimes: *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Reasons for Judgment, 1 June 2001, p. 367; *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, p. 246; *Prosecutor v. Stakic*, IT-97-24-A, Judgment, 22 March 2006, p. 375.

75 See for instance, the ICC Prosecutor's attempts to add genocide to the charges against Al-Bashir: *Prosecutor v. Al Bashir*, Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09, 10 March 2009, available at http://www.icc-cpi.int/NR/exeres/CC751CCC-B58D-49A8-8073-83E0D06D3717.htm, last accessed on 25 March 2012.

76 For an excellent account of this debate, see Karen Engle, "Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina", in *American Journal of International Law*, 2005, vol. 99, pp. 778, 785–787, referring especially to Rhonda Copelon, "Surfacing Gender: Reconceptualizing Crimes against Women in Time of War", in Alexandra Stiglmayer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina*, 1994, pp. 198, 205, 207.

injuries to eight others,[77] can be seen as serving the objectives of the ICC. While this decision cannot perhaps be justified on a strict retributivist basis given the sheer scale of atrocities allegedly committed by government forces in Sudan,[78] it furthers other important aims including potentially deterring further such attacks by the rebels, demonstrating impartiality, and facilitating the crucial peacekeeping function of such forces in conflict zones.[79] As the ICC Pre-Trial Chamber stated in its Decision on Confirmation of Charges, the attack on peacekeepers not only had a grave impact on the immediate victims of the attack and their families, but the suspension and disruption of their activities had severe consequences for the local civilian population which relied on them for protection and humanitarian assistance.[80] Similar justifications could be used in the case of prosecuting sexual crimes, especially in societies where an attack on the female population is widely considered an attack on the entire community for diverse reasons – because of the image of women in a particular society, due to its effect on the reproductive function, and because of the message of impotence it sends to the male population.[81]

10.3.2. Pragmatic Factors Affecting Investigations and Prosecutions

Another more pragmatic factor that may have a stronger influence on the investigative and prosecution efforts of *ex ante* tribunals when contrasted with their post-conflict counterparts is the political, resource, and infor-

---

77 For details of the procedural history, see *Prosecutor v. Abu Garda*, Decision on Confirmation of Charges, ICC-02/05-02/09, 8 February 2010.

78 See Human Rights Watch, "ICC/Darfur: Court Acts to Protect African Peacekeepers", 17 May 2009, available at http://www.hrw.org/en/news/2009/05/17/iccdarfur-court-acts-protect-african-peacekeepers, last accessed on 28 October 2011 (noting the difference in the scale of atrocities committed by rebels as contrasted with government forces); Amy Stillman, "Prosecutors Hit Back at Rebel Case Criticism", in *ACR*, issue 210, Institute for War and Peace Reporting, 24 April 2009, available at http://iwpr.net/report-news/prosecutors-hit-back-rebel-case-criticism, last accessed on 28 October 2011.

79 See Human Rights Watch, "ICC Hearing on Darfuri Rebel Leader", 14 October 2009, available at http://www.hrw.org/en/news/2009/10/14/icc-hearing-darfuri-rebel-leader; Stillman, *supra* note 78.

80 *Prosecutor v. Abu Garda*, Decision on Confirmation of Charges, ICC-02/05-02/09, 8 February 2010, para. 33.

81 See for example, Christine Chinkin, "Rape and Sexual Abuse of Women in International Law", in *European Journal of International Law*, 1995, vol. 5, no. 1, pp. 3–5; Buss, 2009, *supra* note 73, pp. 148–149 and references therein.

mation constraints that the former must operate within. For instance, it is suggested that in the context of the DRC, while there were reports of serious crimes having been committed in the provinces of Ituri, North and South Kivu, the ICC's initial investigations targeted the crimes in Ituri. This was a strategic decision keeping in mind the better security for conducting investigations as a result of the presence of UN peacekeepers in the region and also the fact that the rebels in Ituri did not enjoy the support of the DRC government on which the ICC relied for support.[82] There are also other limitations that any evidence gathering exercise will encounter in situations of conflict: (1) the territory where alleged crimes are taking place may be inaccessible or only partially accessible; (2) reaching and interviewing witnesses may be difficult; and (3) the collapse of State and civil society institutions could severely limit access to assistance in terms of information, personnel and resources.[83] This may make the investigation and prosecution of sex crimes in particular quite challenging. Sex crimes are considered to be especially prone to the problem of underreporting, even in times of peace, due to factors such the victim's feelings of guilt, shame or even fear.[84] This underreporting is only exacerbated in times of conflict for several reasons: (1) victims may not be able to reach any State or non State agency to report the incident to; (2) the alleged perpetrators of rape may be agents of the State; and (3) the perpetrator may kill the victim after.[85] An international tribunal that is reliant on domestic authorities and civil society institutions to conduct investigations may thus find it much harder to do so for sexual offences as compared to crimes such as murder.

The experience of the charge of forced marriages before the ECCC, a post-conflict tribunal, presents an interesting contrast. As one of the Lawyers for Civil Parties, Silke Studzinsky, recalls,

---

82 Akhavan, 2009, *supra* note 59, pp. 631–632.

83 See Report on Wilton Park Conference, WPSO8/7, "Pursuing Justice in Ongoing Conflict: Examining the Challenges", December 2008, para. 4, available at http://www.responsibilitytoprotect.org/files/Wilton%20Park--Pursuing%20Justice.pdf, last accessed on 28 October 2011.

84 Jennifer L. Green, "Uncovering Collective Rape: A Comparative Study of Political Sexual Violence" in *International Journal of Sociology*, 2004, vol. 34, no. 1, pp. 97, 104; Elisabeth J. Wood, "Variation in Sexual Violence During War", in *Politics and Society*, 2006, vol. 34, pp. 307, 318–319.

85 Green, 2004, *supra* note 84, p. 105; Wood, 2006, *supra* note 84, pp. 318–319.

> [t]he prosecution and the co-investigating judges did not independently investigate sexual crimes initially both because they were heavily reliant on documentary evidence compiled by the Documentation Center for Cambodia, an independent NGO based, which did not specifically mention these crimes, and because they operated under the widely held assumption that the Khmer Rouge had followed a strict policy of severely punishing any sexual crimes, which resulted in their near absolute prevention.[86]

All this changed with the press conference by Silke Studzinsky and the Lawyers for Civil Parties, where they made public the sexual crimes committed against their client, a transsexual who was forced to behave and dress as a man under the Khmer Rouge.[87] In the days following the conference, several calls came in through the radio, alleging victimisation on account of sexual crimes under the Khmer Rouge. The Lawyers for Civil Parties were also able to unearth literature and studies by academics written in the aftermath of the regime, documenting instances of sexual assault and forced marriages.[88] Thus, a significant factor in being able to bring charges of forced marriages and related sexual offences before the tribunal was the ability of victims to report the allegations and pre-existing studies corroborating their existence. Neither may have been feasible in the context of a pre-conflict tribunal.

I now want to move on to my second factor on the institutional and structural elements influencing the prosecution of sexual crimes, which is quite closely related to the discussion on the aims of the tribunal. This is the vision of the tribunal as one of the tools of post-conflict transitional peace building and establishment of the rule of law.

10.4. The International Tribunal as an Instrument of Post-Conflict Rule of Law Development

There has been a recent trend in academic literature discussing the long term impact of international and hybrid criminal tribunals on the societies in which they operate – that is, apart from the limited, albeit integral, aim of bringing perpetrators of atrocities to justice, whether such interventions

[86] Silke Studzinsky, "Die Roten Khmer befahlen Zwangsheiraten und Vergewaltigungen" in *Streit*, 2009, vol. 2, p. 59.
[87] *Ibid.*
[88] *Ibid*.

can be meaningful in promoting the rule of law in transitional polities.[89] For instance, Stromseth argues that at least part of the assessment of the record of an international or hybrid court must depend on whether the court is able to induce confidence about fair justice in the people affected by the conflict and to rebuild and strengthen collapsed judicial institutions in such societies.[90] She claims that trials for mass atrocity have an inevitable communicative effect, which influences the confidence of affected parties about fair justice. The trials must therefore aim to demonstrate that certain conduct is impermissible, that persons will be held accountable for it; and that justice can be substantively and procedurally fair.[91]

If an international trial is envisaged mainly as a crucial appliance in the tool box of measures seeking to promote the rule of law in a post conflict society, it would justify prioritising the investigation and prosecution of crimes that are deemed to contribute more directly to this purpose. This is arguably a different calculus from that undertaken by tribunals such as the IMT, where the main focus of the tribunal, at least in the initial stages, was to condemn Nazi aggression and the law of atrocity only acquired prominence subsequently.[92]

Scholars have argued that the traumatic past of societies that experienced periods of severe violations of human rights and violence tends to recur in different forms[93] and while there is no concrete evidence to indicate that trials or other reconciliation measures can truly break this cycle

---

[89] See, *e.g.*, Jane Stromseth, "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post Conflict Socities?", in *Hague Journal of the Rule of Law*, 2009, vol. 1, pp. 87–88; see generally Hideaki Shinoda, "Peace-Building by the Rule of Law: A Examination of Intervention in the Form of International Tribunals", in *International Journal of Peace Studies*, 2002, vol. 7, no. 1, p. 41; "Outreach of International Justice: How Can the Work of an International Criminal Tribunal Foster the Rule of Law in National Jurisdictions?", Symposium on the Legacy of International Criminal Courts and Tribunals in Africa (ICTR and International Center for Ethics, Justice, and Public Life, Brandeis University 2010) 34, available at http://www.brandeis.edu/ethics/pdfs/internationaljustice/Legacy_of_ICTR_in_Africa_ICEJPL.pdf, last accessed on 25 March 2012.

[90] *Ibid*., pp. 89–91.

[91] *Ibid*., p. 92.

[92] See Mark A. Drumbl, "Pluralizing International Criminal Justice", in *Michigan Law Review*, 2005, vol. 103, no. 6, pp. 1295, 1299.

[93] See Alexander Wilde, "Irruptions of Memory: Expressive Politics in Chile's Transition to Democracy", in *Journal of Latin American Studies*, 1999, vol. 31, pp. 473, 474.

of violence and trauma,[94] the international trial as an instrument for the establishment of the rule of law at least attempts to pave the way to belief in and support for fundamental human rights principles. This norm-creating function of the international trial is inevitably reflected through the persons and crimes it chooses to prosecute. Sex crimes could justifiably be considered an appropriate category for prioritisation for prosecution under this rubric for several reasons.

While it should be obvious that prevention of impunity for crimes such as killings, torture and other forms of harm resulting in severe suffering should feature prominently on the communicative agenda of international trials, perhaps a special case can be made for focusing on crimes that are less universally regarded, at least in practice, as equally deserving of condemnation.[95] In other words, in a world of scarce resources, the norm creating and enforcing function of international tribunals can arguably be better directed to sending a clear message that sex crimes are considered equally egregious violations of human dignity as any of the crimes that are more traditionally accepted as such.[96]

This argument has particular force in countries where gender relations have been historically unequal and harmful to women, both in times of peace as well as in times of war. In the case of Cambodia, the government followed an official policy of amnesiac silence about the atrocities during the Khmer Rouge, which was only reluctantly discarded with the establishment of the ECCC.[97] As proceedings before the ECCC gathered momentum, the outreach activities carried out by ECCC officials combined with vigorous information and outreach campaigns by NGOs and civil society groups active in Cambodia introduced an entire generation of Cambodians, some for the very first time, to the horrific nature of the

[94] See Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, "Context, Timing and the Dynamics of Transitional Justice", in *Human Rights Quarterly*, 2009, vol. 31, pp. 163, 169.

[95] See Margaret M. deGuzmann, "Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda", in *International Criminal Law Review*, 2011, vol. 11, pp. 515, 521–522.

[96] *Ibid*., pp. 525–526.

[97] See David Chandler, "Cambodia Deals with its Past: Collective Memory, Demonisation and Induced Amnesia", in *Totalitarian Movements and Political Religions*, 2008, vol. 9, no. 2, pp. 355, 356.

crimes committed by the Khmer Rouge.[98] However, this resurgence of interest in Cambodia's past left untouched, the issue of sexual crimes during the Rouge's regime. As the interview with Silke Studzinsky reminds us, this was due to the common assumption that such crimes did not occur during the DK regime and the otherwise extensive documentation on Khmer Rouge atrocities by Documentation Centre for Cambodia ('DCCAM') did not single them out.[99]

This lack of attention to sexual crimes must be seen in the context of current Cambodian society, which is characterised by severe gender disparities. Despite the fact that women are heads of over a quarter of Cambodian households, women continue to be regarded as occupying a lower status in the social hierarchy.[100] Laws prohibiting violence against women, including domestic violence, rape, crimes against sex workers, also suffer from problems of under-enforcement, contributing to a culture of impunity.[101]

Highlighting investigation and prosecution of sex crimes in post conflict societies can have far reaching expressive and didactic effects.[102] Not only can international tribunals establish accountability for crimes, the recognition of which at the international criminal law level is relatively recent and fragile, but also contribute to establishing societal norms that proscribe violence against women, even in times of peace. This potential would also be in line with the position taken by feminist scholars who argue that crimes against women in war time are made more acceptable by the everyday under-prosecution of violent crimes routinely committed

98 Alex Bates, *Transitional Justice in Cambodia: Analytical Report*, British Institute of International and Comparative Law, 2010, pp. 69–70. On the level of knowledge about the Khmer Rouge regime in Cambodian society, see also Phuong Pham, Patrick Vinck and Mychelle Balthazard, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia' Human Rights Center*, University of California Berkley, 2009, pp. 25–27, available at http://www.law.berkeley.edu/HRCweb/pdfs/So-We-Will-Never-Forget.pdf, last accessed on 28 October 2011.

99 Studzinsky, 2009, *supra* note 86.

100 UNIFEM, WB, ADB, UNDP and DFID/UK, "A Fair Share for Women: Cambodia Gender Assessment", 2004, p. 3.

101 *Ibid*., pp. 10–11

102 See M. deGuzmann, 2011, *supra* note 95, pp. 525–526.

against women, with which they have more in common than is apparent at first glance.[103]

10.5. The Role of Civil Parties in International Criminal Trials

Discussions on the history of prosecution of sex crimes by international tribunals readily acknowledge that sex crimes were included within the jurisdiction of the ICTY and the ICTR at least in part due to extensive advocacy by women's organisations.[104] The ICTY Statute specifically enumerates rape as a crime against humanity; the ICTY's Victims and Witnesses Unit must provide support particularly in cases of sexual offences and has been encouraged to appoint qualified women on its staff; the ICTY's rules of evidence contain special provisions for sexual offences; and the position of a Legal Advisor for Gender Related Crimes has been created for the ICTY and the ICTR.[105]

Despite the pioneering work of the ICTY and the ICTY in respect of support for victims of sex crimes and acknowledgement of their suffering, it would not be unfair to suggest that these earlier international courts were not as "victim centric" as their more recent counterparts. Much has been made of the far greater participatory role according to victims in the process of the ICC and the ECCC.[106] The general perception is that the

[103] See Rhonda Copelon, "Surfacing Gender: Reconceptualizing Crimes Against Women in Times of War", in Lois Ann Lorentzen and Jennifer Turpin (eds.), *The Women and War Reader*, New York University Press, New York, 1998, pp. 64, 75; Carolyn Nordstrom, "Girls Behind the (Front) Lines", in Lois Ann Lorentzen and Jennifer Turpin (eds.), *The Women and War Reader*, New York University Press, New York, 1998, p. 86.

[104] Hilary Charlesworth, "Feminist Methods in International Law", American Journal of International Law, 1999, vol. 93, pp. 379, 387; Richard Goldstone, "The United Nations' War Crimes Tribunals: An Assessment", in *Connecticut Journal of International Law*, 1997, vol. 12, pp. 227, 231.

[105] Karen Engle, "Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina", in *American Journal of International Law*, 2005, vol. 99, no. 4, pp. 778, 781.

[106] On victim participation at the ICC, see generally T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford University Press, 2010; Carsten Stahn, Héctor Olásolo and Kate Gibson, "Participation of Victims in Pre-trial Proceedings of the ICC", in *Journal of International Criminal Law*, 2006, vol. 4, p. 219; Hakan Friman, "The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?", in *Leiden Journal of International Law*, 2009, vol. 22, p. 485. On victim participation at the ECCC, see Robert Petit and Anees Ah-

ECCC provides for the most robust mechanism for participation by victims acting as civil parties.[107] According to the ECCC Internal Rules, victims can participate in proceedings before the ECCC by 'supporting the prosecution' and seek collective and moral reparations.[108] The exact scope of victim participation in trial proceedings is still in a state of flux, and after an initial expansive understanding of victims' rights, the Trial Chamber has been slowly limiting their participation.[109] For instance, the Chamber has held that Civil Parties do not have a general right of equal participation with the Co-Prosecutors and cannot make submissions on issues of sentencing or pose questions pertaining to the accused's character.[110] The Internal Rules have also been revised and while the Civil Parties may participate individually at the pre-trial stage, they must comprise a single consolidated group at the trial stage and be represented by Lead Co-Lawyers who file a single claim for reparations.[111] Leaving aside the exact restrictions on participation contemplated and their potential repercussions, it bears noting that the charge of forced marriages may well never have been litigated before the ECCC if the Civil Parties were not permitted to play a crucial participatory role in the pre-trial stage.

One can of course question whether such a prominent role for victims in the trial proceedings such that it enables them to influence the

med, "A Review of the Jurisprudence of the Khmer Rouge Tribunal", in *Northwestern Journal of International Human Rights*, 2010, vol. 8, pp. 165, 173–174; David Boyle, "The Rights of Victims: Participation, Representation, Protection, Reparation", in *Journal of International Criminal Justice*, 2006, vol. 4, p. 307.

[107] See, *e.g.*, Brianne N. McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles", in *Leiden Journal of International Law*, 2009, vol. 22, pp. 127, 142–145; see also Mahdev Mohan, "The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal", in *International Criminal Law Review*, 2009, vol. 9, pp. 733, 735–736.

[108] Rule 23(1), Internal Rules.

[109] See Alain Werner and Daniella Rudy, "Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?", in *Northwestern Journal of International Human Rights*, 2010, vol. 8, no. 3, pp. 301–302.

[110] *Prosecutor v. Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Decision on Civil Parties' Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Parties' Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 12 October 2009, paras. 25 and 46. See further Werner and Rudy, 2010, *supra* note 109, p. 303.

[111] Rule 23(3), Internal Rules; Werner and Rudy, 2010, *supra* note 109, p. 303.

charges filed against the accused is in fact a positive development. Advocates of a victim centric approach in international trials argue that participation enables the victim to regain agency and control over his life, restores his dignity, affirms and validates his experience and contributes to truth-telling and healing.[112] This approach borrows from the 'restorative justice' paradigm that has recently gained popularity in domestic criminal law circles. Restorative justice views crime as conduct that violates people and relationships resulting in an obligation to make reparations and conceives of justice as a purpose driven process bringing together the actors affected by the crime with a view to achieving reconciliation.[113] As one of its most influential proponents, Braithwaite states that this primary focus on the crime's consequences and the needs this generates for the affected community makes restorative justice "more act focused and less focused on the offender as a person; more victim-focused and less offender-focused".[114]

While the restorative justice focus on victims and affected communities is undoubtedly appealing, caution must be exercised before adopting it uncritically at the international criminal law level for several reasons. First, some variants of the model have invited criticism at the domestic level for their vagueness in defining key terms, their potential inconsistency with the demands of impartiality in sentencing, and for altogether overly expansive substantive and procedural rights granted to victims, especially as concerns sentencing.[115] Second, the claim that granting participatory rights to victims in international trials actually achieves the

[112] See the discussion at Mohan, 2009, *supra* note 107, pp. 736–737; Naomi Roht-Arriaza, "Impunity and Human Rights", in Naomi Roht-Arriaza (ed.), *International Law and Practice*, 1995, p. 21; Raquel Aldana-Pindell, "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes", in *Human Rights Quarterly*, 2005, vol. 26, pp. 607, 675; Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violator Console Their Victims?", in *Harvard International Law Journal*, 2005, vol. 46, pp. 295, 337.

[113] David Dolinko, "Restorative Justice and the Justification of Punishment", in *Utah Law Review*, 2003, pp. 319–320.

[114] John Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, 2002, p. 96.

[115] For a detailed critique, see Andrew Ashworth, "Responsibilities, Rights and Restorative Justice", in *British Journal of Criminology*, 2002, vol. 42, pp. 578–595; Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing*, Oxford University Press, 2005, pp. 110–130.

objectives of healing and reconciliation is not always supported by empirical evidence. In the context of the ECCC, some of the research actually points to a contrary result: the disjunction between the experiences and expectations of victims and the manner in which they get interpreted through the lens of the legal process at the ECCC has actually left many who did participate in the process embittered, disillusioned, and frustrated.[116]

Enhanced victim participation may nonetheless form an important structural feature of international tribunals if it is considered useful for different consequentialist reasons: the obligation of the tribunal to establish the "truth" about the crimes that occurred during the events under its consideration. If the objective of the tribunal is indeed to paint as accurate and complete a portrait as it can of the atrocities committed by the accused before it, then the more opportunities that are accorded to parties to assist the court in this goal, the better. This is in fact one of the arguments used by the Lawyers for Civil Parties for including the crime of forced marriages in the list of charges against the accused.[117] This rationale may apply even more strongly in the case of tribunals similar to the ECCC which are oriented quite strongly towards the civil law model[118] where one of the primary purposes of the criminal trial, at least in principle, is to establish the truth.

10.6. Conclusion

The prosecutions for forced marriages before the ECCC do not strictly mirror the dilemmas that a pure case of thematic prosecutions may have to face. Controversial as the charge of forced marriages may be in the context of the ECCC, due to its relatively late addition to the other charges against the accused, it does not pose the more pressing concern that its pursuit would jeopardise any prospects of investigating and prosecuting other offences. Nonetheless, a close study of the case assists us in conducting a "mapping exercise" which identifies factors – normative, pragmatic, and institutional – that would be relevant in the justification of the

[116] Mohan, 2009, *supra* note 107, pp. 737–738.

[117] First Request, *supra* note 1, p. 43.

[118] For the ECCC's civil law orientation, see generally Kate Gibson and Daniella Rudy, "A New Model of International Criminal Procedure?: The Progress of the Duch Trial at the ECCC", in *Journal of International Criminal Justice*, 2009, vol. 7, p. 1005.

practice of thematic prosecutions. This exercise, as the chapter demonstrates, is however merely a first and fairly modest step in addressing the challenge of thematic prosecutions. Any further examination of the rationale behind thematic prosecutions must go deeper and unravel the knotty issues that lie at the heart of these factors and which remain unresolved in international criminal justice –what should be the ultimate goal of prosecutions for mass atrocity and how can this best be achieved through the design and structure of international criminal tribunals.

11

Special Mechanisms to Investigate and Prosecute International Sex Crimes: Pro and Contra Arguments

Olympia Bekou[*]

11.1. Introduction

Thematic prosecutions cannot take place in a vacuum. They require an institutional framework in which to occur. When contemplating thematic prosecutions at the national level, one cannot fail to notice that they are inextricably linked to issues of institutional capacity. Investigating and prosecuting core international crimes at the domestic level is not an easy task. The principle of complementarity ensures that national jurisdictions, alongside the International Criminal Court ('ICC'), share the burden of putting an end to impunity for core international crimes.[1] International sex crimes share with the rest of the core international crimes, both the element of gravity as well as the complexity in terms of investigations and prosecutions. However, what sets them apart is perhaps the fact that they are emotive and political.

In this chapter, international sex crimes will not be examined *per se*. Rather, the emphasis will be on the national level and the institutional capacity needed in order to investigate and prosecute core international crimes at the national level, including international sex crimes.[2] In particular, the chapter will explore the advantages and disadvantages associ-

[*] **Olympia Bekou**, Associate Professor and Head, International Criminal Justice Unit, Human Rights Law Centre, University of Nottingham and Senior Advisor, Case Matrix Network. I am indebted to Hilary Peden and Yusuke Hara for collating some materials for me. All errors or omissions remain mine alone.

[1] See Rome Statute of the International Criminal Court, Preamble para. 10, Arts. 1 and 17.

[2] On the significance of national capacity for the investigation and prosecution of international crimes, see generally M. Bergsmo, O. Bekou and A. Jones, "Complementarity and the Construction of National Ability", in C. Stahn and M.M. El Zeidy, (eds.), *The International Criminal Court and Complementarity – From Theory to Practice*, vol. II, Cambridge University Press, Cambridge, 2011, pp. 1052–1070.

ated with having special mechanisms, in the form of specialised units, for such crimes. The necessity, or not, for specialised units goes beyond sex crimes. Arguments for or against specialised mechanisms apply irrespective of the types of crimes involved.

Besides examining the desirability of having specialised units, the chapter will also discuss whether national prosecutions of core international crimes may be better served by *ad hoc* arrangements. The purpose of this juxtaposition is to present a balanced overview of the key options available when considering whether or not to invest in the creation of specialised units at the national level. The chapter concludes with the acknowledgement that given that both options have considerable advantages and disadvantages, it is difficult to propose a single solution that would be suitable for all national jurisdictions at all times. However, it is clear that a degree of specialisation, whether in the form of specialised mechanisms or particular expertise that could be resorted to, would be of benefit for the effective investigation or prosecution of core international crimes, thematic or otherwise.

11.2. Specialised Units: Some Preliminary Observations

The proliferation of specialised units at the national level is a relatively recent phenomenon. Specialised units dealing with terrorism, organised crime, crimes against children, public health offences, *et cetera*, have mushroomed amongst the judicial systems of the most developed nations.

Specialised units for the investigation and prosecution of core international crimes first appeared to deal with World War II criminals who had fled the *loci comissi delicti* and settled in other countries. Australia, Austria, Canada France, Poland, Spain the Netherlands the UK, and the United States of America all conducted trials involving Nazi war criminals.[3] With the completion of those cases, most of such units were dismantled to be replaced in the modern *post ad hoc* Tribunal and ICC establishment era with specialised units ready to make the complementarity promise a reality, with infrastructure being put in place in order to deal with core international crimes, if and when these arise. The fact that such units, with their current post WWII mandate, have only been in existence for a short period to date, makes it difficult to discern any patterns. Cur-

[3] See generally T.L.H. McCormack, G.J. Simpson (eds.), *The Law of War Crimes, National and International Approaches*, Kluwer, The Hague, 1997.

rently, there is not much research or statistics available on the issue. Assessing the performance of such efforts will require a few more years and hard empirical data, before any comparative statistical analysis may be undertaken. At the time of writing, any examination of such units can only be made on the basis of some general arguments and through the lens of experience from other areas of specialisation, such as the investigation and prosecution of ordinary sex crimes nationally.

Specialisation may occur at a number of different levels: immigration, investigation (policing), prosecution and adjudication.

When discussing specialisation in the investigation and prosecution of international sex crimes, one needs to focus not just on investigation and prosecutions *per se*, but also on how such perpetrators enter into the system and whether the trial itself, if that stage is reached, should also be conducted by specialised units. Although this chapter is primarily concerned with investigation and prosecution, attention ought to be drawn to issues of immigration first.

Even without delving into the complex area of asylum and immigration law, which falls outside the remit of this chapter, it is clear that a number of perpetrators of core international crimes, including international sex crimes, will be picked up at the moment when they are trying to enter a country other than their country of origin, or when they apply for asylum, visas or naturalisation in a new country. This is why a number of States, particularly in Europe, have created specialised units within their border agencies and immigration authorities to deal with such influx. An example would be the Netherlands[4] or the UK.[5] Specialisation therefore occurs even at the stage prior to the actual investigation of a crime.

Besides immigration, the thrust of the debate on the merits or demerits of specialised units can be found in the investigation and prosecution of such crimes. Although variations on the ground regarding the manner of investigation and prosecution of international sex crimes would largely depend on a State's belonging to the inquisitorial or adversarial tradition, arguments relating to specialisation would be the same, with perhaps some differences in the modalities of implementing the scheme.

The next preliminary issue that needs to be considered is what drives the move towards having special mechanisms. The answer is not

4 See *infra* note 10.
5 See *infra* note 12.

immediately obvious. Specialisation cannot be grounded in a legal obligation nor can it be found in a uniform political reality that warrants the creation of such units.

With that in mind, a quick look at the world map reveals that with the exception of Canada,[6] which has a long-standing presence and commitment in human rights and international criminal justice issues, the concentration of formalised special units for core international crimes is found primarily on the European continent. Denmark,[7] Germany,[8] Sweden,[9] the Netherlands,[10] Norway,[11] and the U.K. to some extent,[12] have

[6] See http://canada.justice.gc.ca/warcrimes-crimesdeguerre/home-accueil-eng.asp, last accessed on 5 November 2011. The PPSC is responsible for prosecuting offences under the Crimes Against Humanity and War Crimes Act. The PPSC's first prosecution under the Act resulted in the conviction to life imprisonment of Désiré Munyaneza for genocide, crimes against humanity, and war crimes in relation to the Rwandan genocide. This case is on appeal at the time of writing. A second case, that of R. v. Mungwarere, who was charged in 2009 with genocide, is currently ongoing with the additional charges of war crimes and crimes against humanity made against him in 2010, a trial date set for 2012. See Public Prosecution Service of Canada, "Annual Report", November 2010, available at http://www.ppsc-sppc.gc.ca/eng/pub/ar11-ra11/04.html#section2_2_2, last accessed on 5 November 2011.

[7] Pursuant to the Ministerial Order No.1146/2002, the SICO was created with a special mandate for legal proceedings in relation to international crimes, including genocide, crimes against humanity, war crimes, acts of terrorism and other serious crimes committed abroad. Other serious crimes include homicide, torture, deprivation of liberty, rape, bombing and arson. See http://www.sico.ankl.dk/page22.aspx, last accessed on 5 November 2011.

[8] In Germany, a Special Unit for the Fight against War crimes was created in 2003 and in 2009. It was renamed the Central Unit for the Fight against War Crimes and further offences pursuant to the Code of Crimes against International Law. See Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch (ZBKV), available at https://www.bka.de/nn_196810/sid_78C6A12A8BCA1FC2B8A3D5DACC6549BE/DE/DasBKA/Aufgaben/Zentralstellen/ZBKV/zbkv.html?__nnn=true, last accessed on 5 November 2011.

[9] Following a decision of the National Police Board on 5 September 2007, the National Criminal Police's War Crimes Unit, has operated since March 2008. It is responsible for investigation and prosecution of war crimes, crimes against humanity and genocide. For its achievements, see http://www.aklagare.se/Dokumentsamling/Uppdragochrapporter/Rapporter/Rapport-internationella-brottpdf/, last accessed on 5 November 2011.

[10] The Dutch War Crimes unit is located within the Immigration and Naturalisation service. See http://english.ind.nl/, last accessed on 5 November 2011.

[11] The National Authority for Prosecution of Organised and Other Serious Crime was created in 2005, bearing a special responsibility for investigating and prosecuting cas-

gone down the route of specialisation. It is therefore worth examining what makes the European continent more open to the establishment of specialised units.

For countries belonging to the European Union, the impact that European integration has had on the issue of specialisation needs to be examined. In recent years, the EU has been a staunch supporter of the International Criminal Court ('ICC') and has taken considerable steps in support of the Court.[13] Amongst the various instruments that have been promulgated by the EU,[14] European Council Decision 2003/335/JH[15] fosters closer co-operation, in the investigation and prosecution of core international crimes, by setting up a European network of contact points and by inviting Member States 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".[16] However, despite the influential role that EU law has played in that field more generally, it does not account for notable aberrations in the European continent. Out of all EU Member States, the ones that have specialised units remain the exception. Amongst the larger EU Member States, France,[17] but also Spain, do not have operational spe-

es concerning organised crimes, high-tech crime and international crimes, including genocide, crimes against humanity, and war crimes. See http://www.nsd.uib.no/polsys/data/en/forvaltning/enhet/13694, last accessed on 25 March 2012.

12 Although the UK does not have a special Unit within her prosecution service, it does, however, have a war crimes team within the UK Border Agency. See further http://www.ukba.homeoffice.gov.uk/, last accessed on 5 November 2011. Moreover, the counter-terrorism unit of the Metropolitan police provides assistance with investigation on an *ad hoc* basis. See http://www.met.police.uk/so/counter_terrorism.htm, last accessed on 5 November 2011

13 See A. Antoniadis, O. Bekou, "The EU and the International Criminal Court: An Uneasy Symbiosis in Interesting Times", in *International Criminal Law Review*, 2007, vol. 7, pp. 621–55.

14 Council Decision 2011/168/CFSP, 21 March 2011, on the International Criminal Court and repealing Common Position 2003/444/CFSP and Action Plan to follow-up on the Decision on the International Criminal Court, Council of the European Union, 12080/11, 12 July 2011.

15 Council Decision 2003/335/JHA, 8 May 2003, on the investigation and prosecution of genocide, crimes against humanity and war, official journal L 118/12, 14 May 2003.

16 *Ibid.*, Art. 4.

17 Although a draft for the creation has gone before the French Senate, the unit is not operational at the time of writing. See "Projet de loi relatif à la repartition du contentieux et creation d'un pole specialise dans les crimes contre l'humanité au TGI de Pa-

cialised investigative and prosecutorial units despite the fact that they have both been involved in the prosecution of core international crimes. And whilst France is in the process of establishing such a unit, hopefully before not too long, no such unit exists in Spain, which is interesting given the latter's position on universal jurisdiction as developed over the years.[18]

Despite the absence for a firm legal basis requiring the establishment of specialised units, such units have made their appearance on the legal stage. Whether they are here or not to stay depends largely on their efficiency, their ability to bring about successful convictions, and perhaps most importantly their cost-effectiveness.

11.2.1. The Advantages of Special Mechanisms

Having examined some preliminary issues, let us now turn to the advantages specialisation offers, which may explain why States have begun to invest in creating specialised units. Given the absence of empirical data to prove or disprove the perceived advantages, what is presented below are some advantages that would apply generally where specialised units exist, irrespective of the type of crime targeted.

11.2.1.1. Long-Term Commitment

The first advantage is perhaps the most symbolic one: the mere existence of a specialised unit indicates that a long term commitment to investigat-

ris", available at http://www.senat.fr/rap/l10-394/l10-39432.html, last accessed on 5 November 2011. See also the recommendations on the draft submitted by Amnesty International, International Federation for Human Rights ('FIDH'), Human Rights Watch ('HRW'), Ligue des Droits de l'Homme and Redress, entitled "Recommandations relatives a l'etablissement d'un pole specialisé dans les crimes de guerre et contre l'humanité au Tribunal de Grande Instance de Paris", March 2011, available at http://www.fidh.org/IMG//pdf/France_War_Crimes_Unit_Recommenda tions_03-16-11.pdf, last accessed on 5 November 2011.

[18] See Enrique Carnero Rojo, "National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, pp. 699–728; Ignacio de la Rasilla del Moral, "The Swan Song of Universal Jurisdiction in Spain", in *International Criminal Law Review*, 2009, vol. 9, pp. 777–808.

ing and prosecuting these specific crimes exists.[19] It emphasises that impunity for these crimes will not be tolerated.[20] That is not to say that the existence of the unit, if not coupled with relevant action, would suffice. However, it can be safely assumed that States which have committed the resources required for the establishment of such units would be prepared to put them to good use. Building capacity on a longer term basis ensures better long term planning and the ability to deal with cases as they arise.

11.2.1.2. Development of Knowledge and Expertise (Training)

An advantage closely linked to what the existence of special mechanisms signals is the development of expertise and knowledge within the unit and how this will enable the unit to better perform its duties in the future.[21] A specialised unit is able to bring together experts from more than one field, such as judges, prosecutors, interpreters, researchers, to deal with certain crimes that may be complex and sensitive.[22]

11.2.1.3. Better Resource Allocation and Mobilisation

Having one unit respond to all crimes in a certain field concentrates the information and resources needed for these crimes in one department. This allows for the better mobilisation of resources to prosecute interna-

[19] See Redress and FIDH, "Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units", 9 December 2010.

[20] Canada's Crimes against Humanity and War Crimes Program, available at http://www.justice.gc.ca/warcrimes-crimesdeguerre/crime-crime-eng.asp, last accessed 2 March 2011.

[21] Redress and FIDH, 2010, p. 9, *supra* note 19.

[22] B. Kouchner and M. Alliot-Marie, "Pour la création d'un pôle 'génocides et crimes contre l'humanité' au TGI de Paris, par Michèle Alliot-Marie et Bernard Kouchner", Le monde, 6 January 2010, available at http://www.lemonde.fr/idees/article/2010/01/06/pour-la-creation-d-un-pole-genocides-et-crimes-contre-l-humanite-au-tgi-de-paris-par-michele-alliot-marie-et-bernard-kouchner_1287995_3232.html, last accessed on 2 March 2011.

tional crimes in particular.[23] This, in turn, would have the positive result of reducing any overlap in prosecution and investigation activities.[24]

11.2.1.4. Better International Co-operation

The next advantage relates to co-operation. Given that the ICC system relies heavily on State authorities to provide all aspects of co-operation,[25] and given the prominent extra-territorial element in the investigation and prosecution of core international crimes, the existence of such units also facilitates communication with similar units in other countries when it is easy to identify who is responsible for certain crimes.[26]

Besides the formal/institutional aspect of co-operation there is also a human dimension associated with the existence of specialised units. The professional contacts that key personnel employed by such units are likely to develop with colleagues from other such units operating in other countries should not be underestimated. Although formal routes will always have to be followed for the execution of a co-operation request, there is anecdotal evidence to suggest that peer-to-peer communication greatly facilitates the progress of a case, particularly when the request involves co-operation from abroad. Inevitably, colleagues across countries who share the same work pressures and expertise can develop a lingua franca when dealing with colleagues from other countries. This dual aspect of co-

---

23 D. Orentlicher, "Independent study on Best Practices, including recommendations, to Asssist States in Strengthining their Domestic Capacity to Combat all Aspects of Impunity", UN Economic and Social Council, 27 February 2004, E/CN.4/2004/88, para. 41.

24 Redress and FIDH, 2010, p. 9 *supra* note 19.

25 See Art. 86 of the Rome Statute. A statement made by the late Antonio Cassese with regard to the ICTY was that the tribunal "remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions". This rings true of the ICC as well. See A. Cassese, "On Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, 1998, vol. 9, no. 1, p. 9.

26 Within the EU, cooperation is facilitated through Council Decision 2002/494/JHA of 13 June 2002 – which set up a European network of contract points in respect of persons responsible for genocide, crimes against humanity and war crimes – and Council decision 2003/335/JHA of 8 May 2003, on the investigation and prosecution of genocide, crimes against humanity and war crimes, *supra* note 15.

operation, both formal and informal, can be better served through the existence of specialised units.

11.2.1.5. Visibility, Accountability and Outreach

The next benefit of having specialised units relates to externalising the work that the unit undertakes and making it accessible for the wider public, and thus increasing its societal impact. When a single unit is responsible for a certain type of crime, it is in a position to better ensure external visibility of its work and accountability of the investigation and prosecution of these crimes in the eyes of the public.[27] Furthermore, a specialised unit creates better awareness of the issues with which it engages and can also more effectively facilitate the development of outreach and awareness programmes.[28]

11.2.1.6. Consistency, Efficiency, Successful Prosecutions

When these national units are created and are reasonably mobile, they could ensure consistency in the investigation and prosecution of a certain type of crime throughout one jurisdiction.[29] This is particularly relevant to crimes like core international crimes which have a low instance of occurrence, but which are very serious offenses that require specialised knowledge and, owing to their nature, increased sensitivity.

Assuming that the personnel in these units are given special training, they would most likely be able to more effectively and efficiently investigate and prosecute the specialised crimes concerned as compared to ordinary personnel who would have to pick up a highly complex new area of the law for the purposes of dealing with a rather limited number of specialised cases. For instance, a specialised lawyer would be in a better position to assess the strengths and weaknesses of a case and would therefore have higher chances of success in court.[30]

---

27 Redress and FIDH, 2010, p. 9, *supra* note 19.

28 *Ibid*, p. 25.

29 D. Beichner and C. Spohn, "Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit", in *Criminal Justice Policy Review*, 2005, vol. 16, p. 462.

30 *Ibid*.

11.2.1.7. Increased Capacity

Finally, in countries where universal jurisdiction is applied, often personnel with experience only in domestic crimes are involved in international crimes. However, if there is a specialised unit for core international crimes this would lead to increased capacity to properly investigate and prosecute these crimes both abroad and at home.[31]

The creation and operation of specialised units offers distinct advantages. These can be classed as predominantly structural, that is, such advantages are associated with the increased institutional capacity that the creation of such special mechanisms entails. But the human dimension associated with sustainable training, as well as cross-border co-operation, contributes significantly to the desirability of specialised units for the investigation and prosecution of core international crimes, including sex crimes.

11.2.2. The Disadvantages of Special Mechanisms

Every effort where major structural change is required within established and functioning judicial systems is likely to be tainted by the realisation that a number of disadvantages can also be discerned. The creation of special mechanisms for thematic prosecutions is no exception.

11.2.2.1. Added complexity

First and foremost, the very creation of specialised units introduces an added layer of complexity. If each type of crime were to be assigned a special unit, this would create an unnecessarily complex system, not least in terms of policing. It is, therefore, important to consider which types of crime merit special units.[32] Associated with this is the issue of prioritisation *ratione materiae*. The following dilemma therefore ensues: Why sex crimes and not child soldiers for instance? In other words, specialisation may require a justification as to why a certain category of crimes is prioritised over another. The criteria for such prioritisation, and the legal

[31] Track Impunity Always ('TRIAL'), "Une unite pour crimes de guerre: en Suisse aussi?", in *Bulletin d'information*, no. 12, 2007, available at http://www.trial-ch.org/fileadmin/user_upload/documents/Journal/BI12frweb.pdf, last accessed on 5 November 2011.

[32] J. P. Crank and R. Langworthy, "An Institutional Perspective of Policing", in *Journal of Criminal Law and Criminology*, 1993, vol. 83, p. 343.

framework under which such units would need to operate at the national level, is a matter that has to be left to each individual State to decide as this would impinge on questions of national policy.

Complexity is likely to be present not only at the initial stages of the establishment of special mechanisms, but also throughout the operation of the system. Even when the initial start-up cost is overcome, the additional steps that a specialised unit adds to the normal criminal justice process may jeopardise the smooth investigation or prosecution of a case. If, however, specialised units are likely to provide better justice in the long run, then the initial start up cost and added complexity is counterbalanced by the long-term gains.

The fact remains that the complexity that the creation of specialised units brings both in terms of how the new unit would fit in the existing criminal justice system, but also in terms of the ensuing prioritisation dilemmas, is a real issue that needs to be seriously considered prior to advocating in favour of such units.

11.2.2.2. Cost

Closely linked to the issue of added complexity discussed above is the question of cost. Creating specialised units comes at a premium and this is likely to be the key practical argument against such unit creation. Besides the expense required for the initial stage of creation, the cost of running such units is likely to be higher than that of dealing with core international crimes within the normal criminal justice system. A more complex system and special training also requires a larger budget, which may not be feasible in all national jurisdictions, particularly in relation to those of less well-resourced States or States in transition.

11.2.2.3. Unit-Straddling

A further downside associated with specialised units can be observed when crimes falling under the remit of the special unit are interconnected with other crimes or regimes. What this author calls, 'unit-straddling', could potentially occur. For instance, if a peacekeeper commits a sex crime abroad, then jurisdiction would have to be accrued potentially to more than one conflicting agency: 1) the specialised unit entrusted with the investigation and prosecution of core international crimes, and 2) the military system of justice (which, owing to the alleged perpetrator and his

membership of the State's armed forces could also have jurisdiction). The example above is one of many possible combinations.[33] It would not be wise to try and delimitate each unit's remit prior to a conflict amongst units arising. If anything, it might be difficult to predict where the unit-straddling is likely to occur or where potential conflicts are likely to arise as the constituent elements of each case may differ. Each case should therefore be dealt with *in concreto*. In any case, unit-straddling may result in unnecessary overlap of personnel and duplication of effort and should be avoided to the extent that it is possible.

11.2.2.4. Rarity of Incidence

The next disadvantage that can be identified is linked to resource allocation, based on the rarity of incidence of core international crimes. Core international crimes do not routinely occur. Whether a specialised unit will be extensively used or not depends on the position of a State as a post-conflict country or country in transition, the presence of perpetrators or victims on its territory or the exercise of universal jurisdiction. A specialised unit can be underused at best, redundant and even a waste of resources, at worst, if the number of reported cases is low.[34] This point serves as a useful reminder that not all countries and jurisdictions would warrant specialised units because of the rarity of incidence of certain international crimes. In such instances, resources could be better used if allocated on other parts of the criminal justice system.

11.2.2.5. Impact on Personnel

On the other hand, it is possible that the reverse can happen. In jurisdictions with high incidents of crimes that would come under the remit of specialised units, special unit personnel could be overworked and experience burn-out. In other words, getting the balance right between numbers of predicted cases and actual personnel will be crucial for resources to be allocated as efficiently as possible. The human factor and the impact that a low or high number of cases would have on key personnel should not be underestimated.

---

[33] Consider also the possibility of specialisation within a specialised system, *i.e.* whether a specialised unit for the prosecution of sex crimes is needed within a state's military justice.

[34] Redress and FIDH,2010, p. 27, *supra* note 19..

11.2.2.6. Impact on Victims

The impact such units may have on the victims and their perception of justice should also be taken into consideration. Specialised units could potentially marginalise victims because these crimes are separate from mainstream judicial processes and may therefore be perceived as a 'special crime'. This might be the case with regard to special sex crimes units where victims may be particularly vulnerable.[35] How victims perceive the justice process is an important aspect of any judicial system; this is more so when victims of core international crimes are concerned.

11.2.2.7. De-skilling

A rather important disadvantage of having specialised units is the so-called de-skilling. What is meant by de-skilling is that, as a result of specialisation, few people possess the necessary knowledge and expertise to process a case falling under the remit of the special unit. For example, in an ordinary rape case, when a victim presents himself or herself at a police station, if specially trained personnel are away attending to another case, the remaining police staff would not be as competent in the collecting of primary forensic evidence from the victim, because they would not feel competent or able to do so. This leads to potential loss of valuable primary evidence in the absence of skilled personnel. The same could be said for specialised units regarding core international crimes. The complexity of such cases inevitably leads to high levels of specialisation amongst staff who develop particular expertise in a relatively narrow field. Their less skilled counterparts would inevitably lag so far behind that it would make it impossible to fill in their shoes when needed. Depending on the system as a whole and how the specialised unit operates within it, the specialised unit could thus be rendered inaccessible to victims. If specialised personnel are unavailable at the time of reporting the crime or if there are too many bureaucratic procedures in place, access to justice may be delayed or even seriously jeopardised. This could cause de-

[35] Saferworld, "Addressing Violence Against Women in Security and Justice Programmes", 11 March 2010, p. 9, available at http://www.saferworld.org.uk/%20downloads/pubdocs/Addressing%20violence%20against%20women%20in%20security%20and%20justice%20programmes%20-%20background%20paper.pdf, last accessed on 5 November 2011.

lays, affect evidence collection, further impacting the outcome of the case, as well as the victim's perception of justice.

11.2.2.8. Marginal Influence on Case Outcomes

Finally, and whilst extrapolating from specialisation in the case of ordinary crimes, and though mindful of the fact that no empirical research is currently available on specialised units pertaining to international crimes the actual influence that such units have on case outcomes would have to be considered. If the prosecution of domestic sex crimes by special units are anything to go by, some studies have revealed that specialised prosecution units do not influence the end result of cases.[36] Whether this would transpose also to the investigation or prosecution of core international crimes cases remains to be seen and cannot currently be firmly established based on the data available to date.

11.3. '*Jura novit curia*' or '*Jura novit curia specialis*'?

Having examined the pro and contra arguments on the creation and operation of specialised units for investigation and prosecution of core international crimes, it is worth considering, for a more complete overview, whether there might also be a need to have specialised judges who would be able to undertake thematic prosecution. Should specialisation at the national level end before entering the courtroom or should a case be made in favour of specialised courts as well?

Although the idea of specialised courts to deal with core international crimes is not new, specialised chambers have been created as a measure of responding to specific post-conflict settings, either to deal with large numbers of cases (see, for example, the special war crimes chamber in Bosnia-Herzegovina)[37],in anticipation of numerous such cases (see the example of Uganda),[1] or have been proposed to deal with ongoing conflicts such as the situation of the DRC.[1] Some of the advantages

[36] Beichner and Spohn, 2005, p. 490, *supra* note 29.

[37] See http://www.sudbih.gov.ba/?jezik=e, last accessed on 5 November 2011.

[38] The Division has recently been renamed 'International Crimes Division' (ICD); available at http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&lte, last accessed on 5 November 2011.

[39] In the context of the workshop that gave rise to this book, a presentation was made on the possibility of creating a mixed chamber in the DRC, which was published as fol-

and disadvantages, discussed above, would equally apply to the establishment of a specialised court system as well. However, there might be less of an incentive to formally establish such special chambers if a State is not likely to be faced with large numbers of cases. Judges of States that have joined the Rome Statute would, in any case, benefit from receiving international criminal law training, which could be put to good use when faced with core international crimes cases, as these may be brought before them. With that in mind, although specialised knowledge would be welcome, advocating the creation of special chambers in all instances may not be justified.

11.4. *Ad hoc* Arrangements

An alternative to having specialised units is to deal with thematic prosecutions using *ad hoc* arrangements. Having examined the advantages and disadvantages associated with the creation of specialised units, the benefits and drawbacks of *ad hoc* arrangements for the investigation and prosecution of core international crimes, including international sex crimes, should therefore also be considered.

11.4.1. The Advantages of *ad hoc* Arrangements

11.4.1.1. Mobility and Flexibility

The first advantage associated with *ad hoc* arrangements relates to the mobility and flexibility that non-formalised arrangements offer. Specialised units are ordinarily concentrated in the capital of the State in question. However, in most systems, investigation and prosecution as well as adjudication are de-centralised. It would not be feasible to create specialised units in each location where prosecutorial capacity exists, nor would it always be desirable. This is because it depends on the circumstances of the case in question, to move all cases to a single location. The use of *ad hoc* experts on international crimes within a country would, therefore, allow for mobility and flexibility. It would not restrict the investigation and

lows: "The Mixed Specialized Court as a Mechanism of Repression of International Crime in the Democratic Republic of the Congo: Lessons Learned from Cambodia, East Timor, Kosovo and Bosnia", available at http://www.cad-congo.org/wp-content/uploads/2010/12/CAD-English.pdf, last accessed on 5 November 2011.

prosecution to large urban areas alone, thus bringing justice closer to the people it concerns.[1]

11.4.1.2. Lower Cost

One of the key disadvantages of having specialised units is, as discussed above,[1] the issue of cost. Conversely, this is perhaps the most prominent advantage of *ad hoc* arrangements. When only a limited number of special advisers are working on specific issues within the entire national jurisdiction, this would lower the cost in the budget associated with their engagement in the process. Such savings would be particularly efficient if there is a lower incidence of core international crimes in that particular jurisdiction. In such an instance, it might not be prudent to proceed with creating a unit whose staff is employed only on a part-time basis and might be better to resort to *ad hoc* arrangements.

11.4.1.3. Use of Existing Expertise

Some of the criticism of having special units is that despite their existence, the training level is still not high enough to effectively combat international crimes. Employing special advisors in an *ad hoc* capacity would enable a government to choose a specific individual based on qualifications and expertise they already possess, rather than having to provide on-the-job training. As no start-up costs would be involved in such an instance, employing individuals who are established in their field would come at a reduced cost, whilst a high level of expertise to deal with core international crimes would, at the same time, be maintained.

The above advantages presuppose that either some competency is already present in a given jurisdiction or that it can be imported relatively easily from abroad. Mobility and flexibility, as well as reduced costs, are certainly compelling reasons in favour of *ad hoc* arrangements. However, as with specialised units, the case for such arrangements is not so clear-cut so as to suggest that this would apply to each and every case before thematic prosecutions can take place.

---

[40] See C.L. Sriram, "Revolutions in Accountability: New Approaches to Past Abuses", in *American University International Law Review*, 2003, vol. 19, p. 383.

[41] See Section 11.2.2. above.

11.4.2. The Disadvantages of *ad hoc* Arrangements

Besides the advantages described in the section above, *ad hoc* arrangements also carry certain disadvantages, which will be examined briefly in this next section.

11.4.2.1. Workload

The first disadvantage relates to the issue of workload. *ad hoc* advisors could become overworked if there are too many cases. Whilst the issue of workload was dealt with with regard to the special units above,[1] finding the right balance would be key to the success of either option. Maintaining a roster of experts who can be called upon at the point of need might be a workable solution. Inevitably, however, the advisor who would have to juggle the *ad hoc* appointment alongside possibly a full-time job may not be able to give a high level of attention to each case which he/she handles. The quality therefore of the case may suffer as a result.

11.4.2.2. Lack of Institutional Memory, Quality Control and Sustainability

Perhaps the greatest drawback of *ad hoc* arrangements is that advisors would not be a consistent part of the system. In any case, the *ad hoc* advisors would not be able to carry out all stages of the investigation and prosecution by themselves. They would still have to rely on police and prosecutors, who will work according to the normal operational protocols and procedures. Advisors moving in and out of cases may lose the overview of each case and not provide a sustainable basis on which to proceed. Moreover, such an arrangement does not encourage the building of capacity for future cases. Police and prosecution teams would still have to be trained alongside the advisor on how to conduct processes of investigation and prosecution correctly, counterbalancing some of the advantages.

The temporality of advisors would have an impact on the institutional culture. There will not necessarily be any institutional memory, particularly if: 1) advisors are only employed for a fraction of the time; 2) there are a large number of them; or 3) they are frequently replaced. Moreover, in developmental terms, employing *ad hoc* advisors does not foster the development of long-term in-house capacity, nor does it facili-

[42] See Section 11.2.2. above.

tate accountability in case there are problems with the advisor's work. The latter point is quite important for quality control purposes.

From the above it is clear that *ad hoc* arrangements, whilst offering more mobility and flexibility, equally carry drawbacks that would affect their effectiveness. Robust mechanisms of quality control procedures would have to be instituted in order to guarantee sustainability of the process in the absence of a permanent system in place. Whilst no solution is risk free, meticulous planning and selection of the right people for the job might counterbalance the disadvantages associated with the use of *ad hoc* arrangements.

11.5. Concluding Observations

It is hoped that the preceding exposition has provided a balanced overview of the main pro and contra arguments of both specialised mechanisms and *ad hoc* arrangements. The question whether to specialise or not to specialise can be answered neither in the affirmative nor in the negative. Despite the distinct advantages that specialisation offers, there are equally significant disadvantages, with de-skilling and unit-straddling constituting very serious reasons to revisit the issue of specialised units. Although there is a clear need for expert knowledge, such compartmentalisation may prove to be detrimental to the overall functioning of the criminal justice process in a core crimes case.

What is clear from the above discussion is that a "one-size-fits-all" approach cannot possibly work for thematic prosecutions, including the prosecution of international sex crimes. Although special mechanisms offer significant advantages, it has to be acknowledged that it is neither feasible nor desirable to insist that each and every State must create specialised units. If such specialisation is alien to the legal system in question, it is likely to be riddled with more problems than it can potentially manage to solve. However, a strong case for expert training and an increase in capacity could be advocated for the investigation and prosecution of core international crimes, sex crimes included, regardless of whether this forms a permanent part of the established system or is the result of *ad hoc* arrangements.

12

Science and International Thematic Prosecution of Sex Crimes: A Tale of Re-Essentialisation

Alejandra Azuero Quijano*

12.1. Introduction

International thematic prosecution of sex crimes is a model for criminal investigation that emerged as the result of successful western feminist advocacy efforts dating back to the early 1990s.[1] This article demonstrates that, as a feminist project, thematic prosecution has undergone three clearly identifiable phases. The first period began in 1993, when feminists negotiated the inclusion of rape as an international crime under the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). The following year, ICTY Prosecutor Richard Goldstone appointed Patricia Viseur Sellers, a prominent feminist internationalist, as Legal Advisor

* **Alejandra Azuero Quijano**, SJD Candidate Harvard Law School. I would like to thank Morten Bergsmo and the rest of the organizers of the FICHL Cape Town Seminar. I owe much to Sarah Richardson, whose forthcoming book inspired the presentation I gave at Cape Town in March 2011. Our conversations about genetics and gender have fed my growing interest for the place of science in legal discourse. I would also like to thank Lucie White for her invaluable mentoring during the past years. Her comments to a previous draft of this chapter were essential to this project. Finally, I would like to thank Amelia J. Evans, for encouraging me to write, and selflessly reading and commenting on previous drafts.

1 Although feminism is not the only force behind the rise of thematic prosecution it is definitely the most significant. This volume and the conference that preceded its publication attest to the fact that today international prosecution of sex crimes is an issue that appeals to a broader community of scholars and practitioners from within and without the legal field. For a summary of feminist efforts to reverse the underprosecution of sex crimes by giving priority to thematic sex crime prosecutions see Margaret M. deGuzman, "Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda", *International Criminal Law Review*, vol. 11, pp. 516–519. See also Margaret M. deGuzman, "An Expressive Rationale for Thematic Prosecution of Sex Crimes", in this volume; and Valerie Oosterveld, "Contextualising Sexual Violence in the Prosecution of International Crimes", also in this volume.

on Gender for the ICTY. It took feminists less than five years to crystallize this first phase, with the result that "gender strategizing" could no longer be considered a luxury for international criminal courts.[2] During the second phase, feminists successfully pushed for prioritizing and isolating the prosecution of sex crimes at the ICTY.[3] This occurred between 1995 and 2001 when the ICTY issued the first indictments and verdicts *exclusively* for counts of rape and sexual slavery in *Kunarac et al.*[4] – also known as the "Foča cases". Such cases became the first thematic prosecution of sex crimes in the history of international criminal courts. Finally, the third phase began in 2006 when, after a thematic prosecution approach prioritized the unlawful enlistment of children, the ICC excluded charges of sexual violence in the case against Thomas Lubanga Dyilo.[5] Despite this decision being considered a reversal of feminists' advocacy achievements, in little more than 20 years, the thematic prosecution of sex crimes became part of mainstream international criminal law practice.

The parallelism between the international legal feminist project in international criminal law – which had the notorious participation of American feminists[6] – and the U.S. women's health movement project for

---

2 I am referencing here the title of a keynote address by Patricia Viseur Sellers entitled "Gender Strategy is not a Luxury for International Courts", in *American University Journal of Gender, Social Policy and the Law,* 2009, vol. 17, p. 301.

3 For a discussion of feminist engagement with international criminal law in the mid-late 1990s, see Doris Buss, "Performing Legal Order: Some Feminist Thoughts on International Criminal Law", in *International Criminal Law Review,* 2011, vol. 11, no. 3, pp. 412–413.

4 International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vuković,* Trial Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T.

5 For a feminist critique of the Lubanga case see Valentina Spiga, "Indirect Victims' Participation in the Lubanga Trial", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 1, pp. 183–198 (discussing the Court's decision to deny sexual violence survivors the status of indirect victims), Sienna Merope, "Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC", in *Criminal Law Forum,* 2011, vol. 22, p. 1–36 (discussing the Court's decision to omit any charges of sexual violence against the accused).

6 For a critical discussion of the role of American feminists in setting the agenda during the 1990s to ensure the criminalization of rape at the ICTY and the International Criminal Court see, *e.g.*, Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law"' *Michigan Journal of International Law*, 2008, vol. 30; Janet Halley, "Rape in Berlin:

the development of sex-specific biomedicine is the departing point of this article. During the last two decades, health feminists in the United States have endorsed scientific theories of essential biological differences between the sexes and used them to justify the need to isolate medical research to focus uniquely on women and girls, and to ultimately create separate specialized institutions for women's health.[7]

First, between 1990 and 1995, health feminists ardently lobbied before Congress for the creation of separate offices within the department of health to address women's health concerns; while also pushing for the mandatory inclusion of women in clinical trials and the subsequent analysis of data separately according to sex. As a result, "gender strategizing" ceased to be considered a luxury for American biomedical institutions. Second, between 1995 and 2004, women's health advocates championed sex-specific research agendas.[8] They also expanded their argument about essential biological differences between men and women beyond disease and health concerns, sustaining that sexual difference could also explain female behavior.[9] It became the first time feminists countered their own project – longstanding since the 1970s – to dissociate gender from nature (the latter in turn is associated with sex), and instead argued in favour of

Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict", in *Melbourne Journal of International Law,* 2008, vol. 78, p. 114.

7 Steven Epstein, *Inclusion: The Politics in Medical Research,* University of Chicago Press, Chicago, 2007, pp. 233–257; Sarah Richardson, *Sex Itself: Male and Female in the Human Genome*, University of Chicago Press, forthcoming, 2013.

8 Richardson, forthcoming, 2013, *supra* note 7.

9 This expansion was partly subsequent to the publication of a report by the Institute of Medicine and sponsored by the Society for Women's Health Research. See Institute of Medicine, "Exploring the Biological Contributions to Human Health: Does Sex Matter?", available at http://iom.edu/Reports/2001/Exploring-the-Biological-Contributions-to-Human-Health-Does-Sex-Matter.aspx, last accessed on 29 September 2011:

> Sex differences in health throughout the lifespan have been documented. Exploring the Biological Contributions to Human Health begins to snap the pieces of the puzzle into place so that this knowledge can be used to improve health for both sexes. From behavior and cognition to metabolism and response to chemicals and infectious organisms, this book explores the health impact of sex (being male or female, according to reproductive organs and chromosomes) and gender (one's sense of self as male or female in society).

gender being determined by differences at the biological level.[10] Finally, starting in 2005, feminists enlisted genomic findings about sexual difference[11] to champion the idea that all biomedical research ought to be conducted and designed to take into account genomics' assertion that men and women should be considered different species. In little more than 20 years health feminists made a remarkable turn to arguments of essential differences between the sexes.

The alignment between the two feminist projects over the past two decades is nothing less than astounding. What we are witnessing is a re-essentialization of feminist advocacy in law and science in ways that are as surprising as the fact that the phenomenon has remained largely unexplored by theorists of science[12] and legal academics alike. However, it is

---

[10] Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality,* Basic Books, New York, 2000, pp. 3–4:

> In 1972 the sexologists John Money and Anke Ehrhardt popularized the idea that sex and gender are separate categories. Sex, they argued refers to physical attributes and is anatomically and physiologically determined. Gender they saw as a psychological transformation of the self – the internal conviction that one is either male or female (gender identity) and the behavioral expressions of that conviction […]. Meanwhile, the second-wave feminists of the 1970s also argued that sex is distinct from gender – that social institutions, themselves designed to perpetuate gender inequality, produce most of the differences between men and women […]. Money, Ehrhardt, and feminists set the terms so that sex represented the body's anatomy and physiological workings and gender represented social forces that molded behavior. Feminists did not question physical sex; it was the psychological and cultural meanings of these differences – gender – that was at issue.

[11] My analysis of the rise of genomic models of sexual difference is based on the work of Sarah Richardson. See Sarah Richardson, "Sexes, Species, and Genomes: Why Males and Females are not Like Humans and Chimpanzees", in *Biology and Philosophy,* 2010, vol. 25, pp. 823–841.

[12] See, *e.g.*, Carla Fehr, "The Evolution of Sex: Domains and Explanatory Pluralism", in *Biology and Philosophy,* 2001, vol. 16, pp. 145–170; Sarah Richardson, 2010, p. 837, *supra* note 11 ("Despite its ubiquity in biological explanation, the foundations of the concept of sex (unlike that of species and population, for instance) in biology have gone largely unexamined"; Steven Epstein, 2007, p. 254, *supra* note 7:

> [V]arious authorities perform the social control function of fitting individuals into categories. Yet the active labor that goes into making sex appear dichotomous is generally invisible to the broader society, or at least, rarely remarked upon.

not in my interest to argue this is a case of 'bad science'. Nor am I claiming that science is being distorted and captured by politics, or arguing for the need to establish sociological explanations and causal links. What captivates me about the matching moves of both projects and their almost perfect correspondence in time is how it points in the direction of the complex relationship between feminists and scientists when it comes to shaping the meaning(s) of sexual difference(s).[13] I reinterpret the emergence and proliferation of thematic prosecutions as a scenario where international legal feminists have explicitly and implicitly engaged with essentialist biological ideas about sexual difference.[14] This is a tale of re-essentialization that does not end with a lesson about how, when and why feminists should engage, reject or ignore biological explanations of sexual difference. Instead, it ends by raising questions about the ways in which both projects might be gesturing towards the emergence of a novel regime of ideological governance of sexual difference.

The article is structured in three parts. I tell the parallel histories of both projects articulated in three successive periods in order to track the different phases of re-essentialization of advocacy in both spheres. I have given each period a title that speaks commonly to the science and the law. Part I tells about the "era of gender strategizing"; Part II outlines the rise of sex-specific research agendas in biomedicine and international criminal

---

[13] Anne Fausto-Sterling, 2000, p. 4, *supra* note 10. Fausto-Sterling poignantly discusses how feminists have constantly oscillated between endorsing and rejecting scientific explanations of sexual difference, while also influencing the production of scientific knowledge. Often, this coming and going has been justified by the need to dislocate long-standing cultural associations between sex, nature, and femalehood. Other times, feminists have opted to ignore science altogether. However, for Fausto-Sterling argues that:

> [F]eminists definitions of sex and gender left open the possibility that male/female differences in cognitive function and behavior could result from sex differences […] in ceding territories of physical sex, feminists left themselves open to renewed attack on the grounds of biological difference. Indeed, feminism has encountered massive resistance from the domains of biology, medicine, and significant components of social science.

See also, Anne Fausto-Sterling, *Myths of Gender: Biological Theories About Women and Men,* Basic Books, New York, 1992, p. 162 (here the author discusses the influence of feminist advocacy in science).

[14] Anne Fausto-Sterling, 2000, p. 8, *supra* note 10 ("Feminists, too, have used scientific arguments to bolster their cause.").

law; and Part III describes the emergence of a post-genomic age. The purpose of what follows is to dislodge the familiarity with the virtues of thematic prosecution. Putting the arguments in their historical context and allowing the reader to see them afresh would render visible the part of the process that led to their familiarity and "ring of truth".[15]

12.2. The Era of Gender Strategizing: 1990–1995

> It is readily understood that gender is a code word. Gender strategy, especially if gleaned from court decisions, case law, press releases, or public pronouncements of international courts or tribunals, is frequently reduced to: "Oh, were the female sexual assault charges (read rape) included in the indictment?"[16]

Early in the 1990s feminists championed gender-based analysis of disease and violence to reverse the invisibility of women's experience[17] in health policies and criminal law.[18] Women's health advocates asserted that breast cancer – among several other illnesses and conditions – should be seen as a woman's disease,[19] despite the fact it also occurred in men. At

---

[15] Evelyn F. Keller, *Refiguring Life, Metaphors of Twentieth Century Biology*, New York University Press, 1995, p. 9.

[16] Patricia Viseur Sellers, 2009, p. 303, *supra* note 2.

[17] Doris Buss, 2011, p. 413, *supra* note 3

> The fact that women *experience* wartime violence in ways particular to them as women was largely disregarded in the post–1945 period. Feminist activists thus needed to address an immediate gap in knowledge about, and political commitment to addressing, sexual violence in conflict situations (emphasis added).

[18] See, *e.g.*, Patricia Viseur Sellers, 2009, pp. 301–326, *supra* note 2 (discussing the history of gender strategizing between 1990 and 2009); Diane Lupig, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law*, 2009, pp. 17, 431 (discussing the history of feminist advocacy in international criminal courts up to the adoption of the Rome Statute). Doris Buss, 2011, p. 413, *supra* note 3:

> The fact that women experience wartime violence in ways particular to them as women was largely disregarded in the post–1945 period. Feminist activists thus needed to address an immediate gap in knowledge about, and political commitment to addressing, sexual violence in conflict situations.

[19] Carole S. Weisman, "Breast Cancer Policy-Making", in Anne S. Kasper and Susan J. Ferguson (eds.), *Breast Cancer: Society Shapes an Epidemic*, Palgrave, New York,

approximately the same time, legal feminists used international treaty negotiations to push for the international recognition of rape against women. The conclusion was the same: breast cancer and rape need to be seen as gender-coded phenomena.[20] Although in their campaigning efforts neither group of feminists expressly denied that men could get breast cancer, that men are raped, or that women can and do rape, they did imply, and sometimes even publicly stated, that these gender coded phenomena occurred uniquely against women.[21]

Consequently, under the banner of gender-based disease and crime, feminist organizations for women's health and rights' pushed for the establishment of what they foresaw as gender-competent institutional formations. Such institutions would be able to address the overlooked needs of women and girls. Gender-coded analysis of disease and criminal violence set the stage for a whole architecture of gender-coded institutional formations and protocols. I will call this first period of health and legal advocacy, the "Era of Gender Strategizing".

2002, p. 213. ("[…] because breast cancer is primarily an illness of women, gender issues have been central to its politics").

[20] See, *e.g.*, Doris Buss, 2011, p. 413, *supra* note 3. In Buss' words, one of the goals of 1990s feminist activism "was to ensure that rape remains visible as a gendered crime, not just or only a crime against an ethnic/ racial/religious community. The concern here was (and is) that sexual violence against women might grab international attention only when it can be seen as part of an attack on a community; as 'the dishonoring of the nation'. The task then was and is to ensure the ongoing visibility of the gendered nature of the harms women face in conflict, while maintaining recognition of the political, social and economic complexity of violence and conflict" (emphasis added).

[21] Former Legal Advisor for the ICTY and ICTR, Patricia Viseur Sellers addressed this issue and characterized as unfortunate the reduction of gender to sexual violence against women and girls in the field of international criminal law: "*Gender* in the popular sense-not necessarily in the academic sense, and I am quite aware that I am in a university – *is shorthand for women and girls*. The word evokes comments, such as, "Oh, I read an article on gender", or "Oh, they've got a new gender thing coming out, right? […] Gender depends on the meaning given males and females in the context of a society. So we often speak in 'reductionist' terms, *reducing gender to women*, and when we refer to gender strategy we tend to reduce it to sexual violence committed *against women and girls*. This is unfortunate. There is room for growth [emphasis added]". Patricia Viseur Sellers, 2011, p. 303–304, *supra* note 2.

12.2.1. Gender Strategizing at the *ad hoc* Tribunals

Stemming from feminist anti-rape campaigning during the 1970s and 1980s in the United States,[22] feminist activists moved outside the domestic arena and began to push for the international recognition of sexual violence.[23] The efforts for international recognition fell into two components. One was the negotiation by international legal feminists for the recognition of sexual violence as a breach of women's human rights.[24] The second was advocacy for the international criminalization of sexual violence in armed conflict.[25] Due in part to specialization of feminism at large,[26] and to divisions within the international legal feminist movement,[27] the two agendas of legal reform have followed different trajectories.

---

[22] "Remember the gender strategy at the International Criminal Tribunal for the former Yugoslavia (ICTY) directly descends from the Western feminist banners that led the domestic campaigns against rape in the 1970s and 80s". *Ibid*.

[23] See, *e.g.*, Hillary, Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law", in *American Journal of International Law,* 1991, vol. 85, pp. 613–645 (narrating the emergence of this feminist-activist push); see also Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism", in *Harvard Journal of Law and Gender,* 2006, vol. 29, pp. 342 (for a discussion of the internationalization of the turn in American feminism to criminal/social control visions of law).

[24] Rhonda Copelon, "Toward Accountability for Violence Against Women in War: Progress and Challenges", in *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights,* Elizabeth D. Heineman (ed.), 2011, University of Pennsylvania Press, Philadelphia, pp. 232–256 (describing the process of changing the status of sexual violence in international human rights law).

[25] For a general discussion of feminist involvement in the international criminalization of sexual violence in war, see Barbara Bedont and Katherine Hall-Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court", in *Brown Journal of World Affairs*, 1999, vol. 6, pp. 65–85; Rhonda Copelon, "Integrating Crimes against Women into International Criminal Law", in *McGill Law Journal,* 2000, vol. 46, pp. 217–240; Karen Engle, "Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina", in *American Journal of International Law*, 2005, vol. 99, no. 4, pp. 778–816.

[26] Ellen Messer-Davidow, *Disciplining Feminism: From Social Activism to Academic Discourse*, Duke University Press, 2002, p. 207 (Specialization is part of the trajectory of disciplinary growth of feminism, one that tends to intensify the production of differences within feminist discourses).

[27] Karen Engle, 2005, pp. 778–816, *supra* note 25 (for an illuminating account of divisions within international legal feminism).

The history of gender strategizing in international criminal law begins a few years before the UN Security Council established the *ad hoc* tribunals in Yugoslavia and Rwanda. By 1993, reports of sexual violence in the Bosnia-Herzegovina conflicts had reached international media.[28] Perhaps conscious of this attention, the UN Security Council quickly established a commission of experts to verify the situation in the Balkans. The report produced by the Commission of Experts,[29] led by Cherif Bassiouni, became both the basis for the establishment of the Yugoslavia tribunal in 1993, and a milestone in the campaigning for criminalization of rape insofar as it established patterns of sexual violence.[30] Indeed, the documentation of sexual violence in Annex IX of the Commission's report is still considered by legal practitioners and scholars to be a landmark in terms of the documentation and legal analysis of sexual violence against women and men in war.[31]

---

[28] Alexandra Stiglmayer's journalistic account first published in German and later translated to English was one of the first documents to set off the alarms. Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina,* University of Nebraska Press, 1994.

[29] The report includes documentation of thousands of cases of crimes and abuses, including information ensuing from over 200 interviews with survivors and witnesses to sexual violence committed against civilians. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, Annex IX: Rape and Sexual Assault, May 1994, available at http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf, last accessed on 30 September 2011. An official letter dated May 24 1994 from the Secretary General of the United Nations, Mr. Kofi Anan, presents the report of the commission of experts to the UN Security Council (UNSC S/1994/674).

[30] "Five patterns emerge from the reported cases, regardless of the ethnicity of the perpetrators or the victims". See *supra* note 29. The Commission also included a medical team sent by the UN "to investigate rape in the former Yugoslavia". The rationale behind this decision was that medical data could be a method for verifying claims of widespread rape in Bosnia:

> Using a public health approach, medical personnel can help provide evidence of the scale of these abuses. An illustration of this kind of documentation is provided by the international team of four physicians (which included one of us [Shana Swiss] sent by the UN to investigate reports sent by the UN to investigate reports of rape in the former Yugoslavia in January 1993.

Shana Swiss and Joan E. Giller, "Rape as a Crime of War: A Medical Perspective", in *Journal of American Medical Association*, 1993, p. 613.

[31] Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, *supra* note 29:

The first step of the gender strategy meant including sexual violence as a constituent act of the crimes that fell under the jurisdiction of the ICTY. Thus, the era of gender strategizing begins following the publication of the Commission of Expert's report, as feminists successfully influenced the inclusion of rape as a crime against humanity under the jurisdiction of an international tribunal for the first time. These developments first occurred through Article 5 of the statute establishing the ICTY,[32] and one year later through Article 3 of the statute pursuant to the ICTR.[33] Once reform had taken place at the statutory level, the next step was the

> There have also been instances of sexual abuse of *men* as well as castration and mutilation of *male sexual organs* […]. *Men* are also subject to sexual assault. They are forced to rape women and to perform sex acts on guards or each other. They have also been subjected to castration, circumcision or other sexual mutilation.

[32] Art. 5 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, "Crimes Against Humanity": The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts (emphasis is mine). United Nations Security Council, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), UN Doc. S/RES/827 (1993).

[33] Art. 3 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens responsible for Genocide and other such violations committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, "Crimes against Humanity": The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) Other inhumane acts (emphasis is mine). United Nations Security Council, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994.

transformation of institutional arrangements and prosecutorial practices. International legal feminists aimed to create separate units of investigation for gender-related crimes.[34] They saw this institutional arrangement as a necessary precondition to infuse with gender expertise the production of evidence and the interpretation of procedural rules during the investigations. However, partly due to lack of political will, and partly because of budget constraints, the so-called sex crime units were not created. Instead, in 1994 Richard Goldstone appointed a full time Legal Advisor for Gender, and made her responsible for the implementation of the tribunal's gender strategy.[35] This model of gender expertise, aimed at coordinating, supervising, and educating teams of well-trained court personnel, has re-

[34] Patricia Viseur Sellers, 2009, p. 307, *supra* note 2:

> In 1994, after the naming of a Prosecutor, women's groups, especially European and American groups (both North and South Americans) pursued their discussions with both the Prosecutor and the Deputy Prosecutor at the ICTY. They urged the establishment of a separate prosecution unit for sexual assault investigations. Women's groups wanted to ensure that sexual assault investigations were a forethought, and not an afterthought. The vigilant contributors reiterated that the investigation and prosecution of sexual assault crimes were integral to the Tribunal's mandate.

[35] By 1994 Richard Goldstone had appointed Patricia Viseur Sellers, a prominent feminist internationalist, as first Legal Advisor for Gender at the ICTY. Sellers occupied the same position at the ICTR from 1995 until 1999.

> In order conscientiously to address the prevalence of sexual assault allegations committed in the former Yugoslavia and Rwanda, a legal adviser for gender-related crimes has been appointed. The adviser, as a member of the Prosecutor's secretariat, reports directly to the Prosecutor and the two Deputy Prosecutors and has three major areas of responsibility: to provide advice on gender-related crimes and women's policy issues, including internal gender issues such as hiring and promotion; to work with the Prosecution Section to formulate the legal strategy and the development of international criminal law jurisprudence for sexual assaults; and to assist the Investigations Unit in developing an investigative strategy to pursue evidence of sexual assaults.

Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, § 2(B)(6), UN Doc. A/50/365-S/1995/728 (1995), reprinted in [1995] ICTY Y.B. 261.

mained instrumental to the international legal feminist agenda for gender-competent international courts.[36]

Interestingly, the vocabulary that emerged from this period involved an intricate system of gender-coding aimed at making visible the harmful experiences of women and girls in war.[37] In a nutshell, the system was grounded on the use of the word 'gender' as, effectively, a synonym for "women and girls".[38] In Sellers' own words, gender became a "code" to refer to women and girls.[39] This move transformed the interpretation of other expressions and international criminal law categories. Gender crimes stood for rape against women and girls,[40] while gender strategies

[36] "The Gender Legal Advisor has been instrumental in ensuring the investigation and prosecution of sexual violence crimes". Barbara Bedont and Katherine Hall-Martinez, 1999, *supra* note 25, p. 76.

[37] See, *e.g.*, Doris Buss, 2011, p. 413, *supra* note 17; Karen Engle, 2005, p. 814, *supra* note 25 ("for the most part, feminists in both camps emphazised male-on-female sexual violence as the harm that needed to be addressed by the ICTY").

[38] Patricia Viseur Sellers, 2009, p. 303, *supra* note 2:

> Gender in the popular sense-not necessarily in the academic sense, and I am quite aware that I am in a university-is shorthand for women and girls. The word evokes comments, such as, 'Oh, I read an article on gender', or 'Oh, they've got a new gender thing coming out, right?'.

For other examples see, *e.g.*, Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", in *Berkley Journal of International Law,* 2003, vol. 21, p. 317 (for an example of the interchangeable use of the words gender, and the expression women and girls) p. 317; Jennifer Green, Rhonda Copelon, Patrick Cotter and Beth Stephens, "Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique", in *Hastings Women's Law Journal*, 1994, vol. 5, p. 173 (using the expression gender-based crimes while referring to increased international attention to violence against women)

[39] Patricia Viseur Sellers, 2009, *supra note* 17.

[40] "Even though the reduction of gender strategy to sexual violence is too simplistic, there exists a basis of truth. However, there is an emerging, hopefully prevailing, norm that gender crimes under international criminal law and under humanitarian law should not be limited to prosecution of sexual violence. Gender crimes should not be limited, to what I call the 'R word': rape. Rape was just the beachhead; the proverbial landing at Normandy, so that we could wade ashore at Kigali. It was the enumerated provisional place where we chose to disembark while under fire and while behind enemy lines". Patricia Viseur Sellers, 2009, p. 305, *supra* note 2. See also Kelly D. Askin, 2003, pp. 288–349, *supra* note 38 (using throughout the article expression gender-related crimes to refer to rape against women and girls); Karen Engle, 2005, p.

were defined as the "legal ability to prosecute crimes committed against women and girls under humanitarian law […]";[41] and gender-competent tribunals defined as those that successfully addressed the sexual assaults under their jurisdiction.[42] Gender justice required the arrest of suspects, the adjudication on individual responsibility and the delivery of jurisprudence aimed at countering impunity of sexual assaults against women and girls,[43] while gender injustice became the mishandling of sexual assault charges against women by prosecutors.[44] In this coding system, gender ended up simultaneously equated to sex,[45] while embodied by women and girls.[46] Tellingly, by the end of her genealogy of international legal feminist advocacy, Sellers had replaced the use of the expression gender-based crimes for sex-based crimes.[47]

12.2.2. Gender Strategizing in Biomedical Research

While legal feminists called for gender strategizing at the *ad hoc* tribunals, a sector of the United States' women's health movement pushed for their own version of gender strategies by denouncing the lack of sex and gender-specific research.[48] They called for the inclusion of women in clin-

801, *supra* note 25 (noting how Sellers suggests gender crimes and sexual assault were considered as one and the same from the early 1990s).

41 Patricia Viseur Sellers, 2009, p. 305, *supra* note 2.

42 *Ibid*.

43 *Ibid*.

44 *Ibid*, p. 316.

45 "An unintended consequence of the jurisprudence might well be that the primary harm to be addressed becomes one of sex, not of violence or gender oppression". Karen Engle, 2005, p. 801, 815, *supra* note 25 (poignantly discussing the "replacement of a focus on gender with a focus on sex" as one of the unintended consequences of the gender strategy at the ICTY).

46 "Repeatedly the raped female, the sexual assault victim/survivor, has become unforgivably reduced to embody gender strategy. This is reasonable to a certain extent". Patricia Viseur Sellers, 2009, p. 316, *supra* note 17.

47 "The successes of the ICTY and the ICTR—meaning the arrest of suspects, the adjudication of crimes based on individual responsibility, and the delivery of jurisprudence that countered impunity including impunity for sex-based crimes—are great". *Ibid*.

48 See, *e.g.*, Tracy L. Johnson and Elizabeth Fee, Introduction to Women's Health Research in *Women's Health Research: A Medical and Policy Primer*, Florence P. Haseltine (ed.), 1997, Society for the Advancement of Women's Health Research,

ical trials and the regulation of biomedical research so that it would include analysis of results according to the sex of the participants. Underlying this feminist strategy was the idea of "illnesses and disorders that affect women predominantly or differently than men"[49] needed to be addressed by producing more data on women. In 1990, under the leadership of Drs. Florence Haseltine and Joanne Howes, a coalition that included feminist activists and people from scientific and medical establishments created the Society for Women's Health Research ('SWHR').[50] This non-profit organization became the steering wheel of advocacy efforts against the lack of clinical investigations on "disease and conditions that affect women *uniquely*".[51] Their first big success was to get Congress' General Accountability Office ('GAO') to evaluate the policies and practices related to the application of the National Institutes of Health ('NIH').[52]

The next strategic step of the SWHR was to push for the creation of separate offices for sex and gender-specific research within the department of health.[53] As a result of this successful advocacy effort, GAO created the Office for Research on Women's Health ('ORWH'). But health feminists, in the same fashion as international legal feminists, believed it was necessary to create separate institutional formations exclusively dedi-

1997 (recounting how women have been excluded from medical research for decades).

49 Society for Women's Health Research, available at http://www.womenshealth research.org/site/PageServer?pagename=about_main, last accessed on 30 September 2011.

50 See, *e.g.*, Karen L. Baird, Beyond Reproduction: The Women's Health Movement in the 1990s, in *Beyond Reproduction: Women s Health, Activism, and Public Policy*, Karen L. Baird, with Dana-Ain Davis and Kimbely Christensen, Associated University Press, Cranburry, 2009, p. 9 (for a broad history of the movement during this first period of advocacy); Karen L. Baird, "Protecting the Fetus: The NIH and FDA Medical Research Policies", in *Beyond Reproduction: Women's Health, Activism, and Public Policy*, Karen L. Baird, with Dana-Ain Davis and Kimbely Christensen, Associated University Press, Cranburry, 2009 (for an account of the role of SWHR in this process).

51 Society for Women's Health Research ('SWHR'), "About Us: Celebrating 20 Years", available at http://www.womenshealthresearch.org/site/DocServer/SW HR_One-Sheeter_2011.pdf?docID=7461, last accessed on 30 September 2011 (Emphasis added).

52 Steven Epstein, 2007, p. 303, *supra* note 7.

53 *Ibid*., 2007, pp. 233–257.

cated to research on women's biomedical issues.[54] By 1993, they succeeded in getting the NIH Revitalization Act passed in Congress, making it mandatory to include women in all clinical trials. After this decision the FDA issued a guideline on "calling analysis of data by *gender*".[55]

The push for legal reform was expected to transform scientific and medical practices in two fundamental ways. On the one hand, it would make the inclusion of women in medical trials a legal obligation; and second, it would mandate the analysis of medical trial results by sex. This second objective is also linked to a third and more ambitious project health feminists already had in mind: setting up clinical research trials in order to carry out biomedical research specifically aimed at measuring differences between males and females. Despite the fact that the whole point of their effort was to promote biomedical research practice grounded on biological sexual difference, they referred to it as "sex and gender differences research", while using both terms interchangeably.[56]

The push for the establishment of institutions with expertise on women's issues both in biomedicine and international criminal law was

[54] I thank Sarah Richardson for pointing out to me this trend in the women's health movement. According to Richardson, health feminists aimed, first, for the establishment of offices within institutions and later for the creation of permanent specialized units and institutions to carry out sex-difference research. See Richardson, forthcoming 2013, *supra* note 7. See also, Steven Epstein, 2007, pp. 233–257, *supra* note 7.

[55] The NIH Revitalization Act ordered the inclusion of women in trials combined with the analysis of results by sex. Furthermore it made the ORWH a permanent entity. See, *e.g.*, Society for Women's Health Research, "SWHR Timeline", available at http://www.womenshealthresearch.org/site/DocServer/SWHR_Timeline_2011.pdf?docID=7463, last accessed on 30 September 2011; Steven Epstein, 2007, p. 304, *supra* note 7. See also, J. Claude Bennet, "Inclusion of Women in Clinical Trials: Policies for Population Subgroups", in New England Journal of Medicine, July 22 1993, vol. 329, pp. 288–292 (discussing the pros and cons of the inclusion of women in clinical trials).

[56] Altogether it remains unclear whether or not health feminists were sustaining the idea of gender being grounded in biology, nor if biological sexual differences were being deployed to analyze female social behavior. For an example of the interchangeable use of sex and gender in this type of research see, *e.g.*, A. Parekh1, W. Sanhai, S. Marts and K. Uhl, "Advancing women's health *via* FDA Critical Path Initiative", in *Drug Discovery Today: Technologies,* 2007, vol. 4, no. 2, p. 69. ("Studying sex and gender differences is critical to understanding diseases that affect women solely, disproportionately or differently from men").

the result of a successful shift in their advocacy strategies.[57] The shift was grounded on the assumption that men and women were the two relevant groups to compare.[58] Steven Epstein has criticized this trend in women's health advocacy and framed it as partaking in what he calls the "inclusion and difference paradigm", which is a "set of changes in research policies, ideologies, and practices, and the accompanying creation of bureaucratic offices, procedures, and monitoring systems".[59] The turn towards differences between the sexes in feminist advocacy, argues Epstein, is part of a tendency to dethrone the standard human and replace it with group-specific approaches.[60] He argues that in doing so, the women's health

[57] I thank Sarah Richardson for pointing out to me the relation between institution building and changes in advocacy strategies in the field of sex-based biology.

[58] Steven Epstein, 2007, p. 250, *supra* note 7:

> As Judith Lorber has argued, the overriding mistake of so many 'epistemologically spurious' studies of sex differences in both the biological and the social sciences is that they begin simply by assuming that 'men' and 'women' are the relevant groups to compare, look for the differences between them, and then attribute whatever they find to the underlying sex difference.

See also Judith Lorber, "Believing is Seeing: Biology as Ideology", in *Gender and Society,* December 1993, vol. 7, no. 4, p. 571.

[59] According to Epstein, this biopolitical paradigm refers to "the research and policy focus on including diverse groups as participants in medical studies and in measuring differences across those groups". Steven Epstein, 2007, pp. 6, 17, *supra* note 7:

> [It is biopolitical because] it reflects the presumption that health research is an appropriate an important site for state intervention and regulation and because it infuses the life sciences with new political import. […] It hybridizes scientific and state policies and categories. Specifically, it takes two different areas of concern – the meaning of biological difference and the status of socially subordinated groups – and weaves them together by articulating a distinctive way of asking and answering questions about the demarcating of subpopulations of patients and citizens.

[60] *Ibid*., pp. 233–257:

> There has been almost no scholarly attention to the broad-scale attempt to dethrone the 'standard human' and mandate a group-specific approach to biomedical knowledge production – an identity-centered redefinition of U.S. biomedical research practice that encompasses multiple social categories.

movement has participated in the creation of equivalence across two previously distinguishable forms of difference – gender and sex.[61]

The parallel between the gender strategizing of health feminists and international legal feminists between 1990 and 1995 shows a shared move towards re-essentialization of advocacy efforts already underway. The first step in that direction was the flattening of gender and sex either by reducing gender to refer to women and girls, interchangeably using both categories, or implicitly and explicitly suggesting that gender is determined by biological differences.[62] Interestingly, feminists' use of gender and sex coding in both spheres appears as an invitation for sex-based institutional formations. However, these institutional projects are not presented to the public as sex-coded but gender-coded initiatives. By 1995 each group of advocates had succeeded in influencing the creation of new institutions, the renovation of old ones, and the transformation of institutional practices within their own spheres of action.

12.3. The Rise of Sex-Specific Agendas: 1996–2001

> The very fact of dividing subjects into male and female categories for research purposes may serve to reify and perpetuate a socially created dichotomy. The search for differences can help to create the differences, if you are looking for something you are likely to find it.[63]

In the previous section I described how feminists' gender-coded analysis of both female disease and criminal violence against women set the stage for a whole architecture of sex-based institutional formations and protocols. This era of female inclusive institution building under the banner of gender strategizing was succeeded by a period of advocacy aimed at further differentiating men and women on the basis of sexual dif-

[61] "[S]ex/gender, race/ethnicity, and age are all treated as formally equivalent modes of difference to be 'handled' administratively in similar ways". *Ibid*., p. 142.

[62] For a discussion on how this shift counters the feminist project – longstanding since the 1970s – to dissociate gender from nature, and instead supports the idea of gender being determined by differences at the biological level, see Fausto-Sterling, 2000, *supra* note 10.

[63] Susan Star Leigh, "Sex Differences and the Dichotomization of the Brain: Methods, Limits and Problems in Research on Consciousness", in *Genes and Gender II,* cited in Steven Epstein, 2007, p. 251 *supra* note 7.

ference.[64] Successful feminist advocacy during the second half of the 1990s led to the implementation of methods and institutional practices that separated, and often isolated the analysis of illness, health conditions, or criminal conduct, on the basis that it affected women predominantly, or differently than men. Between 1996 and 2001 feminist advocacy thus moved into another era, which geared away from inclusion and pushed for institutions to develop sex-specific agendas.[65]

During this period, thematic prosecutions became the prime focus of international feminists' sex-specific agenda. Under this prosecutorial model, sexual crimes committed by men against women[66] were prioritized, grouped, and investigated in isolation from other acts that also fell under the jurisdiction of the ICTY. Health feminists' own version of a sex-specific agenda led to the emergence of sex-based biology, which is explained in further detail in section 12.3.2.[67] Dichotomist sexual coding, along with the flattening of gender and sex, remained two key underpinnings of this period. However, in this period feminists appear to go one step further in their embrace of essentialist notions of sexual difference, by claiming or assuming the overriding significance of biology and genetics in understanding the behavior of males and females. In this way these two feminist projects inadvertently make their projects increasingly dependent on the possibility of containing reality in mutually exclusive categories like males and females, or victims and perpetrators. I will call this era "the rise of sex-specific agendas".

---

64 During the early 1990s advocates for change used early reports of such differences as a rationale for inclusionary reform, during this second period, inclusionary policies and procedures for subgroup comparisons resulted in proliferation of difference findings. Steven Epstein, 2007, p. 235 *supra* note 7.

65 I borrow this category from Sarah Richardson's analysis of sex-specific research agendas in a post-genomic context. See Sarah Richardson, forthcoming 2013, *supra* note 7.

66 Karen Engle has pointed our how the ICTY's prosecutorial strategy has functioned "to see all sexual assault as reproducing the dynamics of male-on-female (sexual) violence". Karen Engle, 2005, pp. 815, *supra* note 25.

67 Steven Epstein, 2007, pp. 233-257, *supra* note 7:

> [E]mphasis on sex differences in medicine is part of a larger trend toward claiming or assuming the overriding significance of biology and genetics in understanding the behavior of males and females.

12.3.1. The Birth of Sex-Specific Prosecutions

Between 1996 and 2001, international legal feminists successfully completed the second phase of their project for redefining the status of sex crimes in international humanitarian law. Two major events mark this period. The first are the landmark *Foča* cases which involve the indictments and verdicts against Kunarak, Kovak, and Vukovik.[68] The *Foča* cases refer to the prosecution and conviction of three middle rank Bosnian police officers for their individual responsibility in the rapes and sexual enslavement of Muslim women from the municipality of Foča in the early 1990s. The second event is the adoption of the Rome Statute in 1998.

Foča is the ICTY case that has received the most media attention, following the Milošević trial.[69] It was the first time in history that an international tribunal convicted an accused solely on counts of sexual violence.[70] Even more significant is the fact that the convictions were the result of a prosecutorial strategy designed to prioritize, group, and isolate sexual crimes committed against women from a broader repertoire of criminal acts that occurred in Foča around the same time.[71] The convictions against Kunarac *et al*. constitute the first example of international thematic prosecutions of sexual violence in armed conflict.[72]

It was not mere coincidence that in *Foča* the ICTY grouped sexual crimes committed predominantly against women and simultaneously isolated their prosecution from the investigation of other offences under its

---

68 *Prosecutor v. Kunarac et al.*, *supra* note 4.

69 Minna Schrag, "Lessons Learned from ICTY Experience", in *Journal of International Criminal Justice,* 2004, vol. 2, no. 2, p. 427–343.

70 Institute for War and Peace Reporting, 22 February 2005, available at http://iwpr.net/report-news/foca-rape-case, last accessed on 30 September 2011:

> This trial and verdicts have two very important aspects for international law. This is the first conviction by an international court for sexual enslavement and the first trial to deal exclusively with sexual crimes per se rather than grouping such offences with killings and similar war crimes as the "accompanying phenomena" of war.

71 See, *e.g.*, Doris Buss, "Rethinking 'Rape as a Weapon of War'", in *Feminist Legal Studies,* 2009, vol. 17, p. 145–163 (discussing the importance this case played in shifting the understanding of sexual violence against women as simply accompanying phenomena to other crimes).

72 See Minna Schrag, 2004, pp. 427–343, *supra* note 69 (discussing how the thematic approach to prosecution in Foča countered the initial internal decision at the ICTY's OTP not to pursue 'theme cases').

jurisdiction. International legal feminists, together with non-governmental organizations and university-based institutes, lobbied and campaigned for the prioritization of cases of systematic rape against women.[73] In response, as the press release following the indictment reveals, the Office of the Prosecutor ('OTP') had decided to "pay specific attention to gender-related crimes".[74] The head prosecutor at the ICTY, Richard Goldstone, placed the prioritization of sex crimes against women at the core of the tribunal's mission.[75] The prosecutor himself portrayed the separate prosecution of sex crimes committed by men against women as the core of the gender strategy of the court.

The prosecution strategy in *Foča* was designed to meet two objectives. First, it was intended to focus exclusively on sexual crimes against women; and second, it was meant to bring attention to the systematic nature of rapes of Bosnian Muslim women.[76] By having the first successful thematic prosecution of rape also become the first ICTY prosecution for

[73] For detailed analyses of feminist's campaigning at the ICTY see, *e.g.*, Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism", in *Harvard Journal of Law and Gender,* 2006, vol. 29, pp. 342–347; Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993–2003", in *Human Rights Brief,* 2004, vol. 11, p. 16; Karen Engle, 2005, p. 778, *supra* note 25 (account of feminist activists' concerted effort to affect the prosecutorial strategies at the ICTY); Joanne Barkan, "As Old as War Itself: Rape in Foca", in *Dissent*, Winter 2002, p. 63–64 (detailed account of feminist campaigning in Foča).

[74] ICTY, Press Release: "Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY's First Indictment Dealing Specifically with Sexual Offences", 27 June 1996, CC/PIO/093-E, available at http://www.icty.org/sid/7334, last accessed on 30 September 2011:

> The indictment made public today is the result of an investigation which commenced in late 1994. This indictment fully illustrates the OTP's strategy […] to investigate the operation of detention facilities in connection with the takeover of parts of Bosnia and Herzegovina by the Bosnian Serb forces […] *to pay specific attention to gender-related crimes*" [emphasis added].

[75] "We have always regarded it as an important part of our mission to redefine and consolidate the place of these offences in humanitarian law". ICTY, *supra* note 74.

[76] During the seminar that precedes this volume, Morten Bergsmo pointed out that "international sex crimes were first investigated and prosecuted in a systematic manner by the ICTY through the so-called Foča cases". See, *e.g.*, Karen Engle, 2005, p. 798, *supra* note 25 (discussing how the exclusive focus on rape was widely acknowledged and seen as precedent).

rape as an autonomous act that constituted a crime against humanity, *Foča* created a link between the isolation of sex crimes and proving the systematic nature of sexual violence against women in war.[77] Despite having resulted in some disappointment for feminists, it became the iconic "rape case", and demonstrated the potential of a sex-specific thematic prosecution for the advancement of feminist goals.[78]

Unfortunately, *Foča*'s symbolic power in shaping the legal consciousness of its time also legitimized the need to strategically isolate cases of sexual violence against women in order to make them successful. This legitimized the practice of sex-specific prosecution at a time when it was still hard to appreciate some of its unintended consequences.[79] Neither was it easy to appreciate amidst the success of feminist campaigning how slowly but steadily a context of heightened reductionism of gender to sex was unfolding.

---

[77] The front page of the New York Times quoted a court spokesman, who called it a "landmark indictment because it focuses exclusively on sexual assaults, without including any other charges […]. There is no precedent for this. It is of major legal significance because it illustrates the court's strategy to focus on gender-related crimes and give them their proper place in the prosecution of war crimes". Karen Engle, 2005, p. 798, *supra* note 25.

[78] Joanne Barkan, 2002, *supra* note 73:

> History – in so far as it will deal with human rights for women – will likely judge one strategic decision made by the ICTY as invaluable: the decision to put together "the rape case". Even in the early stages of the tribunal's work, the lobbying to get prosecutors to pay attention to sexual offenses paid off. Before long, more than 20 percent of the charges filed at the ICTY involved allegations of sexual assault – an extraordinarily high percentage in light of the past record. But in any individual case, the rape of women was only one crime among many being prosecuted. If rape were overshadowed in most trials by other crimes, the possibility of breaking new legal ground for women's rights decreased. But, hypothetically, a case devoted to just one type of crime, just one category of victim, and just one place might have significant impact on the law and on public opinion. In late 1994, the ICTY office of the prosecutor, supported by women's rights advocates, began the investigation for a rape case. The prosecutors would investigate only sexual crimes and only those committed against women. The place they chose to investigate was Foca.

[79] See, *e.g.*, Karen Engle, 2005, *supra* note 25 (for a discussion of some of the unintended consequences of feminist advocacy at the ICTY).

The adoption of the Rome Statute clearly illustrates how the success of international feminist campaigning was fraught with a strong taint of re-essentialization. Three years before the final verdicts in *Foča*, Article 7(3) of the Rome Statute defined gender as referring only to the "two sexes".[80] Despite containing the most comprehensive enumeration of sex crimes in international criminal law to date, and incorporating several structural provisions designed to facilitate the effective investigation and prosecution of sex crimes,[81] the equation of gender to sex had become embedded in the future statutory and regulatory framework of the ICC.[82]

12.3.2. The Birth of Sex-Based Biology

Sex-based biology ('SBB') is a term coined by Dr. Florence Haseltine[83] – founder of the Society for Women's Health Research ('SWHR')[84] – refer-

[80] Art. 7(3) of the Rome Statute of the International Criminal Court provides in full:

> For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

[81] See, *e.g.*, Sienna Merope, 2011, p. 2. *supra* note 5. For a discussion of these provisions as the result of over a decade of feminist advocacy see*, e.g.*, Susanna SáCouto and Katherine Cleary, "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law,* 2009, vol. 17, pp. 337, 339.

[82] For a thorough and balanced analysis of the downside of the definition of gender in the Rome Statute see Valerie Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice", in *Harvard Human Rights Journal,* 2005, vol. 18, p 55.

[83] Dr. Haseltine has published extensively on the topic of women's health research, and specifically in the field of sex-based biology. See, *e.g.*, Florence P. Haseltine, "Formula for Change: Examining the Glass Ceiling", in Florence Haseltine (ed.), 1997, p. 255, *supra* note 48; Florence P. Haseltine "Gender Differences in Addiction and Recovery", in *Journal of Women's Health & Gender-Based Medicine*, July 2000, vol. 9, no. 6, pp. 579–583;

[84] Steven Epstein, in *What's the Use of Race: Modern Governance and the Biology of Difference,* pp. 62–87:

> In the early 1990s, the SWHR had coalesced around the goal of inclusion of women in research and had campaigned for the NIH Revitalization Act. By the late 1990s, the Society's raison d'etre was the furtherance of research on differences between men and women that bore medical significance.

ring to "the study of sex differences in health and disease".[85] Substantively, SBB involves both increased research on women's health, and sex-based analysis of data.[86] Methodologically, it entails the push for the establishment of institutions specialized in doing research about diseases and conditions that affect women uniquely.[87] The rise of SBB is the result of a conscious and certainly successful transformation in feminist women's health advocacy strategies from sameness as inclusion to sameness as difference.[88] The movement towards difference was marked by a strong activist return to arguments that highlight the biological differences between males and females, accompanied by growing funding of research that reflects this shift.

As a social movement that has "swum in feminist currents", SBB distinguishes itself from feminist health movements of the 1970s and

[85] SWHR appears to be the most salient organization in accounts that retrace the emergence and development of SBB. In some of these accounts Haseltine appears as also having coined the term gender-specific biology. It remains unclear whether or not SBB is different from gender-specific biology. However, they both appear to rely heavily on notions of sexual difference to *explain* gender attributes. See, *e.g.*, Steven Epstein, "Bodily Differences and Collective Identities: The Politics of Gender and Race in Biomedical Research in the United States", in *Body & Society*, 2004, vol. 10, pp. 194:

> In recent years, the emphasis on biological difference has also been promoted by advocacy groups such as the Society for the Advancement of Women's Health Research, which heralds the new field of 'gender-specific biology' – a term invented by Florence Haseltine and defined as 'the field of scientific inquiry committed to identifying the biological and physiological differences between men and women.

[86] Steven Epstein, 2007, p. 243, *supra* note 7.

[87] SWHR's Web Catalog, *supra* note 51.

[88] Early in the 1990s feminist health activism made a significant move from arguing fundamental sameness towards arguing fundamental differences between the sexes – what Steve Epstein has called the inclusion and exclusion paradigm. During the 1970s and 80s, American women's health activism focused on the inclusion of women's health needs and concerns in public policy and scientific research agendas. However, by the early 90s the inclusionary policies and procedures achieved had resulted in the proliferation of scientific findings reinforcing the idea of difference between the sexes. As a result of this process, a strand of the feminist movement began pushing for "the emphasis on sex differences in medicine" See Steven Epstein, 2007, p. 236, *supra* note 7; Sarah Richardson, forthcoming 2013, *supra* note 7 (for detailed discussions of this move from sameness to difference and the complex web of implications for scientific practices).

1980s by showing eagerness to embrace assertions of biological differences by sex.[89] This has remained the core of health feminist advocacy strategies for over more than a decade.[90] SBB is grounded on a conception of the sexes as dramatically different, and claims to have "revolutionized the way that the scientific community views the sexes".[91] If not a revolution, a major transformation took place between 1995 and 2001. While in the 1970s the term 'gender' was absent from biomedical writing and research, today the words 'sex' and 'gender' are everywhere in biomedical literature.[92] What we observe in their usage starting in the mid- 1990s is a trend to interchange them without any explanation. Contrary to the trend from the 1970s, when the use of the term 'gender' expanded while that of 'sex' contracted in biomedical writing. From the 1990s onwards the usage

[89] Steven Epstein, 2007, p. 244, 247, *supra* note 7:

> The strategic moves in the construction and public representation of sex-based biology raise important questions about the politics of women's health and about the broader feminist currents within which the women's health movement has swum.

Drawing from the work of Hara Estroff Marano, Epstein catalogues it as post-feminism, ("the fruits of previous feminist struggles are now being reaped […] it's safe to talk about sex differences again"). However, SBB proponents locate it "broadly within the legacy of feminism", despite ideological divides within the women's health movement. Others like Bernadine Healy call it the "third stage of feminism" or even "post-feminism". See, *e.g.*, Steven Epstein, 2007, p. 248, *supra* note 7; Marianne Legato, "Gender-Specific Physiology: How Real is it? How Important is it?", in *International Journal of Fertility and Women's Medicine,* 1997, vol. 42, no. 1, p. 26.

[90] Steven Epstein, 2007, p. 241, *supra* note 7:

> [SBB] emphasize[s] fundamental, thoroughgoing, biological differences between men's and women's bodies […] those who subscribe this movement believe that women – and men – deserve separated medical scrutiny because they are biologically different at the level of the cell, the organ, the system, the organism.

[91] SWHR, "Before the Senate Appropriations Subcommittee on Labor, Health and Human Services, Education, and Other Related Agencies", 15 March 2010, available at http://www.womenshealthresearch.org/site/DocServer/NIH_Approps-_Senate_Testimony.pdf?docID=4424, last accessed on 30 September 2011.

[92] Nancy Krieger, "Genders, sexes, and health: what are the connections – and why does it matter?", in *International Journal of Epidemiology,* 2003, vol. 32, no. 4, p. 652:

> Open up any biomedical or public health journal prior to the 1970s, and one term will be glaringly absent: gender. Open up any recent biomedical or public health journal, and two terms will be used either: (1) interchangeably, or (2) as distinct constructs: gender and sex.

of 'sex' has expanded while that of 'gender' has contracted to the point that today 'gender' appears to have been reduced to 'sex'.

The term 'sex-based biology' was well established by the end of the 1990s.[93] In 2001, the Institute of Medicine ('IOM') published a report sponsored by SWHR entitled "Exploring the Biological Contributions to Human Health: Does Sex Matter?".[94] This publication is considered to signal the naissance of SBB as a field of biomedical study. The report, which concluded with a recommendation for scientists to investigate sex "from womb to tomb",[95] became a powerful advocacy tool used by SWHR and its allies to advocate for major funding for sex-specific research before Congress.[96] It became the banner under which SBB expanded the use of sex-difference research from its initial priority – studying women's responses to medication – towards its application in interdisciplinary studies of female behavior.[97]

The rise of SBB, starting in 1995, and the subsequent development of sex-specific research agendas with their heightened emphasis on sex differences, occurred in a context of ever-growing claims and assumptions of the "overriding significance of biology and genetics in understanding the behavior of males and females".[98] As Anne Fausto-Sterling announced back in 1985: "[t]he popular press and scientists alike have apparently fallen in love with the gene".[99] As explanations of sexual difference move from human anatomy and chromosomes towards genetic expression, the

---

93 In 1995, the SWHR held its first national meeting focused on sex-based biology. Phyllis Greenberger, Sherry Marts, "News from the Society of Women's Health Research: Hormones, Chromosomes and the Future of Sex-Based Biology", in *Journal of Women's Health and Gender-Based Medicine,* 2000, vol. 9, no. 9, p. 937:

> The intriguing notion – that sex differences could be found at a level as basic as the control of gene expression – led the Society to begin planning a series of conferences with a focus on basic research in sex-based biology.

94 Institute of Medicine, *Exploring the Biological Contributions to Human Health: Does Sex Matter?,* National Academy Press, Washington DC, 2001.

95 *Ibid*., p. 5.

96 Thanks to SWHR post-report advocacy strategies in 2001 Congress passed a new funding initiative aimed at the creation of specialized centers of research on sex and gender factors affecting women's lives. See Steven Epstein, 2007, p. 242, *supra* note 7.

97 See, *e.g.*, Phyllis Greenberger, Sherry Marts, 2000, pp. 93–938, *supra note* 93.

98 Steven Epstein, 2007, p. 236, *supra* note 7

99 Anne Fausto-Sterling, 1985, p. 62, *supra* note 13 (first edition).

enlistment of sex-specific research to explain and understand male and female behavior augmented rapidly. The public and scientists alike seemed increasingly interested in proving or disproving how much of our social behavior can be explained through genetic mapping.

The rise of sex-specific agendas in international criminal law and biomedicine is characterized by an increasing turn towards notions of fundamental difference between the sexes. Of course, in each sphere these notions tend to manifest themselves quite differently. This turn towards difference echoed both during the Foča, and the birth of SBB. Choosing to isolate the prosecution of crimes against women and biomedical investigations of female reactions to medicine produced more data on sexual difference, and this data was used to further assert differences among men and women. The criticism of sex-specific agendas in biomedicine by authors like Epstein and Richardson[100] illuminate some of the unintended consequences of these practices, including on international legal feminists' agendas. For instance, we could examine the ways in which the practice of sex-specific prosecutions obscure commonalities across males and females (that is when females are perpetrators or male are victims of sexual violence); and occludes differences within each sex (that is, the rape of indigenous women, or women with disabilities). However, despite the pressing need to formulate these questions – and many others – to ensure that the gender strategizing remained true to its goals of reversing the invisibility of harmful experiences of women and girls, by the beginning of the 21st century sex-specific prosecution and biomedical research were so well meaning and seen as such advancements for women that it was hard to argue they could be reinforcing gender stereotypes[101] or disguising problems of categorization of the two sexes as unambiguously divided.[102]

[100] See Steven Epstein 2007, *supra* note 7; Sarah Richardson, forthcoming 2013, *supra* note 7.

[101] Sarah Richardson, forthcoming 2013, *supra* note 7 (for the analysis of this phenomenon in sex-specific biomedical research).

[102] See Steven Epstein 2007, p. 253, *supra* note 7 (arguing "there is no unambiguous divide between the two sexes").

12.4. The Post-Genomic Age: 2002–2010

> [Today] contrary to politically correct visions of a shared, universal human genome, males and females are more genetically different than ever conceived.[103]

Between 2005 and 2010 international legal feminists have dealt with the paradoxical effects of advocating for sex-specific agendas. While SBB advocates joyfully enlisted recent findings in genomic science, placing sexual differences at the level of genetic expression, international legal feminists saw the ICC to be turning gender strategizing on its head when trying to prioritize the prosecution of war crimes constituted by the unlawful enlistment of children. As biological explanations of sexual difference shift from the anatomic and chromosomal towards locating the essence of sex at the level of genetic expression, it becomes harder for feminists to contain the expansive quality of binary thinking embedded in sex-specific agendas. This is the case especially when the "labors involved in making sex appear dichotomous"[104] in feminist advocacy remain largely unexplored.[105]

The classification of individuals into mutually exclusive categories that apparently have nothing to do with sex – that is, victims and perpetrators – is inevitably infused with social constructions about men and women. When gender is reduced, confused, or replaced by sex, and sex is thought to be determined by genes, assertions about stereotypical gender differences (that is, women are victims and men are perpetrators of sexual violence in war) gain an apparent truth-value. Consequently, gender attributes – even stereotypical ones – end up associated to notions of nature and essence. The challenge of feminist projects in the face of such scenarios is not the facticity of biological sexes, but the unintended consequences of binary thinking for their own political agendas.

---

[103] Richardson, 2010, p. 824, *supra* note 11.

[104] Steven Epstein, 2007, *supra* note 7.

[105] See Lynda Birke, "Sitting on the Fence: Biology, Feminism and Gender-Bending Environments, in *Women's Studies International Forum,* 2000, vol. 23, no. 5, p. 587–599 (discussing the challenges of examining feminist advocates' use of categories such as sex and gender due to the "schism between feminist theorists and feminist activists").

12.4.1. Investigating Sex Crimes in a Post-Genomic Age

In 2006, the ICC issued a warrant of arrest against Thomas Lubanga, former commander-in-chief of the *Forces Patriotiques pour la Libération du Congo* ('FPLC').[106] After his arrest and the confirmation of charges by a Pre-Trial Chamber, Lubanga became the first person to be tried under the Rome Statute.[107] This case signals the beginning of a new phase in the development of thematic prosecutions for two reasons. On the one hand, the case inaugurates the practice of thematic prosecution at the ICC, having progressed from its use in special tribunals; and on the other hand, it is the first time an international court explicitly alludes to a thematic prioritization strategy not centered on gender-based crimes. Instead, Lubanga's trial focuses solely on his responsibility as co-perpetrator of war crimes consisting of enlisting and conscripting children under the age of 15.[108]

The principle of selective prosecution broadly defines the practice of criminal investigations at the ICC. In order to select the crimes the court first goes through several "screening decisions".[109] First, the focus is

[106] International Criminal Court, "Press Release: Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo", ICC-OTP-20060302-126, 14 March 2006, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Press+Releases/Press+Releases+2006/Issuance+of+a+Warrant+of+Arrest+against+Thomas+Lubanga+Dyilo.htm, last accessed on 25 March 2011:

> Thomas Lubanga Dyilo founded the UPC in September 2000 and became its president. In September 2002, he set up the FPLC as the military wing of the UPC and became its commander-in-chief. During the fighting in Ituri, more than 8,000 civilians have died and in excess of 600,000 others have been displaced. In 2002, the FPLC seized control of Bunia and parts of Ituri in Orientale Province.

[107] The Lubanga Trial at the International Criminal Court, "Who is Thomas Lubanga?", available at http://www.lubangatrial.org/qa/, last accessed on 28 September 2011.

[108] Valentina Spiga, "Indirect Victims' Participation in the *Lubanga* Trial", in *Journal of International Criminal Justice,* 2010, vol. 8, p. 191, *supra* note 5 ("analyzing the criminal charge that results from the breach to the prohibition of using persons under the age of 15 to participate actively in hostilities").

[109] On the notion "screening decisions" as the ICC's OTP prerogative of selecting which situations to investigate and deciding how to prioritize, see Alison Marston Danner, "Prosecutorial Discretion and Legitimacy", in *Guest Lecture Series of the Office of the Prosecutor,* 13 June 2005, The Hague, available at http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/050613_Danner_presentation.pdf, last accessed on 30 September 2011.

on crimes committed by "those persons who bear the greatest responsibility".[110] Second, the investigation focuses on those crimes of the accused that "show a sample […] reflective of the gravest incidents".[111] Third, when it comes to choosing which group of crimes will be part of the sample the court must identify and prioritize the main types of victimization.[112] The ICC has deployed the notion of gravity to identify such types, when they are considered grave on the basis of their quantitative or qualitative salience. In other words, they have to be frequent, egregious or both. In *Lubanga*, the OTP prioritized child enlisting on the basis that it was both quantitatively[113] and qualitatively[114] salient. In deciding to prosecute solely on the basis of child enlistment, the OTP was also making a

[110] International Criminal Court, 14 March 2006, *supra* note 106.

[111] Office of the Prosecutor, "Report on Prosecutorial Strategy", 14 September 2006, pp. 5–6, available at http://www.fidh.org/IMG/pdf/OTPProsecutorialStrategy_20 06-2009.pdf, last accessed on 30 September 2011. See, *e.g.*, Sienna Merope, "Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC", in *Criminal Law Forum*, 2011 (discussing the OTP's screening decisions in Lubanga).

[112] *Ibid*.

[113] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo,* "Confirmation Hearing: Introductory Comments of Senior Trial Attorney Ekkehard Withopf", 9 November 2006, available at http://212.159.242.181/iccdocs/asp_docs/library/%20organs/otp/speeches/EW_20061113_en.pdf, last accessed on 30 September 2011:

> [T]he Prosecution will show the face of a military commander who for the sake of that war, together with others, conscripted and enlisted children under the age of fifteen years into the FPLC. Thomas Lubanga Dyilo made the children get military training. Thomas Lubanga Dyilo made them train to kill. Thomas Lubanga Dyilo made the children kill. And Thomas Lubanga Dyilo let the children die. Die in hostilities. *Many, many children*. [emphasis added]

[114] International Criminal Court, 14 March 2006, *supra* note 106:

> Young children – boys and girls alike – were taken from their families and forced to join the FPLC. They were taken away and trained in camps set up for this purpose. As president of the UPC and commander-in-chief of the FPLC, Thomas Lubanga Dyilo exercised de facto authority. He had ultimate control over the adoption and implementation of the UPC's and FPLC's policies and practices, which consisted, amongst other things, of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities.

political decision to use the Lubanga case to send a message about the status of child enlistment as an international crime.[115]

International legal feminist advocates and scholars,[116] together with internationalist commentators and human rights organizations,[117] denounced the decision to exclude charges of sexual violence from the investigation against Lubanga and the refusal to let the victims of sexual assaults committed by child soldiers participate in the proceedings. They read this as turning the principle of gender strategizing on its head. Feminists' criticisms seem legitimate, insofar as the court's decision meant that acts of sexual violence by child soldiers against women, and against child soldiers themselves, should not be prioritized despite evidence of their high frequency and egregiousness.[118] However, in asserting this view, in-

[115] International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo,* "Confirmation Hearing: Introductory Comments of Senior Trial Attorney Ekkehard Withopf", *supra* note 113:

> This Confirmation Hearing will give the world a picture, an idea about the brutality of the life of child soldiers. And it will give the world a picture about people who are responsible for it. Criminally responsible.In this case: Thomas Lubanga Dyilo.

[116] See, *e.g.*, Susana SáCouto and Katherine Cleary, 2009, p. 337–359, *supra* note 81 (for a detailed recount of reactions to exclusion of charges for sexual violence in Lubanga); Sienna Merope, 2011, *supra* note 111 (analyzing the consequences for gender justice of the Trial Chamber decision not to recharacterize the facts); Suzan M. Pritchett, "Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court", in *Transnational Law and Contemporary Problems,* 2008, vol. 17, 265–305 (case note applying "critical feminist jurisprudential analysis to the application of the Rome Statute in the ICC case of Prosecutor v. Thomas Lubanga"); Margaret M. deGuzman, 2011, p. 518, *supra* note 1(discussing feminist organizations' reaction to Lubanga).

[117] Women's Initiative for Gender Justice, "Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno Ocampo", 20 September 2006), available at http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf, last accessed on 30 September 2011; see also Human Rights Watch, "Joint Letter to the Chief Prosecutor of the International Criminal Court", available at http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm, last accessed on 30 September 2011; Avocats Sans Frontières *et al.*, "Joint Letter from Avocats Sans Frontières *et al.* to the Chief Prosecutor of the International Criminal Court, D.R. Congo: ICC Charges Raise Concern", 31 July 2006.

[118] See, *e.g.*, Avocats Sans Frontieres *et al.*, 2006, *supra* note 117. Susana SáCouto and Katherine Cleary, 2009, *supra* note 81 (discussing the existence of evidence supporting allegations that girls had been kidnapped into Lubanga's militia and were often raped and/or kept as sex slaves); Suzan M. Pritchett, 2008, p. 267, *supra* note 116

ternational legal feminists failed to appreciate that the reasoning behind this exclusion is the same type of reasoning that underpins sex-specific prosecutions: successful international prosecution of gender crimes requires isolating the investigation from other criminal acts.

As it is clear from feminist reactions to Lubanga, the problem is not that the OTP chose to prosecute child enlistment, but that it found this strategy irreconcilable with the formulation of charges on sexual violence despite the evidence.[119] Given the long-standing history of associating women and children in both feminist and child advocacy strategies, it appears surprising that the Trial Chamber refused to include women as indirect victims.[120] One possible explanation for this phenomenon is to read Lubanga as a sex-specific prosecution. To exclude women as victims of child soldiers is the only way to salvage the sexual difference that underpins the binary of victims and perpetrators. In other words, to see child soldiers as victims of Lubanga and perpetrators of sexual assaults at the same time is an impossible move under a sex-difference approach to pros-

(noting how it is "virtually undoubted that violence against women in the DRC conflict has been systematic and widespread").

[119] Despite vocal criticisms against the omission of charges in the Lubanga case, feminists have qualified as "positive developments" for gender strategizing the fact that subsequent ICC decisions have included charges for sexual violence. See, *e.g.*, Susana SáCouto and Katherine Cleary, 2009, p. 342, *supra* note 81.

[120] The OTPs draft policy on victim's participation attests of the existence of a difference in views between the Trial Chamber and the OTP in respect to making the victims of rape by child soldiers into indirect victims of Lubanga. Despite the OTPs view, the Trial Chamber concluded in favor of the exclusion of victims of child soldier rape from the category of victims. Sexual violence was left out of the charges against Thomas Lubanga. Despite its efforts, the OTP failed to convince the court of its theory of indirect victimhood.

> The Office concurs that "victims" under rule 85(a) can be persons who were not the direct targets of a crime, but who suffered indirect harm as a result of the commission of a crime. The Office supports a broad characterization of "indirect victims". In Lubanga, the Office expressed its views that those who have suffered harm as a result of crimes committed by child soldiers, *i.e.* as a consequence of the crimes charged, are also entitled to participate.

See International Criminal Court, "Policy Paper on Victims' Participation", April 2010, available at http://www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-D0981E4ABE02/281751/PolicyPaperonVictimsParticipationApril2010.pdf, last accessed on 15 March 2012.

ecution. Children could not be considered victims and perpetrators insofar as one cannot be female and male at the same time.[121]

This statement by Catharine MacKinnon, Special Gender Advisor to the ICC and vocal feminist advocate of thematic prosecutions, brings to the foreground how the coupling of female (victim) and the male (perpetrator) is reproduced over and over. Interestingly, MacKinnon is using it to differentiate between boy and girls within the category of child soldiers: "Lubanga made boys into rapists and girls into sex slaves in order to make them into soldiers he could command and use at will".[122]

The coupling of female/victims and male/perpetrators and the treatment of both couples as dichotomous categories, thus mutually exclusive, might help understand what prevented the ICC from including women as indirect victims, nor formulating charges against Lubanga for sexual assaults committed by children.[123] Furthermore, it could even illuminate the exclusion of sexual violence charges against Lubanga, including his responsibility for sexual assaults perpetrated against male and female child soldiers.[124]

---

[121] See, *e.g.*, Valentina Spiga, 2010, p. 184, *supra* note 5 (for a meditation on the question "when the direct victims are at the same time perpetrators, as in the case of child soldiers, who may inflict harm upon others).

[122] For a note on the role of gender advisors at international courts *vis-à-vis* instance of sexual violence involving child soldiers, see Patricia Viseur Sellers, 2009, p. 301, *supra* note 2:

> The Legal Advisor should also address the sexual assaults committed upon boy soldiers and sexual assaults boy soldiers are ordered to commit as part of their training or in order to "carry out" their military missions.

[123] For discussion of the tensions of showcasing the prosecution against Lubanga as a case dealing with the sexual abuse of child soldiers given the decision not to include counts of sexual violence, see Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law,* forthcoming 2012, p. 265 (noting how, "[w]hile the ICC prosecutor initially justified crime selection in the Lubanga case by invoking practical considerations involving timing and evidence availability", he later highlighted "the case's role in showcasing the sexual abuse of child soldiers"). See also Luis Moreno-Ocampo, "Keynote Address: Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence", in *Law and Social Inquiry,* 2010, vol. 15, pp. 845–846.

[124] The male child (child soldier) is the victim, and the male adult (Lubanga) is the perpetrator. The male child is read as the female in the victim-perpetrator scheme. Thus, it excludes the possibility of including women as victims, much less of charging Luban-

12.4.2. Investigating Sexual Difference in a Post-Genomic Age

In March 2005, the Duke Institute for Genome Sciences and Policy ('IGSP') issued a press release announcing, "the first comprehensive survey of gene activity has revealed an unexpected level of variation among individuals".[125] The results were described as potentially having major implications for "understanding the differences in traits among women and between males and females, in terms of both health, disease […] as well as normal gender differences".[126] In essence, said Huntington Willard, one of the authors of the report, "there is not one human genome, but two – male and female".[127]

Following the announcement, several news outlets published their takes on the report.[128] While most writers focused on the difference be-

ga of rapes of the child soldiers. In both hypotheses, the female/victim male-child would be considered a male/perpetrator male-child. Following binary reasoning under which male and female are mutually exclusive categories the required move would be against the goal of the court, since it would entail the impossibility of making the male/child a victim of unlawful enlistment.

[125] The NIH supported their findings as published in the March 2005 edition of the journal *Nature.* Laura Carrel, Huntington Willard, "X-Inactivation Profile Reveals Extensive Variability in X-Linked Gene Expression in Females", in *Nature*, vol. 434, no. 7031, pp. 400–404.

[126] From the outset, the authors of the investigation used the words *sex* and *gender* to suggest that their findings would have bearings for the study of sex and gender. See Duke Medicine News and Communications, "X Chromosome Variation May Explain Differences Among Women, Between Sexes", 16 March 2005, available at http://www.dukehealth.org/health_library/news/8450, last accessed on 30 September 2011:

> Such characteristic genomic differences should be recognized as a potential factor to explain sex-specific traits both in complex disease, as well as normal gender differences.

[127] Duke Medicine News and Communications, 2005, *supra* note 126. See Richardson, 2010, p. 823 *supra* note 11 (discussing the way the findings by Willard and Carrel were presented to the public).

[128] Fred Guterl, "The Truth About Gender", in *Newsweek,* 2005, vol. 145, no. 13, pp. 38–39, available at http://www.thedailybeast.com/newsweek/2005/03/28/the-truth-about-gender.html, last accessed on 30 September 2011:

> [A] new study has found that women and men differ genetically almost as much as humans differ from chimpanzees […]. [The] study published last week in the journal Nature puts this difference at about 1 percent. Considering that the genetic makeup of chimpanzees and humans differs by only 1.5 percent, this is significant.

tween men and women, others, like Maureen Dowd from the New York Times, chose to focus on what the findings said about difference among women: "[w]omen are not only more different from men than we knew. Women are more different from each other than we knew – creatures of 'infinite variety', as Shakespeare wrote".[129] Indeed, as Huntington Willard stated to the press,

> [t]he findings suggest a remarkable and previously unsus-pected degree of expression heterogeneity among females in the population [and] further work is required to explore potential consequences of that variation.[130]

Despite divergent emphasis in reporting, the remarkable fascination these findings generated serves as a reminder of the preoccupation that scientists and popular press had with the gene.[131]

But what does it mean to say – quoting the New York Times – "that, women are, indeed, 'a different species'"?[132] Historian of science Sarah Richardson interprets the finding in the following way:[133] Based on differences between their DNA maps – also known as genomes – men and women ought to be considered members of different animal species.[134] Richardson points out two discursive moves that ensue from this assertion. On the one hand, arguing that males and females have different genomes entails an analogy between sex and species; and on the other hand, this formulation carries along a reversal – if not a contradiction – *vis-à-vis*

> "You could say that there are two human genomes, one for men and one for women", says Huntington Willard, a geneticist at Duke University and coauthor of the article.

See also Richardson, 2010, p. 823 *supra* note 11 (for a detailed discussion of media reporting of the findings).

129 Maureen Dowd, "X-Celling over Men", *The New York Times*, 20 March 2005, available at http://www.nytimes.com/2005/03/20/opinion/20dowd.html, last accessed on 30 September 2011.

130 Duke Medicine News and Communications, 2005, *supra* note 126.

131 "The popular press and scientists alike have apparently fallen in love with the gene", Anne Fausto-Sterling, 1992, p. 62, *supra* note 13.

132 Maureen Dowd, 2005, *supra* note 129.

133 Richardson, 2010, p. 823, *supra* note 11.

134 In comparative genomic research about sex differences males are considered different species, based on the differences between their DNA maps. See, Richardson, 2010, p. 823, *supra* note 11.

the single genome paradigm dominant during the 1990's.[135] Furthermore, she observes that:

> Willard's construction argues this shift is part of a broader move in human genomics – a subfield within molecular biology that studies human DNA maps – toward studies of human diversity, focusing on the differences between different populations.[136]

The findings by Willard and Carrel signal the emergence of a "genomic concept of sex"[137] and a "genomic model of biological sex differences".[138] The uncritical embrace by genetic researchers of the newly found variations between male and female genes[139] – considered nothing less than astounding[140] – set up the stage for the breadth and scope of a discursive shift that has considerably transformed "in an often invisible way", thinking about genetic differences between the sexes.[141]

Richardson poignantly illustrates this point. First, she observes how the "genomic construction of biological sex differences"[142] inaccurately implies far greater variation between males and females than understandings of sexual difference still dominant in the 1990s. In doing so, she argues, they play "into traditional gender-ideological views of sex differ-

---

[135] "Part of what gives Willard's statement […] its effect and significance is its startling reversal of the mantra of the 1990s Human Genome Project (HGP) – that there is a single human genome and humans are 99.9% identical". See Richardson, 2010, p. 827, *supra* note 11 (discussing how the existence of two different human genomes can be read as a reversal – if not a contradiction – of the 1990s *single human genome* mantra widely publicized by the Human Genome Project).

[136] *Ibid*.

[137] "Recent genetic research on human sex differences evidences the emergence of a 'genomic' concept of sex, analogizing sexes to 'species' and 'genetic populations". *Ibid*.

[138] *Ibid*.

[139] Richardson, 2010, pp. 827, 837–839, *supra* note 11:

> I find that there are not strong, empirical, explanatory, social, or ethical reasons for genomicizing sex differences. For these reasons, it is more advisable to refer to 'sex differences in the human genome' than to 'male genome' and 'female genome' […]. [T]here are not strong empirical, explanatory, social, or ethical reasons for genomicizing sex differences.

[140] Lauren A. Weiss, Lin Pan, Mark Abney and Carole Ober, "The Sex-Specific Genetic Architecture of Quantitative Traits in Humans", see http://genes.uchicago.edu/wp-content/uploads/ober/NatureGenet38-218-222.pdf, last accessed on 25 March 2012.

[141] See Richardson, 2010, pp. 830–831, *supra* note 11.

[142] See *ibid.*, p. 828.

ences".[143] Second, she points out how seeing males and females as different species is influenced by phylogenetics, a subfield of genomics that uses, and is criticized for using, population-based genetic variation (also known as profiling) to explain differences in health and disease between racial and ethnic groups.[144] Third, since this scientific model stems from the assertion that male and female genes differ systematically from each other, Richardson argues that it tends to discard altogether the idea of a single human genome – at least in the context of sex research. Thus, doing so implicitly legitimizes the scientific analysis of "males and females independently of the other".[145]

What Richardson describes is an extraordinary shift towards binary thinking about sex in biology that has largely gone unnoticed in other realms of knowledge, including feminist legal theory and practice.[146] Thus, the "methodological consequences [of this discursive move] for the study of the social dynamics of gender"[147] have been denounced by only a few voices in academia. Nonetheless, the fact that this is happening precisely at a time when sex-specific agendas proliferate in international legal feminist projects is of particular interest; chiefly, given the well-documented tendency in biology to "expand the relevance of explanatory categories beyond their empirically warranted limits".[148] Since there is evidence of the importance of the single human genome paradigm both for late 20th century science, liberal social discourse, and feminist agendas,[149]

[143] "Thinking of males and females as having different genomes exaggerates the amount of difference between them […] playing into traditional gender-ideological views of sex differences". *Ibid*.

[144] *Ibid*.

[145] This is the case despite the fact that sexes do not meet any of the criteria required to be categorized as a species interbreeding, shared common ancestry, morphology, spatial and temporal boundaries. See Richardson, 2010, pp. 831–832, *supra* note 11.

[146] Despite its ubiquity in biological explanation, the foundations of the concept of sex (unlike that of species and population) in biology have gone largely unexamined. See, Richardson, 2010, p. 837, *supra* note 11. See also ("Indeed, binary thinking underpins 'genomic thinking' about sex difference in biology"); Carla Fehr, 2001, *supra* note 12.

[147] See Richardson, 2010, p. 837, *supra* note 11.

[148] John Dupré, *The Disorder of Things: Metaphysical Foundations of the Disunity of Science*, Harvard University Press, 1993, p. 79.

[149] See Richardson, 2010, p. 827, *supra* note 11:

the emergence of a two-human-genome paradigm merits – at least – that we raise some questions about the unintended consequence of prosecutorial practices that either assume or foster binary thinking about the sexes.

12.5. Some Questions about the Future of Thematic Prosecution

In this article, I have offered a reinterpretation of the emergence of international thematic prosecutions of sex crimes and the rise of sex-specific biomedical research as parallel tales of re-essentialization. I argue it is a scenario where international legal feminists have explicitly and implicitly engaged with biologically grounded notions of essential differences between men and women. Nonetheless, this tale of re-essentialization does not end with a lesson about how, when and why feminists should engage, reject or simply ignore biological explanations of sexual difference. Instead, it ends by raising questions about the ways in which these two feminist projects might be gesturing towards the emergence of a novel regime of ideological governance of sexual difference.

In this final section, I will step back from the parallel I have just presented in order to ask some questions that might help make sense of the ways in which two apparently very successful feminist projects have produced results that are gender essentializing. After all, is it not surprising that gender-coding disease and crime has led to gender essentializing? I invite future exploration of these questions.

Questions about binary reasoning. This chapter raises a series of questions regarding the vices and virtues of binary thinking for feminist agendas, in general, and for international legal feminism in particular. Why is binary thinking problematic? The problem with binary thinking derives from its potential to disguise problems of categorization.[150] The

> The power and importance of this idea of a single, shared human genome in the late twentieth century science and liberal social discourse should not be underestimated.

[150] "It is not the facticity of the two biological sexes that is problematic from the perspective of critical gender theory [search Fausto and google "the construction of sex"]; rather, it is *binary thinking* that carries the epistemic failure and leads to shaky reasoning about sex in biology […]. As gender theorists have observed, binaries invite dualistic, dichotomous thinking, so that it becomes difficult to think of two without subsuming one in to the other, ranking them, implying polarity or complementarity, or posing them as opposites [see books cited by Richardson, 2010, *supra* note 7, p. 838]. Binaries tend to imply exhaustive categories and to drive reasoning toward the detection of difference as fixed polarity". See Richardson, 2010, p. 838, *supra* note 12.

unjustified use of sex as an organizing category for analysing disease or crime, combined with the interchangeable use of sex and gender as categories of analysis and the reduction of gender to sex, are all different manifestations of binary thinking. As I discussed in sections 12.2., 12.3., and 12.4., these moves have had tangible effects for feminist advocacy projects (that is, obscuring commonalities across men and women, obscuring differences within each sex). I would add that ignoring binary thinking also dismisses feminist critiques of scientific categories of sexual difference.

Questions about categorisation. What is the relation, if any, between mutually exclusive categorization associated with binary thinking and subordination? I maintain that the story I have told in these pages is not simply a story about re-essentialization. It is also a story about a shift from a regime of epistemic subordination to a regime of oppression through categorization. When asking these questions it should not be forgotten that the two feminist projects that are the subject of my argument are part of a broader governance trend that gives overriding significance to sex and gender for understanding and managing male and female behaviour.

Questions about governance. The account I gave here has an institutional focus. It derives from an interest in understanding the conflicts and compromises that shape how international thematic prosecution of sex crimes becomes policy, practice, and institutional formations. Questions about governance are thus read as ways to better understand the processes by which social and legal changes take institutionalized forms. There are questions about the institutional formations that have followed the move towards re-essentialization in feminist advocacy agendas. What would it look like to create institutional formations that respond to sexual difference as variation instead of seeing it as dichotomous? Is there a way of ensuring that institutions do not get entrapped in the practice of governance I have presented in these pages?

Questions about governance also offer the possibility to engage with the place of governance *in* feminist projects. For example, the two feminist agendas I have analysed here can be read as manifestations of Governance Feminism. As such, they show the "incremental but by now

quite noticeable installation of feminists and feminist ideas in actual legal-institutional power".[151]

Questions about feminism. Last and surely not least, this article raises a series of important questions about feminist theory and practice. How does the phenomenon described here relate to the professionalization of feminists? How does it relate to the specialization of feminism? As Ellen Messer-Davidow has pointed out, specialization is part of the trajectory of disciplinary growth of feminism, one that tends to intensify the production of differences within feminist discourses.[152] However, commonalities between health and international legal feminists' activist strategies during the past two decades defy the tendency of feminism to grow towards difference within its own ranks. All the more relevant is that we consider how and when these two particular spheres of feminist advocacy align. Finally, there is the issue of professionalization, and how experts trained in gender within their own fields have become key players for the development of new prosecutorial and biomedical knowledge.[153]

---

[151] See Halley, Kotiswaran, Shamir, and Thomas, 2006, *supra* note 23.

[152] Ellen Messer-Davidow, 2002, p. 207, *supra* note 26.

[153] Steven Epstein, 2007, *supra* note 7:

> While an insistence on equality as sameness was a typical strategy of feminist movement in past decades, in more recent years notions of essential difference appear to provide strategic wedge specially to certain sectors of the women's health movement […] this wave […] reflects the professionalization of the women's health movement and the concomitant rise of some women (often white and middle-class) to positions of authority and influence […].

See also Richardson, forthcoming 2013, *supra* note 7 (Discussing how the women's health movement is about professional women's activism, professional women advocating for women's issues). What Epstein and Richardson have identified as the professionalization of women's health activism is illustrative of a well-documented global phenomenon since the 1980s: the professionalization of feminism altogether. See Sabine Langa, "The NGO-Ization of Feminism: Institutionalization and Institution Building within the German Women's Movement", in *Global Feminisms Since 1945* (Bonnie Smith ed.) 2000, p. 290:

> Globalization has changed the nature of women's activism […]. The reality of a visible women's movement is replaced by the professionalization of feminism, resting in the policy decisions of a few individuals.

Questions about genetics. Amidst this landscape of "geneticization",[154] is it possible to ignore the impact of genetics for international legal feminist advocacy agendas? After all, there are some serious feminist critiques of this tendency.[155] It is precisely in the context of evaluating thematic prosecution as institutional design and feminist practice as it is today, where there is space for thinking how we ought to engage with the science in thematic prosecution tomorrow.

[154] Antoinette Rouvroy, *Human Genes and Neoliberal Governance,* Routledge-Cavendish, 2008, p. 124 (discussing the concept as the ever growing tendency to distinguish people one from another on the basis of genetics).

[155] This question is inspired by the work of Anne K. Eckman. See Anne K. Eckman, "Beyond the Yentl Syndrome: Making Women Visible in Post 1990 Women's Health Discourse", in *The Visible Woman: Imaging Technologies, Gender, and Science.* New York University Press, New York, p. 145.

13

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 on 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,[1] this gap was later remedied.[2]

* **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, LLM and doctoral candidate GAU (currently ICTY) for language revision.

1 *Cf.* ICTR (Trial Chamber I), *Prosecutor v. Akayesu*, Judgment, 2 September 1998, Case No. ICTR-96-4-T ('*Akayesu* Trial Judgment'), para. 686:

> In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law.

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.[3]

Also, a second problem of a procedural nature, namely the systematic under-investigation and under-prosecution of sex crimes, although certainly a fact in the (missing) history of sex crimes prosecutions,[4] seems to disappear slowly but steadily, with the increasing awareness and media coverage of sex crimes.[5] Today, it is widely recognized 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

ICTY, *Prosecutor v. Furundžija,* Trial Judgment, 10 December 1998, Case No. IT-95-17/1-T ("*Furundžija* Trial Judgment"), para. 175 ("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", 2009, *American University Journal of Gender, Social Policy & the Law*, vol. 17, no. 2, p. 431 *et seq*., p. 448.

2 See my chapter on the criminalization of sex crimes entitled "Sexual Offences in International Criminal Law, with a special focus on the Rome Statute of the International Criminal Court", in Morten Bergsmo (ed.), *Understanding and Proving International Sex Crimes*, Torkel Opsahl Academic EPublisher, Oslo (forthcoming).

3 *Cf.* Daniel J. Franklin, "Failed Rape Prosecutions at ICTR", in *The Georgetown Journal of Gender and the Law*, 2008, vol. 9, pp. 208 *et seq*.

4 See for example Tamara F. Lawson, "A Shift Towards Gender Equality in Prosecutions", in *Southern Illinois University Law Journal*, 2008–2009, vol. 33, pp. 204 *et seq*. (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. 435 *et seq.* quoting, *inter alia*, Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, Nijhoff, The Hague 1997, p. 19 at 436:

> [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.

5 See, *e.g.*, Lawson, 2008–2009, p. 205, see *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.

prosecutions and trials dealing with sex crimes has followed suit.[6] 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.[7] There may still be a disproportion between the number of prosecutions 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.[8] In the case of the international criminal justice system,

---

6 See as the first relevant judgment ICTR *Akayesu* Trial Judgment, para. 731, see *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, iss. 2, pp. 348 *et seq*. (arguing that since the creation of the *ad hoc* Tribunals there have been significant improvements in the prosecution of such crimes); Lawson, 2008–2009, pp. 208 *et seq*., 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* (hereinafter 'ICLR'), 2011, vol. 11, pp. 432 *et seq*. Patricia M. Wald, "Women on International Courts: Some Lessons Learned", *ICLR*, 2011, vol. 11, pp. 401 *et seq.* still moans about significant crimes against women even in peacetimes:

> 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 ICC's 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 *ICLR*, 2011, vol. 11, pp. 529 *et seq*. 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 *ICLR*, 2011, vol. 11, p. 775.

7 *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.

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

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 recourses.[9] All these factors make it necessary to develop rational criteria for the prioritization and selection of cases.[10]

> 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, Albin Eser, Kai Ambos and Andrew Sanders (eds.), *The Prosecutor of a permanent International Criminal Court*, Max-Planck Institute for Foreign and International Criminal Law, Freiburg i.B., 2000, pp. 504 *et seq*. (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.

9 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, pp. 196–212, (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 prioritized 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.").

10 See Morten Bergsmo (ed.), *Criteria for prioritizing and selecting core international crimes cases*, Torkel Opsahl Academic EPublisher, Oslo 2009, available at http://www. fichl.org/fileadmin/fichl/documents/FICHL_4_Second_Edition_web.pdf, last access-ed 8 April 2012; see also 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, available at http://www.profis.com.co/modulos/contenido/default.asp?idmodulo=162, last access-ed 13 October 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.[11] 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,[12] but the gathering and assessment of data regarding (gender) crimes in the respective conflict situations proves to be difficult[13] and differs from situation to situation.[14] Moreover, it should be noted that the recognition of large-scale sexual crimes in conflict situations is of recent date,[15] and we are only beginning to understand the impact of such crimes on the conflicts and the

[11] Ní Aoláin *et al.*, 2011, pp. 439–440, see *supra* note 6, with further references.

[12] For example, at the International Criminal Tribunal for the former Yugoslavia ('ICTY'), as of mid 2011, 78 of the 161 accused (= 48,4%) had been charged with acts of sexual violence. 28 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. 19 of the proceedings are still on-going, 6 cases have been referred to a national jurisdiction, and one accused is still a fugitive. See http://www.icty.org/sid/10586, last accessed on 4 August 2011.

[13] 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.

[14] 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, available at http://www.bbc.co.uk/news/world-africa-13367277, last accessed on 4 August 2011.

[15] Hereto, Ambos, 2011, fns. 6 and 7 (with text), see *supra* note 2.

persons affected. This entails an uncertainty, which may also influence empirical assessment.

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.[16] 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.[17]

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.[18] 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

[16] Ní Aoláin *et al.*, 2011, pp. 426, 428 *et seq.*, 439–440, 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 *ICLR*, 2011, vol. 11, pp. 463 *et seq*. (pointing to "private and opportunistic harms" (p. 463) and to a lack of accountability in connection with forced migrations).

[17] Ní Aoláin *et al.*, 2011, pp. 437 *et seq.*, see *supra* note 6, referring to the ICTY *Akayesu*-case and the ICC *Lubanga Dyilo*-proceedings.

[18] Crit. with regard to sex crimes Suzan M. Pritchett, "Entrenched Hegemony, Efficient Procedure, or Selective Justice", in *Transnational Law & Contemporary Problems,* 2008, vol. 17, pp. 292–293.

case depends heavily on witness testimony.[19] Although the international tribunals' procedural rules provide for some flexibility as to the burden of evidence,[20] 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.[21] It is also possible that the sexual violence occurs in private places and is informed by discriminatory gender relations.[22] Existing witnesses are reluctant to testify for reasons of traumatisation, fear and/or mistrust.[23] 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".[24] 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 criticized that the 'standard of proof' required in cases of sexual vio-

---

19 *Cf.* the ICTY-OTP paper "Reliving the past: The challenges of testifying", available at http://www.icty.org/sid/10608, last accessed on 12 October 2011.

20 Rule 63(4) of the ICC "Rules of Procedure and Evidence" ('RPE'), adopted in the first session of the Assembly of States Parties ('ASP') on 3–10 September 2002, ICC-ASP/1/3, 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". *Cf.* moreover Rule 96 of the ICTY's RPE (adopted on 11 February 1994, as amended on 8 December 2010, IT/32/Rev. 45), and Rule 96 of the ICTR RPE (adopted on 29 June 1995, as amended on 1 October 2009). Both provisions contain evidential eases (*e.g.*, 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, Sellers, 2009, p. 306, see *infra* note 29, describes it as "groundbreaking". On evidentiary rules see also Luping, 2009, pp. 482–483, see *supra* note 1.

21 Franklin, 2008, pp. 209 *et seq*., see *supra* note 3.

22 Pritchett, 2008, p. 293, see *supra* note 18.

23 As described by the ICTY-OTP,

> 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. (see *supra* note 19)

24 Beth Van Schaack, "Obstacles on the Road to Gender Justice", in *American University Journal of Gender, Social Policy & the Law*, 2009, vol. 17, iss. 2, p. 369.

lence is higher than in other cases.[25] While in ordinary cases, so it is argued, 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.[26]

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

[25] SáCouto and Cleary, 2009, pp. 353 *et seq*., *supra* note 6, with further references.

[26] See *ibid.*, who point to several decisions where more evidence has been required to proof 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 (Trial Chamber), *Prosecutor v. Galic*, Judgement, 5 December 2003, Case No. IT-98-29-T, paras. 729–740; ICTY (Appeals Chamber), *Prosecutor v. Galic*, Judgement, 30 November 2006, Case No. IT-98-29-A, paras. 177, 178, 389; ICTR (Trial Chamber), *Prosecutor v. Kajelijeli*, Judgement and Sentence, 1 December 2003, Case No. ICTR-98-44A-T, para. 681, 683, 780, 923 (where an order to commit rapes has not been found; while it was proven that the accused knew of and authorized sexual assaults in general, evidence for a specific order was missing); ICTY (Appeals Chamber), *Prosecutor v. Kordic and Cerkez*, Judgment, 17 December 2004, IT-95-14/2-A, para. 27 (on instigation); ICTY (Trial Chamber), *Prosecutor v. Brdjan*, Judgment, 1 September 2004, Case No. IT-99-36-T, paras. 577, 1054; ICTR (Appeals Chamber), *Prosecutor v. Gacumbitsi*, Judgment, 7 July 2006, Case No. ICTR-2001-64-A, paras. 133, 135, 137, 138 (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/Cleary, 2009, pp. 358 *et seq*., *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.

been the victims of sexual violence. These often traumatised victims may find some relief after participating in the trial proceedings through testifying.[27] 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.[28] 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".[29] The latter has also been recognized 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.[30]

---

[27] 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 "Reliving the past: The Challenges of Testifying", available at http://www.icty.org/sid/10608, last accessed on 12 October 2011.

[28] 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 – esp. in cross examination, lacking feedback after trial, *etc.*) *cf.* Griese, *Folgen sexueller Kriegsgewalt*, Mabuse-Verlag, Frankfurt am Main, 2nd ed., 2006, pp. 417 *et seq*.

[29] Patricia V. Sellers, "The 'Appeal' of Sexual Violence: Akayesu/Gacumbitsi Cases", in Center for Human Rights, *Gender based Violence in Africa: Perspectives from the Continent*, vol. 51, available at http://www.chr.up.ac.za/index.php/gender-publications.html, last accessed on 12 October 2011. 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, Abingdon, 2010, pp. 81–82 with further references. For a thorough assessment of secondary victimization, see Stefanie Bock, *Das Opfer vor dem Strafgerichtshof*, 2010, pp. 70 *et seq.* (general), pp. 403 *et seq*. (on protection against secondary victimization), and pp. 422 *et seq.* (on sexual crimes).

[30] ICTY (Trial Chamber), *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, Case No. IT-94-1-T, para. 46.

From the prosecution's perspective, the inappropriate handling of sexual violence cases may deter potential witnesses from testifying[31] or may have unpredictable implications on the behaviour of a witness in 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 ('OTP'), gender related issues may not be represented properly during the trial and appeals proceedings.[32]

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.[33]
2. Sex crimes are generally considered more difficult to prove.

---

[31] Similarly linking 'procedural safeguards' for victims and witnesses to their likeliness to report or testify about a crime: Mouthaan, 2011, pp. 788–798, see *supra* note 6.

[32] Sellers, 2009, pp. 14 *et seq*., see *supra* note 29, is speaking of "gender injustice" in relation to a "mishandling of sexual assaults" at the ICTR in times where no legal advisor on gender within the OTP has been appointed. As an example, she refers to ICTR, *Prosecutor v. Kajelijeli*, Trial Chamber Judgment and Sentence, 1 December 2003, Case No. ICTR 98-44A-T. Similar Doris Buss, "Learning our lessons? The Rwanda Tribunal record on prosecuting rape", in Clare McGlynn and Vanessa E. Munro (eds.), 2010, pp. 61 *et seq.*, esp. p. 64, see *supra* note 29, arguing that the ICTR failed to held promises made with the Akayesu-Judgment and linking this, partly, to the decision to discharge gender advisors. Buss, *ibid*., p. 64, furthermore draws attention to the case of ICTR, *Prosecutor v. Bagambiki et al*., Trial Judgment, 25 February 2004, ICTR-99-46-T, where the OTP did not pursue charges of sexual violence although evidence on such crimes was available, due to "personnel problems".

[33] Lawson, 2008–2009, 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), as cited in Lawson, 2008–2009, p. 193, see *supra* note 4:

> 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.

3. Thus, they tend to be avoided and other charges relating to concurrent cases, which are easier to prove, are selected.[34]

As 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".[35]

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.[36]

This is in contrast to the standard approach, according to which the totality of crimes – including possible sex crimes – is to be considered

---

[34] See also ICC Office of the Prosecutor ('OTP'), "Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications", p. 3, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Annex+to+the++_+Paper+on+some+policy+issues+before+the+Office+of+the+Prosecutor+_++++Referrals+and+C.htm, last accessed on 12 October 2011: "the Prosecutor has to take into account […] the likelihood of any effective investigation being possible". With regard to sex crimes Lawson, 2008–2009, p. 193, see *supra* note 4 (difficulty in the setting up "the strong case" and resulting in urge to avoid pursuing less "winnable" sexual violence cases).

[35] Binaifer Nowrojee, "Your Justice is Too Slow – Will the ICTR Fail Rwanda's Rape Victims?", in *United Nations Research Institute for Social Development*, Occasional Paper 10, November 2005, p. 10, available at http://www.unrisd.org/80256B3C005BCCF9/%28httpPublications%29/56FE32D5C0F6DCE9C125710F0045D89F?OpenDocument, last accessed on 12 October 2011.

[36] FICHL, Seminar on "Thematic Investigation and Prosecution of International Sex Crimes", Concept and Programme, available at http://www.fichl.org/fileadmin/fichl/activities/110307-08_Seminar_on_thematic_prosecution__Concept_and_programme__110207.pdf, last accessed on 17 October 2011.

first. Only after that has been done, can or should one proceed to prioritize 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.[37]

It is my understanding that thematic investigations and prosecutions cannot operate at the expense of other important investigations. The concept 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.[38] On a supranational level, EU law provides for such units.[39]

---

[37] *Ibid*.

[38] *E.g.*, European countries like Belgium, Denmark, Germany, Sweden, The Netherlands, Norway, 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 Specialise War Crimes Units", in Redress/fidh, December 2010, available at http://www.fidh.org/IMG/pdf/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf, last accessed on 12 October 2011 (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, *cf.* the Ugandan Judiciary's website, available at http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&Itemid=154, last accessed on 12 October 2011. Schurr, *op cit.*, p. 18, is even doubting 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 specialized units, (published in this volume, Chapter 11).

[39] Thus, the EU Council, 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 (*ibid.,* Art. 1). Then, with EU Council Decision 2003/335/JHA, 8 May 2003, it called its members to "consider the need to

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 recognized as a major social problem and the political will and resources to set up a specialised infrastructure exists.[40] In fact, such a unit exists on the international level within the ICC-OTP (the Gender and Children's Unit – 'GCU')[41] and within other international/mixed tribunals as well.[42] Such

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 Art. 4 (2003) of the Council Decision.

40 This is, *e.g.*, the case in Germany. On special police and judicial divisions to deal with sexual and gender-based violence cases in Liberia, *cf.* Laura Golakeh, "Liberia Becoming Leader in Eradicating Sexual and Gender-Based Violence", Global Press Institute, 14 June 2011, available at http://www.globalpressinstitute.org/print/733, last accessed on 12 October 2011.

41 *Cf.* Luping, 2009, pp. 434 and 489, see *supra* note 1; Moreover, Moreno Ocampo appointed in November 2008, to counter mounting criticism (*cf.* Sellers, 2009, p. 330 at fn. 81, see *supra* note 29), Catharine MacKinnon as special gender adviser, see ICC Press Release, "ICC Prosecutor appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes", 26 November 2008, ICC-OTP-20081126-PR377, available at http://www.icc-cpi.int/menus/icc/press and media/press releases /press releases %282008%29/icc prosecutor appoints prof_ catharine a. mackinnon as special adviser on gender crimes, last accessed on 12 October 2011. In Art. 42(9), the ICC Statute 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".

42 At the ICTY, already as early as October 1994, Patricia Viseur Sellers has been appointed as a legal advisor for gender at the OTP (*cf.* Sellers, 2009, p. 307, see *supra* note 29). According to Michelle Jarvis, Senior Legal Advisor to the Prosecutor, email of 13 September 2011 to the author, a "sexual assault and rape investigation team" has been created in the OTP in 1995, and in the subsequent years, specific female investigators were hired. Currently, a "Prosecuting Sexual Violence Working Group" within the OTP has the mandate to strengthen the OTP's work on gender issues, and a Senior Legal Advisor with special knowledge on gender issues has been appointed. Sellers has subsequently (1995–1999) also been appointed as a legal advisor for gender at the ICTR's OTP where after her departure there were even two gender advisors (*cf.* Sellers, 2009, p. 307, see *supra* note 29). Nevertheless, since the millennium's turn the ICTR's OTP is no more equipped with such an advisor (*cf.* Sellers, 2009, pp. 314–315, see *supra* note 29, criticizing prosecution's mishandling of sexual violence case but also seeing improvement in the recent jurisprudence). At the SCSL, Chief Prosecutor David Crane "incorporated policies and modalities to investigations of crimes committed against women", but did not appoint an advisor for gender, see Seller, 2009, p. 316, see *supra* note 29. At the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), no special units for gender crimes are in place (Seller, 2009,

specialised units within the OTP are to be distinguished from specialised victims support units, which belong, in organizational terms, to the registries of the international tribunals.[43] These units have, rather, a supporting function and are in charge of measures of witness/victims protection. In contrast, specialised units within the OTP 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),[44] specialised units within

p. 316, see *supra* note 29), but when in 2009 a request for the investigation of gender related crimes were brought before the Chambers, 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, Case File No: 002/19-09-2007-ECC-OCIJ, D268/2, 18 December 2009, para. 15.

[43] For example at the ICC, a Victims and Witnesses Unit has been established pursuant to Art. 43(6) of the Rome Statute. According to Art. 43(6) of the Rome Statute, measures of the Victims 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", *cf.* the unit's website, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm, last accessed on 11 October 2011. At the ICTR, pursuant to Rule 34 of RPE, a 'Witness and Victims Support Section' exists under the authority of the Registrar; see also http://www.unictr.org/tabid/106/default.aspx, last accessed on 11 October 2011. The ICTY has a similar unit, *cf.* http://www.icty.org/sid/158, last accessed on 11 October 2011. Warning of dangerous overlaps between units located at the registry and the OTP: Mouthaan, 2011, p. 788, see *supra* note 6.

[44] *Cf.* Art. 68(1) of the Rome Statute 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

the OTP and gender advisors may also help to comply with this obligation and react to the specific circumstances linked to cases of sexual violence. The specialized units assigned to the Registry can assist the Prosecutor in this task.[45]

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 ICL, 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 linked or overlapping with the other crimes; otherwise one would lose sight of the broader context.[46]

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.[47] In the words of an experienced international prosecutor: "The prosecution works with big lamps, not magnifying glasses".[48] 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-OTP, the Office is committed "to do a selection of cases that represent the entire criminality and modes of victimiza-

> 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.

Hereto also Luping, 2009, pp. 479 *et seq*., see *supra* note 1.

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

46 As argued by Valerie Oosterveld, University of Western Ontario, in the Chapter 9 of this volume.

47 The point was convincingly made by prosecutor Herminia T. Angeles from the Philippinian Ministry of Justice, who participated most actively in our seminar.

48 Fabricio Guariglia, Senior Appeals Council, ICC-OTP, statement at the seminar "Thematic Investigation and Prosecution of International Sex Crimes", FICHL/Yale University/University of Cape Town, Cape Town, 7–8 March 2011.

tion. The Office will pay particular attention to methods of investigations of crimes committed against children, sexual and gender-based crimes".[49] In fact, the OTP has already set up special mechanisms and organizational approaches to better assess sexual crimes that may have occurred in a situation under investigation. Thus, for example, in Uganda, the OTP's investigators working on the ground were all trained in the handling of sexual and gender based crimes.[50] 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".[51]

Up to now, the only exclusive or focused sex investigation – regarding a situation of sexual slavery and forced prostitution – was carried out in the ICTY's *Foča* case.[52] This is the exception that confirms the rule,

[49] ICC-OTP, "Report on Prosecutorial Strategy", 14 September 2006, p. 7, available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Statement/Report+on+Prosecutorial+Strategy.htm, last accessed on 12 October 2011.

[50] Luping, 2009, p. 48, see *supra* note 1.

[51] ICC-OTP, "Prosecutorial Strategy 2009–2012", 1 February 2010, para. 29, available at http://www.icc-cpi.int/menus/icc/structure of the court/office of the prosecutor/reports and statements/statement/prosecutorial strategy 2009 _ 2012?lan=en-GB, last accessed on 12 October 2011.

[52] ICTY (Trial Chamber), *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment, 22 February 2001, Case No. IT-96-23-T and IT-96-23/1-T, esp. pp. 217 *et seq.*; and ICTY (Appeals Chamber), *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgement, 12 June 2002, IT-96-23 and IT-23/1-A. 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*, 2002/2003, vol. 10, pp. 183 *et seq*., esp. pp. 218 *et seq*. on the judgment's significance; and Doris Buss, "Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic", in *Feminist Legal Studies*, 2002, vol. 10, iss. 1, pp. 91 *et seq*. 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, see *supra* note 35; and Arbour, 2003, p. 203, see *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 "normalize" the prosecution of sexual violence, or should we keep nurting 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".

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 advisor since November 2008[53] focusing specifically on sex crimes,[54] has so far not grounded a prosecution exclusively on international sex offences. In *Lubanga*, the Prosecution abstained from charging sex crimes[55] and this decision was not remedied until the Trial Judgment of 14 March 2012.[56] In *Katanga*, four out of ten charges (three of crimes against humanity 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)).[57] Even in the *Bemba* case, which is generally considered

53 See *supra* note 42.

54 See ICC-OTP, "Deputy Prosecutor's Speech on Update on judicial proceedings: a focus on charging and prosecuting sexual and gender crimes", 30 September 2008, available at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/deputy%20prosecutor_s%20speech%20onupdate%20on%20judicial%20proceedings_%20a%20focus%20on%20charging%20and%20prosecuting%20sex, last accessed on 31 July 2011.

55 For a critical analysis see SáCouto and Cleary, 2009, p. 341, see *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, see *supra* note 18, according to which the prosecution could not establish a link between individual rapists and Lubanga himself.

56 ICC Trial Chamber I, *Prosecutor v. Lubanga*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, paras. 16, 630. This procedural decision cannot be remedied by reading 'sexual violence' into the using-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 Statute). Regrettably, the Prosecutor and his deputy (the Prosecutor elect Fatou Bensouda) omitted to mention the procedural side of this issue in their press conference the day after the judgment where they criticized the majority decision (available at www.youtube.com/watch?v=eoj_qCwHePk, last accessed on 9 April 2012). 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 *ICLR*, 2012, vol. 12, pp. 115–153, at 137–138 with fn. 156.

57 ICC Pre-Trial Chamber I, *Prosecutor v. Katanga et al.*, Warrant of Arrest for Germain Katanga, 2 July 2007, ICC-01/04-01/07-1, pp. 4–5; ICC (Pre-Trial Chamber I), *Prosecutor v. Katanga et al.*, Decision on the Confirmation of the Charges, 30 September 2008, ICC-01/04-01/07 ("*Katanga* Confirmation of Charges"), paras. 354, 436, 444.

as a case about rape as a weapon of war,[58] rape was only one, albeit highly significant,[59] count amongst 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, FLDR leader Callixte Mbarushimana has been charged, *inter alia*, with rape as crime against humanity and war crime.[60] Also, other ICC investigations in Uganda,[61] Sudan,[62] Kenya[63] and Lybia[64] are targeting, but never exclusively, alleged acts of sexual violence.

---

58 According to Sudan Vision, "Africa in Focus: Prosecutor: Ex-Congo VP used Rape as Weapon", 13 January 2011, available at http://www.sudanvisiondaily.com/ modules.php?name=News&file=article&sid=42450, last accessed on 12 October 2011, Deputy Prosecutor 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", 15 January 2009, available at http://www.enoughproject.org/blogs/bemba-hague-focus-sexual-violence, last accessed on 12 October 2011.

59 See ICC (Pre-Trial Chamber II), *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, 15 June 2009, ICC 01/05–01/08 ('*Bemba* confirmation decision'), paras. 171–185 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).

60 ICC Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, Warrant of Arrest for Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-2, para. 10 (vii) and (viii).

61 Charges of *rape and sexual slavery* are part of warrants of arrests in the Ugandan situation, see ICC (Pre-Trial Chamber II), *Situation in Uganda,* 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: sexual slavery: count 1 (p. 12), rape: count 2, 3 (pp. 12–13); ICC (Pre-Trial Chamber II), *Situation in Uganda,* Warrant of Arrest for Vincent Otti, Public redacted version, 8 July 2005, ICC-02/04-01/05-54: sexual slavery: count 1 (p. 12), rape: count 3 (p. 13). See also Luping, 2009, pp. 493 and 495 (on the gendered nature of crimes occurred in Uganda) and pp. 493–494 (on the investigative approach and challenges), see *supra* note 1.

62 Charges of *rape and of persecution as crime against humanity through sexual violence* are part of warrants of arrests, see ICC (Pre-Trial Chamber I), *Situation in Darfur, Sudan*, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3: rape: counts 13, 14, 42, 43 (pp. 8–9, 14–15), persecution: count 10 (p. 8), count 39 (p. 14); ICC (Pre-Trial Chamber I), *Situation in Darfur, Sudan*, Warrant of Arrest for Ahmad Harun, 27 April 2007, ICC-02/05-01/07-2: rape: count 13, 14, 42, 43 (pp. 8–9, 13–14), persecution: count 10 (p. 8), count 39 (p. 13); ICC (Pre-Trial Chamber I), *Sit-*

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 traumatized witnesses/victims to obtain the necessary evidence. Depending on the cultural context, it may be taboo to speak of any sexual behaviour at all, least of all acts of sexual violence.[65] In such a context, a full-fledged investigation of alleged acts of sexual violence is hampered. Moreover,

uation in Darfur, Sudan, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-1, p. 6 ('thousands of rapes,) and p. 8, para. vii.

63 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 Press Release, "Pre-Trial Chamber II delivers six summonses to appear in the Situation in the Republic of Kenya", 9 March 2011, ICC-CPI-20110309-PR637, available at http://www.icc-cpi.int/menus/icc/press and media/press releases/news and highlights/pre_trial chamber ii delivers six summonses to appear in the situation in the republic of kenya?lan=en-GB, last accessed on 12 October 2011.

64 As one point among several activities, the ICC Prosecutor reported to the UN Security Council to investigate rape allegations: "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, available at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20to%20the%20united%20nations%20security%20council%20on%20the%20situation%20in%20the%20libyan%20arab%20jamahiriya_%20pur, last accessed on 12 October 2011.

65 For example, in some societies any conversation about sexual behavior is considered completely taboo. In other societies, to speak about rape may be taboo given the violation of the dignity and honor of the people involved (of either the victim, his/her marriage partner, family, clan and/or tribe); see *infra* note 68 and FIDH, "Crimes of sexual violence: Overcoming taboos, ending stigmatization, fighting impunity", The Hague, 29 October 2007, available at http://www.fidh.org/IMG/pdf/Note_crimes_sexuels_EN.pdf, last accessed on 17 October.

sexual violence, its consequences and the specific harms caused,[66] call for further exploration and more profound understanding.[67] 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.[68]

---

[66] Critically as to whether international criminal accountability duly reflects women's subjective experiences and harms: Ní Aoláin *et al.*, 2011, pp. 428 *et seq.*, see *supra* note 6.

[67] See above, supra note 7 and text; *cf.* also Ní Aoláin *et al.*, 2011, p. 428, see *supra* note 6.

[68] See 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/Clearly, 2009, pp . 353 *et seq.*, 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, iss. 2, p. 304 *et seq*. (pp. 304–305: "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]).

Former ICTY/ICTR Chief Prosecutor Louise Arbour recalls that because of the difficulty of investigating sex crimes, it was debated whether her Office shall "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?".[69]

Thus, clearly, specialised (especially psychological) skills for investigation, in particular for properly interviewing rape victims and witnesses are required.[70] 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 Security Council Resolutions have been issued in the last years, which show 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.[71] At the same time, 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,

---

[69] Arbour, 2003, p. 203, see *supra* note 9.

[70] The highly required expertise in sexual violence investigations has been convincingly demonstrated by Agirre Aranburu, "Sexual violence beyond reasonable doubt: using pattern evidence and analysis for international cases", in *Leiden Journal of International Law* ('LJIL'), 2010, vol. 23, p. 609 *et seq*.

[71] United Nations Security Council ('UNSC'), Resolution 1820, 19 June 2008 ('UN/SC/Res/1820'), para. 1:

> [...] 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 UNSC Resolution 1960, 16 December 2010 ('UN/SC/Res/1960'), Preamble, para. 11: "[...] noting that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims".

and national reconciliation".[72] The ICC Statute does not only criminalize 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).[73] In the same vein Regulation 34(2) of the OTP Regulations explicitly refers to sexual violence,[74] and the ICC's RPE include a special provision on the Principles of Evidence in cases of sexual violence.[75]

Thus, thematic investigations may also be demanded by the emerging international law on the matter and in light of the increasing concern of international policy makers. 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.[76]

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 ambigui-

---

[72] UN/SC/Res/1820, 2008, para. 4, *supra* note 71: "[...] the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation." Similarly, UNSC Resolution 1888, 30 September 2009 ('UN/SC/Res/1880'), Preamble, para. 8.

[73] It provides that the Prosecutor shall "[T]ake 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".

[74] ICC-OTP, "Regulations of the Office of the Prosecutor", entry into force 23 April 2009, ICC-BD/05-01-09, available at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Regulations+of+the+OTP.htm, last accessed on 12 October 2011; which reads on p. 18:

> 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.

[75] ICC RPE, *supra* note 20. *Cf.* also Rule 96 ICTY RPE, *supra* note 20.

[76] *E.g.*, 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".

ties. This has been demonstrated in our Cape Town seminar by the emphasis laid on purposes by some,[77] and the relativisation of these theories by others.[78] To name but a few arguments: such prosecutions may restore the dignity and integrity of the victim[79] or even the (international) order;[80] the establishment of international standards against sexual violence may possibly have a "knock-on effect" on domestic criminal proceedings.[81] Reviewing all these approaches, in my view, it is most convincing, in line with the theory of positive general prevention or – how it is newly labelled – 'expressivism',[82] 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 specialized prosecution authorities or units gives this kind of crimes 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.

---

77 See, for a feminist's approach, Margaret M. deGuzman's chapter in this volume (Chapter 2); see also deGuzman, "Giving Priority to Sex Crime Prosecutions: The Philosophical Foundation of a Feminist Agenda", in *ICLR*, 2011, vol. 11, pp. 515 *et seq*. (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 an feminist goal: Doris Buss, "Performing Legal Order: some Feminist Thoughts on International Criminal Law", in *ICLR*, 2011, vol. 11, pp. 423.

78 So Neha Jain's *caveat* with regard to retribution, during her seminar's presentation, *cf.* summary: Morten Bergsmo, "International Sex Crimes as a Criminal Justice Theme", *FICHL Policy Brief Series no. 4 (2011)*, p. 3, available at http://www.fichl.org/policy-brief-series/, last accessed on 12 October 2011 and her chapter in this volume (Chapter 10).

79 Ní Aoláin *et al.*, 2011, p. 440, see *supra* note 6.

80 Buss, 2011, p. 422, see *supra* note 77.

81 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".

82 For Mark Drumbl, *Atrocity, punishment, and international law*, Cambridge University Press, Cambridge, 2007, pp. 173 *et seq*. expressivism means that the purpose of punishment is to strengthen faith in rule of law among 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 the confidence in the rule of law by punishing.

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.[83] The ICC-OTP's approach of providing specialised assistance and advice by the already mentioned GCU, ensuring that the members of investigation teams have the necessary specialised knowledge and that witness interviews are conducted accordingly,[84] 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.[85]

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 criminalizing 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 violence 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

---

[83] See, *e.g.*, Luping, 2009, p. 434, see *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.

[84] See Luping, 2009, pp. 489 *et seq*., see *supra* note 1.

[85] 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 […]".

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 advisors 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".[86]

[86] 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, available at http://www.unictr.org/News/tabid/192/P/70/Default.aspx, last accessed on 12 October 2011.

14

UN Military Peacekeeper Complicity in Sexual Abuse: The ICC or a Tri-Hybrid Court

Roisin Burke*

> *We condemn publicly the abuses committed by international peacekeeping personnel, abuses that include the crimes of rape, the trafficking of human beings and illicit narcotics, but we remain tight-lipped when it is our own peacekeepers who commit them.*[1]

Rape, prostitution and other forms of sexual abuse and exploitation ('SEA') have featured in military environments throughout the ages. The quintessential example of this was the abuse of Japanese comfort women or the German brothels in WWII.[2] As has been revealed in numerous reports by prominent NGOs and the UN itself since the 1990s have revealed, such activity is present even in the context of UN peacekeeping operations, with incidents of rape, forced prostitution and even more significantly sexual abuse of children, child pornography, trafficking and other forms of sexual violence, abuse and exploitation being perpetrated by a minority of UN peacekeepers.[3] This activity not only undermines the

* **Roisin Burke** is a Teaching Fellow and Ph.D. candidate at the Asia Pacific Centre for Military Law, University of Melbourne Law School. LLM Irish Centre for Human Rights, National University of Ireland, LLB University of Limerick.

1 Prince Zedi Ra'ad Zeid Al-Hussein, "For Love of Country and International Criminal Law", in *American University International Law Review*, 2009, vol. 24, pp. 647–650.

2 Patricia H. Hynes, "On the Battlefield of Women's Bodies: An Overview of the Harm of War to Women", in *Women's International Forum*, 2004, vol. 27, pp. 431–445.

3 Francis Elliott and Ruth Elkins, "UN Shame Over Sex Scandal", The Independent (UK), 20 January 2007. Between 6,000 to 10,000 women and girls were trafficked into Bosnia, and kept captive at brothels patronised by IPTF, UN civilian police. Oivera Simic, " Accountability of UN Civilian Police Involved in Trafficking of Women in Bosnia and Herzegovina", in *University for Peace and Conflict Monitor*, 16 November 2004, available at http://www.monitor.upeace.org/pdf/bosnia.pdf, last accessed on 10 January 2007; Testimony by Ambassador Nancy-Ely Raphel, 24 April 2002, available at http://wwwc.house.gov/international_relations/107/elyr0424.htM, last accessed on 11 July 2011; See also "Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina", *Human Rights Watch Report,* November

credibility of the UN missions, but it can also have a seriously detrimental effect on local populations and on the promotion of the rule-of-law ('RoL'). It is therefore pertinent that this behaviour is not tolerated and that justice be assured to victims.

In the late 1990s, NBC's Dateline investigated UN peacekeeper complicity in acts of violence, including rape and torture. NBC's reporter Lea Thompson recounted that Canadian peacekeepers beat a Somali child to death after first raping him with a baton, and burning his feet and genitals with cigarettes'.[4] Allegations of SEA have been made against peacekeepers on UN operations in Bosnia and Herzegovina, Sudan, Liberia,[5] Sierra Leone,[6] Cambodia,[7] Kosovo, the Democratic Republic of the Congo ('DRC'), Somalia,[8] Ivory Coast, Burundi,[9] Guinea,[10] and Haiti.[11] A report issued in May 2008 by U.K. Save the Children, examining sexual abuse perpetrated by UN peacekeepers in the Ivory Coast, Southern Sudan, and Haiti, highlighted the fact that SEA is disproportionately perpetrated against children and young girls.[12]

2002, vol. 14, no. 9(D), p. 14; Isabelle Tallyrand, "Military Prosecution: How the Authorities Worldwide Aid and Abet International Trafficking in Women", in *Syracuse Journal of International Law and Commerce*, 2000, vol. 27, p. 166.

4 "TV Show Investigates Alleged Acts of Violence", UN Wire, United Nations Foundation, 1999.

5 UNIMIL Investigating Alleged Sexual Misconduct by Peacekeepers in Four Incidents, IRINNews, 3 May 2005.

6 Bojana Stoparic, "Report Says Abuse by UN's Blue Helmets Persists", WomenNews, 18 October 2005.

7 During the UN mission in Cambodia, prostitution rose from 6,000 to 25,000. See Angela MacKay, "Sex and the Peacekeeping Soldier: The New UN Resolution", Peace News, issue 2443, June–August 2001.

8 In the 1990s, photographs were released of Italian soldiers raping a Somali girl. Elliott and Elkins, 2007, *supra* note 3.

9 "UN Sex Abuse Sacking in Burundi", BBC (UK), 19 July 2005.

10 Tanonoka Joseph Whande, "Peacekeepers as Predators: UN Sex Crimes", Sunday Standard (Gaborone), 29 January 2007.

11 Kate Holt and Sarah Hughes, "UN Staff Accused of Raping Children in Sudan", The Daily Telegraph, 4 January 2007; Kate Holt and Sarah Hughes, "Sex and the UN: When Peacemakers Become Predators", The Independent (UK), 11 January 2005; Colum Lynch, "UN Faces More Accusations of Sexual Misconduct", The Washington Post, 13 March 2005, A22.

12 Corinna Csáky, "No One to Turn To: The Under-Reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers", Save the Children, 2008, p. 5, available at http://www.savethechildren.org.uk/en/54_5706.htm, last accessed on 16

UN Standards of Conduct do explicitly prohibit SEA, in particular of children, as set out in the "Ten Rules: Code of Personal Conduct for Blue Helmets, We Are United Nations Peacekeepers,[13] and the Secretary-General's 2003 Bulletin on Special measures for protection from sexual exploitation and sexual abuse" (hereinafter 'SG's 2003 Bulletin').[14] However, until recently these rules were only termed 'Guidelines'[15] and their implementation varies across missions. Furthermore, the SG's 2003 Bulletin does not directly apply to military contingents, although as of 2007 its content for the most part was incorporated into the revised "Model Memorandum of Understanding between the United Nations and the Member States Contributing Personnel and Equipment to the United Nations Peacekeeping Operations" (hereinafter 'revised Model MOU'),[16] which is binding States, but it is difficult to see how it can be enforced. Criminal prosecution for SEA perpetrated by UN peacekeepers is rare,

February 2009; In 2003, Italian, Danish and Slovak peacekeepers were repatriated for having sex with minors. See Elise Barth, "The United Nations Mission in Eritrea/Ethiopia: Gender(ed) Effects", in L. Olsson *et al.* (eds.), *Gender Aspects of Conflict Interventions: Intended and Unintended Consequences*, International Peace Research Institute, Oslo, 2004, p. 9; In January 2007, it was reported that in a town in Sudan, a 12 year old girls were systematically forced to have sex with at least 4 Bangladeshi peacekeepers for an 18 month period. See Elliot and Elkins, 2007, *supra* note 3; For the most recent statistics complied by the United Nations Conduct and Discipline Unit ('UNCDU') on incidents of Sexual Exploitation and Abuse ('SEA'), their type and form, and the status of allegations, see UNCDU, available at http://cdu.unlb.org/Statistics/OverviewofStatistics.aspx, last accessed on 13 August 2011.

13 For the text of these documents, see UNCDU, available at http://cdu.unlb.org/, last accessed on 15 July 2011.

14 Secretary-General's Bulletin on Special Measures for the Protection from sexual exploitation and sexual abuse, ST/SGB/2003/13, 9 October 2003 ('SG's 2003 Bulletin').

15 Elizabeth Defeis, "UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity", in *Washington University Global Studies Law Review*, 2008, vol. 7, no. 2, pp. 185, 196.

16 Standard Memorandum of Understanding between the United Nations and the Member States Contributing Personnel and equipment to the United Nations peacekeeping operations States, UN Doc. A/46/185 (1991), 23 May 1991 ('Model MOU'); For the text of the revised MOU, see Chapter 9 of the *2008 Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions* ('2008 COE Manual'), UN Doc. A/C.5/63/18.

given immunities granted by a plethora of legal instruments.[17] In general, they are at most subject to disciplinary measures such as repatriation or summary dismissal.

Recently the question of whether or not UN peacekeepers, civilian or military, could be subject to the jurisdiction of the ICC has been the subject of debate.[18] This Chapter will critique some of the arguments put forward with respect to UN military personnel. It will address, in brief, whether the prosecution of such personnel by the ICC, where troop-contributing countries ('TCCs') prove unwilling or unable to do so, is plausible or justifiable. Given that the rules and immunities applicable to various categories of UN personnel differ substantially, focus will be limited to incidents of SEA by UN military personnel, as distinct from UN officials and experts on mission.[19]

This chapter will proceed in two parts. Part one will focus on the potentialities and limitations of the ICC as an avenue for holding UN military peacekeepers complicit in SEA to account. Part two will examine, as an alternative, the possible establishment of a hybrid/tri-hybrid justice mechanism.

Arguably serious incidents of SEA could fall within the *actus reus* not only of specific gender-based crimes enumerated in the Rome Statute, but also other acts constituting war crimes and crimes against humanity.

That stated, in sections 14.1.1. and 14.1.2., it will be argued that the high thresholds set by the chapeau elements of war crimes and crimes against humanity would be difficult to overcome and serve as barriers to

---

[17] See generally, Róisín Burke, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", in *Journal of Conflict and Security Law*, 2011, vol. 16, no. 1, pp. 63–104.

[18] Noelle Qienivét, "Role of the International Criminal Court in the Prosecution of Peacekeepers for Sexual Offences", in Roberta Arnold (ed.), *Law Enforcement within the Framework of Peace Support Operations*, Martinus Nijhoff Publishers, 2008, pp. 399, 414; Roy S. Lee, "An Assessment of the ICC Statute", in *Fordham International Law Journal*, 2002, vol. 25, p. 750, pp. 760–761; O'Brien suggests that Art. 28 of the Rome Statute could be used as a basis for the prosecution of Commanders and superiors on UN operations. Melanie O'Brien, "The Ascension of Blue Beret Accountability: International Criminal Court Command and Superior Responsibility", in *Journal of Conflict and Security Law*, 2010, vol. 15, no. 3, pp. 533–555; Max du Plessis and Stephen Pete, "Who Guards the Guards", in *African Security Review*, 2004, vol. 13, no. 4, p. 5.

[19] See further Burke, 2011, pp. 63–104, *supra* note 17.

prosecuting UN military personnel before the ICC for sexual offences. When serious sexual violence or abuse occurs as part of an overall 'systematic' plan or policy to destroy the overall fabric of a societal group, it may amount to genocide under the Rome Statute.[20] A *dolus specialis* requirement is embedded within Article 6, namely the intent to destroy a national, ethnic, racial or religious group in whole or in part.[21] It seems implausible that SEA by UN peacekeepers, are ever likely to be committed with genocidal intent or pursuant to any policy or plan. Therefore genocide will not be considered.

Section 14.1.3. will examine in brief the possible difficulties posed by other provisions of the Rome Statute for any possible prosecution of UN military personnel by the ICC, including the mechanisms for triggering the ICC's jurisdiction, and Articles 16 and 98. Article 16 of the Rome Statute enables the Security Council ('SC') to request a deferral of prosecution by the ICC for a perpetually renewable period of 12 months in the interests of maintaining international peace and security.[22] Article 98 provides that the ICC cannot request the surrender of those suspected of egregious crimes under the ICC Statute, where a bilateral agreement exists that would be violated on surrender. The nature of crimes dealt with by the ICC is limited to the "most serious crimes of concern to the international community".[23] It is unlikely, save in the gravest cases, that crimes of SEA by UN peacekeepers would attract the attention of the court.

Sections 14.1.4. and 14.1.5. will address gravity and prosecutorial discretion and the possible implications these factors may have on the

[20] According to the ICTR Trial Chamber in *Akayesu*, "sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself"; *Prosecutor v. Akayesu,* ICTR-96-4-T, Judgment, 2 September 1998, para. 732; Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender Related Crimes under International Law; Extraordinary Advances, Enduring Obstacles", in *Berkeley Journal of International Law*, 2003, vol. 21, p. 316.

[21] Art. 2, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 United Nations Treaty Series ('UNTS') 277, (entered into force 12 January 1951).

[22] Geert-Jan Alexander Knoops, *The Prosecution and Defense of Peacekeepers Under International Criminal Law*, Martinus Nijhoff, 2004, p. 299.

[23] Art. 5, Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 ('Rome Statute').

ICC exercising jurisdiction over UN military personnel. The principle of complementarity, the foundational principle of the Rome Statute, provides that national courts have primary jurisdiction, even if an act constitutes a crime under the Rome Statute, and that the ICC may only assume jurisdiction when States are unwilling of unable to prosecute.

Section 14.1.6. will examine complementarity in light of any potential prosecution of peacekeepers by the Court. Complementarity will be returned to in Section 14.1.7., albeit from a slightly different perspective, through the lens of positive complementarity, namely the ability of the ICC to assist and encourage national prosecution of core crimes.

Section 14.2. will examine the promise of hybrid courts as an alternative avenue for prosecution of UN military peacekeepers, where the TCC proves unwilling or unable to exercise jurisdiction over their soldiers. This examination will be made in light of a recent suggestion by a UN Group of Legal Experts ('GLE') for the establishment of a hybrid justice mechanism to hold UN officials and experts on mission to account for serious SEA. I will consider the advantages and disadvantages of such a mechanism, in light of its potential application to serious misconduct by UN military peacekeepers. While the GLE favoured host State primary jurisdiction, with the UN exercising partial or shared jurisdiction where the host State's justice system proves inadequate, I will argue that primary jurisdiction should rather rest with the TCC. I will propose alternatively the possible establishment of a tri-hybrid court, which requires input from TCCs, host States, and international personnel. In doing so, I will suggest that the ICC could possibly play a supportive role through positive complementarity, should the crimes committed also amount to crimes under the Rome Statute. Finally, I will consider the possible value of punishment of UN military peacekeepers who are complicit in SEA at an international or hybrid level.

14.1. Prosecution of UN Military Peacekeepers for Sexual Abuse and Exploitation before the ICC

International law in recent years has seen massive developments in the recognition of gender crimes, sexual violence and rape as prosecutable offences.[24] The *ad hoc* tribunals have prosecuted sexual violence as forms

[24] On the historical development of international law as it relates to gender crimes, see further Askin, 2003, p. 288, *supra* note 20; See, *e.g.*, *Prosecutor v. Tadić*, IT-94-1-T,

of genocide, crimes against humanity, war crimes, torture, persecution and enslavement.[25] It is increasingly recognised that sexual violence in armed conflict is a violation of customary international law ('CIL').[26] The Rome Statute now codifies many of the advancements made, through the specific codification of gender-based crimes.

Sexual abuse under the SG's 2003 Bulletin is defined as "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions". Sexual exploitation is defined as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily".[27] SEA as defined by the SG's 2003 Bulletin is nowhere defined in international law, yet certain acts fitting within this definition may nevertheless violate ICL.[28]

The Rome Statute contains the must extensive list of sexual offences to date in an ICL statute.[29] Acts such as rape, sexual slavery, enforced prostitution,[30] forced pregnancy, enforced sterilization and "sexual violence of comparable gravity" are enumerated as prosecutable offences un-

Sentencing Judgment, 14 July 1997; *Prosecutor v. Delalic*, IT-96-21, Judgment, 16 November 1998; *Prosecutor v. Furundžija*, IT-95-17/1, Judgment, 10 December 1998; *Prosecutor v. Kunarac*, IT-96-23-T and 96-23/I, Judgment, 21 July 2000; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998.

25 Art. 7(1), *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc S/RES/827 (1993) ('ICTY Statute'); Art. 6(1), Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955 (1994) ('ICTR Statute'); see generally, Askin, 2003, *supra* note 20.

26 Theodor Meron, "Rape as a Crime under International Humanitarian Law", in *American Journal of International Law*, 1993, vol. 87, pp. 424, 427.

27 SG's 2003 Bulletin, *supra* note 14.

28 On the over-inclusiveness of the term 'sexual exploitation' in particular, see Olivera Simic, "Rethinking 'Sexual Exploitation' in UN Peacekeeping Operations", in *Women's Studies International Forum*, 2009, vol. 32, no. 4, pp. 288–295.

29 See generally Rana Lehr-Lehnardt, "One Small Step for Women: Female Friendly Provisions in the Rome Statute of the International Criminal Court", in *BYU Journal of Public Law*, 2002, vol. 16, pp. 317, 321–322.

30 Qienivét correctly notes that it is important to distinguish when in comes to UN military peacekeepers between prostitution and enforced or forced prostitution, as while both are prohibited by the SG's 2003 Bulletin, only the latter constitutes an offence under ICL and Rome Statute. She argues that the former does not reach the level of coercion envisaged under the EoC to constitute such crimes for the purpose of the Rome Statute. Qienivét, 2008, pp. 416–417, *supra* note 18.

der both under Articles 7 and 8 of the Rome Statute.[31] Sexual offences however could in certain circumstances be regarded as "torture", "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health",[32] "inhumane treatment", "wilfully causing great suffering, or serious injury to body or health", and "other serious violations of IHL", namely "committing outrages upon personal dignity, in particular humiliating and degrading treatment".[33] Where the *chapeau* elements are met, such acts may constitute crimes against humanity or war crimes under Articles 7 and 8 of the Rome Statute. At stated, numerous allegations of rape and other forms of SEA have been made against UN military peacekeepers, some of which could be regarded as coming under the *actus reus* of one or more of these crimes.

SEA by UN military peacekeepers raises issues of the unequal power dynamics between peacekeepers and victims, particularly when the perpetrators are in military attire or bear weapons. This will particularly be the case in conflict and post-conflict environments.[34] It also raises issues of victims' vulnerability due to socio-economic factors and the ca-

[31] Sexual violence as an umbrella term may catch a broad variety of behaviour, not meeting the elements of the other specific acts, such as rape, attempted rape, forced nudity, SEA; trafficking; forced pregnancy, *etc*. See further, Guidelines for Gender-based Violence Interventions in Humanitarian Settings, Inter-Agency Standing Committee ('IASC'), Taskforce on Gender in Humanitarian Assistance, September 2005, p. 8, available at http://www.peacewomen.org/portal_resources_resource.php?id=348, last accessed on 18 June 2011.

[32] Arts. 7 and 8 of the Rome Statute, *supra* note 23.

[33] Sexual offences may also be prosecuted under other categories of offences constituting grave breaches of IHL. The Yugoslavia Commission of Experts also refers to rape as a grave breach. Final Report of the Commission of Experts established pursuant to Security Council Resolution (SC Res.) 780 (1992), UN Doc. S/1994/674, 27 May 1994, para. 46; See generally, Meron, 1993, pp. 424–428, *supra* note 26.

[34] "Abuse of power", "taking advantage of a coercive environment" and "natural, induced or age-related incapacity" are identified in the ICC's EoC as factors which may be considered as obviating consent to certain sexual interactions, in certain circumstances. ICC'S Elements of Crimes, Report for the Preparatory Commission of the International Criminal Court, Addendum, Part II, finalized draft text of the Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, approved by Assembly of State Parties at first meeting, 3–10 September 2002, fn. 15 and 51 ('EoC'). As stated by the Trial Chamber in *Akayesu,* "coercion may be inherent in certain circumstances such as armed conflict or the military presence". *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para. 688.

pacity of peacekeepers to exchange sexual favours for food, services, protection, money, *et cetera*.[35] Reports and statistics show that many of the victims of SEA by UN peacekeepers are in fact children or young girls.[36] Sexual interactions with children irrefutably constitute sexual violence, as they are incapable of genuine consent to sexual intercourse. This obviously may depend on the legal age of consent under TCC and host Statute laws, despite the fact that the SG's 2003 Bulletin prohibits sexual activity with children under the age of 18.[37]

14.1.1. Chapeau Elements of Crimes Against Humanity

Article 7 of the Rome Statute, which covers crimes against humanity, specifically prohibits forced pregnancy, enslavement, rape, sexual slavery, and enforced prostitution "when *committed as part of* a *widespread* or *systematic* attack directed against a civilian population, *with knowledge* of that attack" (emphasis added).[38] As noted, sexual offences may also be prosecuted under other categories of crimes under Article 7. Article 7 of the Rome Statute requires that in order for a crime to reach the threshold of a crime against humanity it must satisfy a number of chapeau elements. Acts must: (1) fit within the definition of a crime covered by Article 7; (2) be committed as part of a widespread of systematic attack; (3) the attack must be directed against a civilian population; and (4) the perpetrator must have "knowledge" of that attack and intend his acts to further this attack.[39] There is no requirement for a nexus with an armed conflict under

---

35 Csáky, 2008, p. 5, *supra* note 12; Schomburg and Peterson note that even in domestic criminal law many states criminalize sexual conduct between those in unequal positions of power, as taking advantage of such may render consent irrelevant. Wolfgang Schomburg and Ines Peterson, "Genuine Consent to Sexual Violence under International Criminal Law", in *American Journal of International Law,* 2007, vol. 101, pp. 121, 138.

36 For data on sexual abuse allegations see: UN Conduct and Discipline Unit, available at http://cdu.unlb.org/Statistics/OverviewofStatistics.aspx, last accessed on 13 August 2011.

37 Section 3, SG's 2003 Bulletin, *supra* note 14.

38 Rome Statute, *supra* note 23.

39 See further, Michael P. Scharf and Nigel Rodley, "International Law Principles on Accountability", in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, International and Comparative Law Series, Transnational Publishers, New York, 2002, p. 94; Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference", in *American Journal of International Law*, 1999, vol. 93, pp. 43, 45.

Article 7.[40] Nor is there a need for a discriminatory motive *per se*. However, there must be a sufficient link between the acts of the perpetrator and the overall attack. Attack does not require that armed force be used for the purposes of crimes against humanity.[41] 'Widespread' or 'systematic' under Article 7(1) are phrased in the alternative.

14.1.1.1. Systematic

The term 'systematic' suggests the need for some form of State or organisational plan or policy to attack a civilian population, and that the accused's act can be linked to this. This requirement is not found in the Statutes of the ICTY or ICTR, nor the Nuremburg Charter, Tokyo Charter or Control Council Law ('CCL') no. 10, and its necessity is disputed.[42] Domestic courts or hybrid courts prosecuting core international crimes would not necessarily need to follow the approach set out in the Rome Statute.

According to the ICTY in *Kunarac*,

> ['systematic'] signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis [...].[43]

---

[40] Christine Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Melland/Schill Studies in International Law, 2009, pp. 100–101.

[41] *Ibid.*, pp. 104–105.

[42] *Ibid.*, p. 112, *supra* note 40; Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, 2005, pp. 229–230; *Prosecutor v. Kunarac et al.*, Judgment, Case IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 98; Antonio Cassese, "Areas Where Article 7 is Narrower than Customary International Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, volume I, Oxford University Press, 2002, p. 375; William Schabas, *An Introduction to the International Criminal Court*, Second Edition, Cambridge University Press, 2004, p. 46. The need for such a plan or policy for crimes against humanity was specifically rejected by the ICTY in *Kunarac*. *Prosecutor v. Kunarac et al.*, Appeals Judgment, Case IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 98; Scharf and Rodley, *supra* note 39.

[43] *Prosecutor v. Kunarac et al.*, Appeals Judgment, IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 429; Kevin Jon Heller, "Situational Gravity under the Rome Statute", in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, 2010, p. 229.

Article 7(2) of the Rome Statute seems to support this interpretation, defining 'attack' as "course of conduct involving the multiple commission of acts referred to in [Article 7(1)] pursuant to or in furtherance of a *State or organizational policy* to commit such attack".[44] The policy element need not, however, be formalised, rather it "can be deduced from the way in which the acts occur".[45] Werle suggests that such evidence could be deduced from "actual event, political platforms of writings, public statements or propaganda programs", *et cetera*.[46] There is however no requirement that the perpetrator be involved in the organising or planning of the attack overall or multiple commission of attacks.[47]

The EoC provides that a "policy to commit such attack" requires that the State or organisation actively promote or encourage such an attack against a civilian population.[48] Authorities have also pointed to use of resources, planning, political motivation and the continuous nature of acts as indicative elements of an attack being 'systematic'.[49] According to the EoC, state omission could in exceptional circumstances alter crimes to crimes against humanity, through "deliberate failure to take action, which is consciously aimed at encouraging such attacks".[50] This stance has also been taken by a number of international authorities, and in the literature.[51] The EoC elaborates, however, that "[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational

---

44 Rome Statute, *supra* note 23.

45 *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 653; The ICTR in *Akayesu* stated that "[t]here is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy". *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 580; Werle, 2005, p. 227, *supra* note 42.

46 *Prosecutor v. Akeyasu*, p. 228, *ibid.*

47 Timothy McCormack, "Crimes Against Humanity", in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court*, Oxford and Portland Oregon, 2004, pp. 179, 189.

48 EoC, *supra* note 34.

49 Robert Cryer, Hakan Friman, Daryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Second Edition, Cambridge University Press, 2010, p. 237.

50 EoC, *supra* note 34.

51 See *Prosecutor v. Tadić*, IT-94-1-T, Appeals Judgment, 15 July 1999, para. 14; Yugoslavia Commission of Experts Final Report, 1994, p. 8, *supra* note 33; Kai Ambos, "The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000", in *Criminal Law Forum*, 2002, vol. 13, issue I, pp. 1, 31–33.

action".[52] Therefore what is required is something more than mere acquiescence.[53]

14.1.1.2. Widespread

Alternatively the attack must be 'widespread' to constitute a crime against humanity. 'Widespread' appears to denote either the large-scale nature of attacks; the scale of the geographic area in which they occur; or the multiplicity of victims.[54] The Trial Chamber in *Akayesu* defined 'widespread' as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[55] However, it further stated that the widespread element may be satisfied by "the cumulative of a serious of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[56] Crimes against humanity in essence entail an element of group victimisation and criminality.[57] Part of the offence is that it does not only impact the victim, but also the broader international community.

What is required is that the overall attack be widespread, not the individual's action. The consequence of the conduct must form part of the widespread attack, even if the conduct is otherwise singular in nature.[58]

While 'systematic' and 'widespread' are phrased in the alternative under Article 7(1), Article 7(2), in setting out the context in which the attack must occur, qualifies that:

---

52 Art. 7, Introduction, p. 5, para. 3, fn. 6, EoC, *supra* note 34.

53 Qienivét, 2008, p. 422, *supra* note 18.

54 *Situation in Darfur (al Bashir Arrest Warrant)*, ICC-PTC-I, ICC-02/05-01/09, 4 March 2009, para. 81; Cryer, Friman, Robinson and Wilmshurst, 2010, p. 236, *supra* note 49.

55 *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 580; The ICTY in *Blaškić* held that "widespread refers to the scale of acts perpetrated and to the number of victims". *Prosecutor v. Blaškić*, ICTY-95-14-T, Judgment, 3 March 2000, para. 206; Byron argues that the ICC would likely require hundreds or thousands of victims for an attack to be considered 'widespread'. Byron, 2009, p. 103, *supra* note 40.

56 *Prosecutor v. Blaškić*, ICTY-95-14-T, Judgment, 3 March 2000, para. 206; *Prosecutor v. Kordić*, IT-95-14/2-T, Judgment, 26 February 2001, para. 179.

57 Allison Marsten Danner, "Constructing a Hierarchy of Crimes in International Criminal Law Sentencing", in *Virginia Law Review*, 2001, pp. 415, 474–477.

58 Byron, 2009, p. 105, *supra* note 40.

> Attack directed against any civilian population' means a course of conduct involving the *multiple commission* of acts […] pursuant to or in furtherance of a State or organizational policy to commit such attack.[59]

The requirement for the attack to form part of the "multiple commission of acts" does not mean that the perpetrator must carry out multiple acts, so long as the act can be linked to the overall attack. Some authors question the extent that Article 7(2) affects the disjunctive reading of "widespread *or* systematic".[60] Article 7(2) was largely a response to opposition during the drafting phase to 'widespread' and 'systematic' being read disjunctively, the concern being that random criminal acts would then be within the remit of crimes against humanity.[61] McCormack notes that this means that even if a plan to commit an attack exists, there must be multiple victims.[62] The use of the terms "directed against a civilian population" denotes some level of scale, thereby excluding isolated and unrelated acts.[63] Nevertheless, this threshold is lower than widespread.[64] According to the Trial Chamber in *Tadić* 'systematic' is a higher threshold than 'directed' as direction might not be formal but "deduced from the way in which the acts occur".[65] So arguably, the chapeau of 'widespread' or 'systematic' are not entirely disjunctive, but rather represent a middle ground.

14.1.1.3. *Mens Rea*

Article 7(1) requires that the perpetrator have knowledge of the attack against the civilian population, however he or she does not have to have been involved in the planning of the attack.[66] In addition to knowledge of the context, the EoC requires that: "[t]he perpetrator *knew* that the conduct

---

59 Rome Statute, *supra* note 23.

60 McCormack, "Crimes Against Humanity", 2004, p. 187, *supra* note 47; Cryer, Friman, Robinson and Wilmshurst, 2010, p. 236, *supra* note 49.

61 Cryer, Friman, Robinson and Wilmshurst, 2010, p. 238, *supra* note 49.

62 McCormack, "Crimes Against Humanity", 2004, pp. 187–188, *supra* note 47.

63 *Situation in Darfur (al Bashir Arrest Warrant)*, ICC-02/05-01/09, 4 March 2009, para. 81; *Prosecutor v. Kunarac et al.*, Judgment, IT-96-23-T and IT-96-23/I-T, paras. 422, 427.

64 Robinson, 1999, pp. 43, 48, *supra* note 48; Phyllis Hwang, "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court", in *Fordham International Law Journal,* 1998, vol. 22, pp. 457, 503.

65 *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 653.

66 Robinson, 1999, pp. 51–52, *supra* note 39.

was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population".[67] That stated, it qualifies that this:

> [...] element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[68]

Therefore, the perpetrator must be aware of the greater context in which he commits the crime and that the crime furthers the attack.[69] The ICTY Trial Chamber in *Tadić* held knowledge could be imputed from the circumstances. It elaborated that 'while there may also be personal motives' for conduct "motives ought not to be solely personal".[70] The latter part was overruled by the Appeals Chamber, which found that nothing in the ICTY Statute indicated that the existence of a personal motive would prevent it from being a crime against humanity.[71] It seems under the EoC personnel motive might co-exist if the perpetrator also has knowledge of the attack and intends to further it. An otherwise isolated incident may

---

67 EoC, *supra* note 34; *Blaškić* Trial Chamber stated that the required *mens rea* is that the accused had "knowledge of the context" and that he "knowingly participated in that context". *Prosecutor v. Blaškić*, ICTY-95-14-T, Judgment, 3 March 2000, paras. 247–257.

68 Art. 7, Introduction, p. 5, para. 2, EoC, *supra* note 34; See also: *Prosecutor v. Kunarac et al.*, Judgment, IT-96-23-T and IT-96-23/I-T, para. 418; *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, paras. 248, 251, 271.

69 *Situation in Darfur (al Bashir Arrest Warrant)*, ICC-02/05-01/09, 4 March 2009, para. 87; Appeals Chamber in *Tadić*: "[t]o convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population, and that the accused knew that his crimes were so related". *Prosecutor v. Tadić*, IT-94-1-T, Appeals Judgment, 15 July 1999, para. 271.

70 *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 657.

71 *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, paras. 657–659; *Prosecutor v. Tadić,* IT-94-1-T, Appeals Judgment, 15 July 1999, paras. 248, 250; For criticism of this view, see further Marco Sassóli and Laura Olson, "The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case", in *International Review of the Red Cross*, 2000, vol. 839, p. 733.

constitute a crime against humanity if it can be sufficiently linked to the collective attack on the civilian population.[72]

14.1.1.4. Application to UN Military Peacekeepers Complicit in Sexual Offences

While certain serious sexual crimes by UN military peacekeepers may fall within the remit of enumerated acts coming under Article 7 of the Rome Statute, for a UN peacekeeper to be prosecuted for a crime against humanity it would have to be proven that his or her crimes were committed as part of a widespread or systematic attack by a group and that he or she intended his or her actions to further this attack.[73] Although in certain host States, such as the DRC, sexual offences have allegedly been perpetrated by UN military peacekeepers with relatively high frequency, the link between these acts and a widespread attack on the civilian population would be extremely difficult to establish. Given their ordinarily isolated nature they are unlikely to be considered by themselves as a widespread attack. However, if such acts can be linked to the broader context in which they occur, namely the acts of other perpetrators in the host State, the nature of these acts might constitute crimes against humanity.[74]

Equally, sexual crimes by UN military peacekeepers are unlikely to be perpetrated pursuant to a plan or policy of either the UN or TCCs to commit an attack on a civilian population. Rather it is more probable that they are opportunistic acts, taking advantage of a coercive environment and differential power dynamics. Sexual crimes in this context are likely to be carried out primarily for personal motives. Yet the existence of a plan or policy need not necessarily be that of the UN or TCC, or even a group of peacekeepers, arguably the act might further an attack pursuant to a plan or policy of other entities within an area. What appears to be the key is that the peacekeeper is aware of this attack, commits the offence within this context, and intends to further the attack. The ICTY Trial Chamber in *Blaškić* stated that the perpetrator need not even identify

---

[72] *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 649; Schomburg and Peterson, 2007, p. 130, *supra* note 35.

[73] Jennifer Murray, "Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of UN Civilian Police in the Trafficking of Women in Post Conflict Bosnia Herzegovina", in *Columbia Human Rights Law Review*, 2003, vol. 34, pp. 475, 512.

[74] Du Plessis and Steven, 2004, p. 11, *supra* note 18.

"with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan".[75]

Knowledge of attack and how a peacekeeper might be aware of his part in it might be difficult to prove.[76] Zwanenburg argues that knowledge of circumstances, given the *ad hoc* nature of UN peacekeeping operations and unclear command and control structures, may be difficult to impute to individuals soldiers.[77] That stated, soldiers are briefed prior to deployment to UN peacekeeping operations. An ongoing attack may be quite obvious on the ground. However, the real difficulty rests in connecting SEA by peacekeepers to the attack. That stated, when it comes to complicity in crimes of an organised nature, which take advantage of, and arguably further the attack, such as trafficking, such crimes might meet the *chapeau* elements crimes against humanity. It seems unlikely, however, that most incidents of SEA by UN peacekeepers would meet the threshold set by the chapeau elements of crimes against humanity under the Rome Statute, save in the most exceptional of circumstances.

14.1.2. War Crimes

The 1949 Geneva Conventions ('GCs') and their Additional Protocols ('APs') of 1977, in addition to the Hague Conventions govern what is labelled "the laws and customs of war" or IHL.[78] Serious violations of the provisions of these Conventions constitute war crimes. The GCs distinguish between grave breaches and other breaches of the laws and customs of war. Crimes constituting "grave braches" are set out in Articles 50 GC I, 51 GC II, 130 GC II and 147 GC IV. Art 147 of GC IV enumerates

[75] *Prosecutor v. Blaškić*, ICTY-95-14-T, Judgment, 3 March 2000, para. 257; *Prosecutor v. Kunarac et al.*, Appeals Judgment, IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 103; *Prosecutor v. Kordic and Čerkez,* IT-95-14/2-A, 17 December 2004, Appeals Judgment, para. 99.

[76] Du Plessis and Pete, 2004, pp. 10–11, *supra* note 18; Marten Zwanenburg, "The statute for an International Criminal Court and the United States: peacekeepers under fire", in *European Journal of International Law*, 1999, vol. 10, pp. 124–143, 134

[77] Zwanenburg, "The statute for an International Criminal Court", 1999, pp. 134–135, *supra* note 76.

[78] See Jackson Naymuya Maogoto, "Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets'", in *Deakin Law Review,* 2000, vol. 5, p. 59.

"graves breaches" as "willful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or unlawful confinement of a protected person".[79] Article 8 of the Rome Statute deals with war crimes committed in international ('IAC') and non-international armed conflict ('NIAC'). Article 8(2)(a) prohibits grave breaches of the GCs, which drawing on the language of the GCs, include possible acts under which SEA could fall, namely: torture or inhuman treatment, and "wilfully causing great suffering or serious injury to body or health". "Grave breaches" of the Geneva Conventions have acquired *jus cogens* status, obliging all states to prosecute or extradite those who violate these norms.[80] Article 8(2)(b) enumerates "other serious violations of the laws and customs of war" applicable to IAC.

There has been considerable debate in the literature as to whether IHL applies to UN military peacekeepers.[81] The difficulty revolves around the fact that only states can become parties to international treaties, and not the UN.[82] The debate has been somewhat resolved with the issuance

[79] Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 6616, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287; Geneva Conventions; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 12 December 1977, 1125 UNTS 3, 37, 16 ILM 1391, 1423.

[80] Meron notes, however, that this does not mean that other breaches of the GCs should be punished by States. Theodor Meron, "International Criminalization of Internal Atrocities", in *American Journal of International Law*, 1995, vol. 89, pp. 554, 569.

[81] On review of the literature, and state and organisational practice it appears largely accepted that IHL is applicable to state led forces authorized by the UN, but there is greater disagreement with regard to its applicability to UN led, commanded and controlled forces. See Keiichiro Okimoto, "Violations of International Humanitarian Law by United Nations Forces and their Legal Consequences", in *Yearbook of International Humanitarian law*, 2003, vol. 6. pp. 199, 204.

[82] Martin Zwanenburg, *Accountability of Peace Support Operations,* Martinus Nijhoff Publishers, 2005, p. 174; In relation to the "Bihac" incident, where UN peacekeepers felt it was their duty to protect a hospital, the The UN Office of Legal Affairs took the position that UN peacekeepers are bound only by the Security Council mission mandate, therefore given their international purpose, they were not required to adhere to

of the Secretary General 1999 Bulletin "Observance by United Nations Forces of International Humanitarian Law" ('SG's 1999 Bulletin'), which affirms that IHL is applicable to its forces where they are actively engaged in hostilities, or at least certain provisions thereof.[83] I will proceed on the assumption that IHL does apply and thereby that it is plausible that UN peacekeepers can commit war crimes as defined under the Rome Statute, when engaged as combatants.[84]

Article 8(2)(c) of the Rome Statute prohibits serious violations of Common Article 3 of the GCs and Article 8(2)(e) "other serious violations of the laws and customs of war" applicable in NIAC.[85] Where peacekeepers engage as belligerents in a conflict that is otherwise a NI-

the provisions of the Geneva Conventions. Furthermore, it could be argued that on the basis of Art. 103 of the UN Charter, Security Council Resolutions take precedence over any other international treaties or agreements. See Statement by S. Katz, UN Office of Legal Affairs Official, in Roy Gutman, "United Nations and the Geneva Conventions", in Gutman and Rieff (eds.), *Crimes of War*, W.W. Norton, 2007, p. 361.

83 However, the Bulletin contains only minimal IHL rules and sets a high threshold for their application. UN Secretary General, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999 ('SG 1999 Bulletin'); See also Daphna Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", in *American Journal of International Law*, 2000, vol. 94, p. 406.

84 Indeed Art. 2(2) of the Safety Convention suggests that the full corpus of IHL should apply to UN operations authorized by the SC under Chapter VII of UN Charter as an enforcement action "in which any of the personnel are engaged as combatants against organized armed forces". C*onvention on the Safety of United Nations and Associated Personnel*, opened for signature 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999).

85 Common Art. 3 may be applicable in far as it constitutes a mandatory minimum threshold of protection of civilians in an armed conflict, constituting CIL. See further Ray Murphy, "United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers", in *Criminal Law Forum*, 2003, vol. 14, issue 2, pp. 153–194; Okimoto, 2003, p. 199, *supra* note 81; *Prosecutor v. Tadić,* Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, paras.87–98; Hilarie McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation Of Warfare*, Ashgate, Dartmouth, 1998, p. 282; In the *Nicaragua Case* the ICJ stipulate that "Art. 3 […] constitutes a minimum yardstick […] rules which in the court's opinion reflect what the court in 1949 called 'elementary considerations of humanity'". *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. United States)*, Judgment, Merits, 1986, International Court of Justice ('ICJ') Rep. 14 (27 June 1986).

AC, in my view it internationalises that conflict, if only insofar as it relates to their conduct, rendering the full corpus of the GCs applicable. I will proceed on the assumption that UN engagement in an armed conflict renders the whole corpus of the GCs applicable. Focus will therefore be placed on Articles 8(2)(a) and 8(2)(b) of the Rome Statute, which apply to war crimes in an IAC.[86]

Sexual violence and rape when committed in the context of armed conflict have been recognised as grave breaches of the GCs and prosecuted as torture, humane treatments, *et cetera*, as war crimes by the *ad hoc* and hybrid tribunals.[87] Article 8 of the Rome Statute specifically enumerates a series of sexual offences as other violations of the laws and customs of war, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence.[88] However, in order for an act to constitute a war crime under the Rome Statute it will need to meet certain *chapeau* elements.

14.1.2.1. Chapeau Elements

The chapeau for Article 8 of the Rome Statute provides that the ICC shall have jurisdiction "*in particular* when committed as part of a plan or policy *or* as part of a large-scale commission of such crimes" (emphasis added).[89] The term 'in particular' suggests that it is not a prerequisite that the commission of war crimes necessarily be large-scale or perpetrated as part of plan or policy but that the existence of these additional elements may

[86] Art. 8(2)(d) and (f) of the Rome Statute, *supra* note 23.

[87] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998; Sexual violence, in particular rape has been prosecuted as a violation of Common Art. 3 for instance in *Prosecutor v. Karadžić and Mladić*, IT-95-5, 25 July 1995, at Count 4 (outrages upon personal dignity); *Prosecutor v. Sikirica* ("Keraterm"), IT-95-8, of 21 July 1995, at Count 19 (cruel treatment); *Prosecutor v. Miljković* ("Bosanski Samač"), IT-95-9, 21 July 1995, at Counts 37, 52 (humiliating and degrading treatment); see further "Ending Impunity for Violence Against Women", United Nations Entity for Gender Equality and the Empowerment of Women ('UNIFEM'), available at http://www.un.org.kh/attachments/061_08032007_ending_violence_on_women_en.pdf, last accessed on 25 March 2012; see Meron, "Rape as a Crime under International Humanitarian Law", 1993, pp. 426, *supra* note 26; See also Judith Gardam, "Women, Human Rights and International Humanitarian Law", in *International Review of the Red Cross*, 1998, vol. 324, pp. 421–432.

[88] Art. 8(b) of the Rome Statute, *supra* note 23.

[89] Art. 8 of the Rome Statute, *supra* note 23.

go towards an assessment of gravity.[90] That stated, the words 'in particular' would not have been used if the ICC must reject every case that is not part of a plan or policy or large-scale commission. Therefore, in theory a single serious act of sexual violence could constitute a war crime. Nevertheless, what it does suggest is that less significant violations should not be dealt with by the ICC. The problem is that this appears to create what some authors have dubbed a "non-threshold threshold" requirement.[91] The insertion of this "non-threshold" in Article 8 was the result of compromise at the negotiating phase, given that some advocates wanted the jurisdiction of the ICC to be restricted to large-scale and systematic crimes, but others were of the view that this would undermine the Court's deterrent effect.[92] With respect to this added non-threshold requirement, the ICC Appeals Chamber has stated:

> First, with regard to war crimes, the requirement of large-scale commission under the Statute is alternative to the requirement of commission as part of a policy. Second, the statutory requirement of either large-scale commission or part of a policy is not absolute but qualified by the express-ion "in particular". Third, the requirement of "systematic" commission of crime is not contained in Article 8 but only Article 7 on crimes against humanity.[93]

For a crime to constitute a war crime, there has to be a nexus with armed conflict. Article 8 provides that the offence is committed "in the context of *and* was associated with an international armed conflict". Therefore in order for a sexual offence by a UN military peacekeeper to constitute a war crime, it would not be sufficient for the conduct only to occur "in the context of" an armed conflict, it must also be proven that it is "closely related" to it. In essence the context of the armed conflict

---

90 Peter Rowe, "War Crimes", in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court*, Hart Publishing, 2004, pp. 203, 205.

91 Du Plessis and Pete, 2004, p. 12, *supra* note 18.

92 See further von Hebel and Robinson, "Crimes Within the Jurisdiction of the Court", in R.S. Lee (ed.), *The Making of the Rome Statute: Issues, Negotiations and Results*, Kluwer Law International, 1999, pp. 79, 107–108.

93 *Situation in DRC*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's application for warrants of arrest, Article 58", 13 July 2006, ICC-01-04-169, reclassified as public on 23 September 2008 pursuant to Decision on the unsealing of judgment of the Appeals Chamber issued on 13 July 2006, 22 September 2008, ICC-01-04-538-PUB-Exp, para. 70.

ought to be what enables the perpetrator to commit the offence. As stated by the ICTY in *Kunarać*:

> [C]ivilians were killed, raped or otherwise abused as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to perpetrators.[94]

A crime could be "closely related", according the ICTY in *Kunarać*, even if "crimes are committed in the aftermath of the flighting […] and are committed in furtherance *or* take advantage of the situation created by the fighting".[95] Accordingly, what distinguishes a domestic criminal offence from a war crime is that that the crime:

> [...] is shaped by or dependent upon the environment – the armed conflict – in which it is committed [...] The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[96]

If the ICC were to follow this approach it could have interesting consequences for UN military peacekeepers complicit in serious sexual offences where an armed conflict is ongoing, assuming all other requirements had been met. Taking the DRC for instance, it could be argued that the ongoing conflict in the State has created an environment wherein it is much easier to commit sexual offences with relative impunity. Peacekeepers engaging in such abuse are taking advantage of this environment. This is particularly so given unequal power dynamics between civilians and peacekeepers in soldiers' attire and carrying arms. This might render their conduct sufficiently associated with the conflict. That is assuming in the circumstances IHL applies to peacekeepers.

However, Schomburg and Peterson explain the mere existence of an armed conflict is not by itself a sufficient nexus, and that it cannot be presumed that relationships between members of foreign armed forces and the local civilian population are inherently coercive.[97] Additional factors would need to be shown, which might include: (1) the perpetrator's status, (2) status of the victim, (3) "circumstances in which offence committed",

---

94 *Prosecutor v. Kunarac et al.*, Judgment, IT-96-23-T and IT-96-23/I-T, para. 568.

95 *Ibid*.

96 *Prosecutor v. Kunarac et al.,* Appeals Judgment, IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 58.

97 Schomburg and Peterson, 2007, pp. 130–131, *supra* note 35.

(4) assistance of parties to the conflict in the commission of the offence; (5) a link between conduct and official duties, *et cetera*.[98] In this author's view if the nexus with armed conflict is proven then consent to sexual interactions may be negated.[99]

The general consensus is that for conduct to be associated with armed conflict it is not necessarily required to take place within the same geographic area as where fighting is occurring, as Article 8 applies to the territory as a whole.[100]

Under the EoC for Article 8, the perpetrator must have both knowledge of the armed conflict and intend to commit the offence. The EoC provides that he or she must be aware of factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".[101] However, there is no requirement that the perpetrator make a legal evaluation as to the existence of an armed conflict or even be aware of facts that establish the nature of the conflict, all that is required is that he be aware of factual circumstances that establish that an armed conflict exists.[102]

14.1.2.2. Conclusion

In limited circumstances where IHL might be deemed to apply to UN military peacekeepers, the prospect of being prosecuted for war crimes before

---

98 *Ibid.*, p. 131.

99 *Ibid*. The ICTY Appeals Chamber in *Kunarac* provided a non-exhaustive list of factors that might be considered in determining whether an act was sufficiently related to an armed conflict, including "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties". *Prosecutor v. Kunarac et al.*, Appeals Judgment, IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 59.

100 Rowe, "War Crimes", 2004, p. 208, *supra* note 90; The Appeals Chamber in *Kunarac*, affirming the Trial Chamber's position, stated, "the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting". *Prosecutor v. Kunarac et al.*, Appeals Judgment, IT-96-23 and IT-96-23/I-A, 12 June 2002, para. 57; See also *Prosecutor v. Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 573. It stated that there is no requirement that "armed conflict was occurring at the exact time and place of the proscribed acts".

101 See introduction to Art. 8 elements. EoC, p. 14, *supra* note 34.

102 *Ibid.*, EoC, p.14.

the ICC appears more plausible than for crimes against humanity. SEA could certainly come within the remit of the *actus reus* of war crimes. Isolated acts may constitute a war crime if they take place in and are somehow connected to an armed conflict. At least in some incidents, when SEA is perpetrated by UN military personnel they are taking advantage of the victims' vulnerability, and the coercive environment. That stated, while there is no explicit requirement that such acts enumerated in Article 8 of the Rome Statute be carried out in both a widespread or systematic manner, this may well go to assessments of gravity, and impact on case selection. This means it is unlikely that single acts will be considered of sufficient gravity, save in exceptional circumstances. At present SEA by UN peacekeepers is unlikely to be prosecuted by as a war crime, unless it can be linked to the wider attack.[103]

14.1.3. Further Restrictions in the Rome Statute

14.1.3.1. Triggering Mechanisms

Even if exceptionally incidents of SEA by UN military personnel could be deemed to meet the *chapeau* of war crimes or crimes against humanity under the Rome Statute, the fact remains that a number of major TCCs are not party to the Rome Statute.[104] This obviously has implications for any possible prosecution of UN peacekeepers by the ICC. In order for the ICC to exercise its jurisdiction over SEA by UN peacekeepers, either the State in which the conduct occurred or the State of nationality of the perpetrator would have to either be a State Party, or if a non-State Party, have accepted the ICC's jurisdiction.[105] The Prosecutor may also initiate an investigation *propio motu* with respect to State Parties.[106]

---

[103] Naomi Cahn, "Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence", in *Stanford Journal of Civil Rights and Civil Liberties*, 2005, vol. 1, p. 240.

[104] Major TCCs that have not yet ratified the Rome Statute, include for instance Pakistan, and India. For statistics on troop-contributions, see http://www.un.org/en/peacekeeping/contributors/2011/jul11_1.pdf, last accessed on 24 August 2011.

[105] Art. 12(2) and (3), and Art. 13(1) and (3), where for the Prosecutor to use its *proprio motu* powers, the Pre-trial Chamber [hereinafter 'PTC'] must "authorize" an investigation. Rome Statute, *supra* note 23.

[106] See, for example, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, Pre-Trial Chamber II, 31 March 2010.

UN operations consist of military personnel from numerous different States, who may or may not be party to the Rome Statute.[107] Are we to subject peacekeepers complicit in SEA to different standards? It appears that the only way possibly around this issue is if the SC, acting under Chapter VII of the UN Charter, refers a situation pursuant to Article 13(b), wherein States possibly could be compelled to co-operate with the ICC.[108] The SC could do so irrespective of whether the conduct occurred in or relates to the conduct of a national of a State Party.[109] The problem is that it is improbable that the SC would ever refer UN military peacekeepers complicit in SEA, particularly given veto powers and the potential impact on troop-contributions. Nevertheless, it might refer a situation to the ICC, within the framework of which the Prosecutor could pursue UN military peacekeeper abuse as a case within a broader situation. For instance, if such abuse occurred in Darfur, a situation already referred by the SC. Equally, State Parties are unlikely to refer a situation to the court on the basis of UN peacekeeper complicity in SEA, in particular due to political considerations, yet such crimes might be connected to a broader situation that might be referred to the Court, and the Prosecutor could pursue such a case.

14.1.3.2. Other Restrictions

It is generally considered that under CIL there can be no immunity for crimes against humanity, aggression, genocide and war crimes.[110] Article 27 of the Rome Statute provides that official capacity "shall in no case exempt a person from criminal responsibility under the Statute […]". As per Article 27(2), no immunities provided for on either national or inter-

[107] There are currently 16 UN peacekeeping operations deployed across four different continents. See UN Department of Peacekeeping Operations available at http://www.un.org/en/peacekeeping/operations/current.shtml, last accessed on 18 June 2010.

[108] Elizabeth Wilmshurst, "The International Criminal Court: the Role of the Security Council", in M. Politi and G. Nesi (eds.), *The ICC Statute of the International Criminal Court: A Challenge to Impunity*, Ashgate, 2001, p. 40.

[109] Art. 13 of the Rome Statute, *supra* note 23; In the case of either SC or a State Party referral, the Prosecutor must go ahead with an investigation unless he determines that "there is no reasonable basis to proceed". Art. 15(4) of the Rome Statute.

[110] Claus Kreß and Kimberly Prost, "Article 98", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart Publishing, 2008, pp. 1603, 1609.

national law debar the jurisdiction of the ICC.[111] That stated, this bar on immunity seems to be somewhat contradicted by Articles 16 and 98 Of the Rome Statute. While it is beyond the scope of this article to discuss the debate surrounding both Articles in any detail, a number of points need to be made, given their implications for any possible prosecution of UN military peacekeepers before the ICC.

Article 16 of the Rome Statute provides that the SC can pass a resolution, acting under Chapter VII of the UN Charter, requesting the ICC to defer a case for a perpetually renewable period of 12 months.[112] Chapter VII authorises the SC to act where it believes there is a threat to international peace and security.[113] Largely under U.S. pressure, in 2002 the SC passed Resolution 1422 on the basis of Article 16. This exempted UN peacekeeping troops from non-State Parties from ICC jurisdiction for a period of 12 months, renewable annually.[114] The Resolution was renewed by SC Resolution 1487 in 2003, however further attempts at renewal failed in 2004 after the Abu Ghraib scandal. UNSC Resolution 1497 in 2003 also contained a broad exemption of forces deployed as part of a multinational force in Liberia from the ICCs jurisdiction.[115] More recently, UNSC Resolution 1970, in which the SC refers the situation in Libya to the ICC, contained a paragraph shielding nationals of non-State Parties

[111] Art. 27 of the Rome Statute, *supra* note 23.

[112] Art. 16 of the Rome Statute, *supra* note 23; See further, Linda Keller, "The False Dichotomy of Peace versus Justice and the International Criminal Court", in *Hague Justice Journal*, 2008, vol. 3, issue I, pp. 12, 17; The ability of the SC to defer a case was hotly contested at the negotiating phase of the Rome Statute. Philippe Kirsch and John Holmes, "Developments in International Criminal Law", in *American Journal of International Law*, 1999, vol. 93, pp. 1, 8.

[113] *Charter of the United Nations*, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945 ('UN Charter').

[114] Carsten Stahn, "The Ambiguities of Security Council Resolution 1422", in *European Journal of International Law,* 2003, vol. 14, pp. 85–105; The fear that States' military force, including peacekeeping forces, could be brought before the ICC, was evident in some states reactions to the Court's establishment. See for example, David Scheffer, "International Criminal Court: the Challenge of Jurisdiction", Ambassador at Large for War Crimes Issues, U.S. Department of State, Address at the Annual Meeting of American Society of International Law, Washington, 26 March 1999; David Scheffer, "The United States and the International Criminal Court", in *American Journal of International Law*, 1999, vol. 93, pp. 12, 18–19; See generally Zwanenburg, 1999, p. 124, *supra* note 76.

[115] SC Res. 1497, UN Doc. S/RES/1497 (2003), adopted 1 August 2003.

operating in Libya from the jurisdiction of the ICC, unless that State waives its jurisdiction.[116] It does not stretch the imagination that the SC might consider prosecution of UN troops by the ICC as a threat to international peace and security, and that it might well request deferral. Such prosecutions could have a seriously negative effect on troop contributions and therefore could undermine current peacekeeping efforts.

Article 98(2) of the Rome Statute might serve as another impediment to prosecution of UN peacekeepers before the ICC. It provides that the ICC cannot request the surrender of those suspected of crimes under the ICC Statute, where a bilateral agreement exists that would be violated on surrender, unless the other State consents.[117] Article 98 was the result of a compromise in the debate around peacekeeper immunities and the jurisdiction of the ICC.[118] Article 98(2) has been used extensively by the U.S., in negotiating "Article 98 Agreements" or "Bilateral Non-Surrender Agreements", to shield its citizens and peacekeepers from the jurisdiction of the ICC.[119] While it is not within the scope of the present chapter to discuss the debate, the propriety of such agreements under international law is contentious.[120] Suffice to state that the ramifications of these Arti-

[116] Paragraph 6, SC Res. 1970, UN Doc. S/RES/1970 (2011), adopted 26 February 2011.

[117] Rome Statute, *supra* note 23.

[118] Knoops, 2004, p. 299, *supra* note 22; It is unclear, however, whether this provision was intended to apply solely to pre-existing agreements or also to ones drawn up at a later date. The object and purpose of the treaty lends support to the prior interpretation. Markus Benzing, "U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties", in *Max Planck Yearbook of United Nations Law*, 2004, vol. 8, pp. 214–219. Art. 98(2) seems to have been drafted with Status of Forces Agreements (SOFAs) in mind. Kreß and Kimberly Prost, "Article 98", 2008, p. 1603, *supra* note 110; SOFA is an agreement made between States deploying troops, or in the case of UN peacekeeping operations, the UN, and the State hosting those troops. SOFAs govern the legal status of those troops in the host State. With respect to UN operations SOFAs cover all categories of personnel deployed by the UN. See further Burke, 2011, pp. 63–104, *supra* note 17.

[119] For further information on these agreements see Coalition for the International Court, available at http://www.iccnow.org/?mod=bia, last accessed on 10 January 2009; See generally, Benzing, 2004, p. 199, *supra* note 118.

[120] Dieter Fleck, "Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under SOFAs?", in *Journal of International Criminal Justice*, 2003, p. 651; Kreß and Prost, 2008, p. 1603, *supra* note 110; Dapo Apkande, "International Law Immunities and the ICC", in *American Journal of International Law*, 2004, vol. 98, issue 3, pp. 407, 426.

cle 98(2) Agreements are multi-fold. They conflict with the object and purpose of the ICC, as set out in its preamble,[121] and arguably contravene Article 18 of the Vienna Convention on the Law of Treaties.[122] They also arguably contradict Article 27 of the Rome Statute.[123] Furthermore, Article 86 Rome requires State Parties to co-operate fully with the court. Numerous States have taken the position that these agreements are inconsistent with state obligations under the Rome Statute.[124] That stated, it is not difficult to foresee a proliferation in the use of Article 98(2) in this manner by States were the ICC to start prosecuting military contingents deployed on UN operations.[125]

14.1.4. Gravity Threshold

The Preamble of the Rome Statute stipulates that the ICC has jurisdiction only over "the most serious crimes of concern to the international com-

[121] See generally, Steffen Writh, "Immunities, Related Problems and Article 98 of the Rome Statute", in *Criminal Law Forum*, 2001, vol. 12, issue 4, p. 429.

[122] *Vienna Convention on the law of Treaties,* U.N.T.S., vol. 1155, p. 331, entered into force 27 January 1980.

[123] However, Art. 27 provides that no one shall be immune from the Court's jurisdiction, whereas Art. 98 relates rather to the surrender of individuals to the court.

[124] The Council of Europe stated that these agreements may be inconsistent with states' other international law obligations. The European Parliament stated that not alone do these agreements contravene states obligations under the Rome Statute, they may even be incompatible with membership of the EU. Many African, Caribbean and Pacific States have taken a similar position on their validity. Council of the European Union, *Draft Council Conclusions on the International Criminal Court*, 30 September 2002, available at http://www.amicc.org/docs/EC9_30_02.pdf, last accessed on 19 March 2004, cited in Chet J. Tan, Jr., "The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court", in *American University International Law Review*, 2004, vol. 19, pp. 1115, 1128; See also Benzing, 2004, pp. 182, 193–195, *supra* note 118.

[125] It is worth noting again the U.S. reaction to the ICC in passing the American Service Members Protection Act. The Act provides that countries ratifying the Rome Statute will have U.S. military assistance withdrawn, unless waived by the U.S. President. Additionally the Act provides that the U.S. may use military force to free any U.S. or U.S.–Allies citizen held by the ICC. Coupled with this the Act also restricts U.S. participation in UN peacekeeping missions save where guaranteed immunity from any prosecution should a crime be committed by a citizen deployed. Few U.S. troops have been deployed on UN peacekeeping operations since 1998. See American Service-Members' Protection Act, Title II, available at http://www.state.gov/t/pm/rls/othr/misc/23425.htm, last accessed on 11 October 2011.

munity as a whole". This is reiterated in Articles 1 and 5 of the Statute.[126] The ICC will step in only in cases involving those most responsible for the gravest of crimes of international concern.[127] A key question therefore is what constitutes the most serious crimes of international concern and can SEA by UN military personnel ever fall within this? While gravity is mentioned in several places in the Rome Statute, no definition is provided. This has led to considerable debate on the required gravity of a crime to enable the ICC to exercise jurisdiction.[128] This Section will examine the ICC Prosecutor's and the Pre-Trial Chamber's ('PTC') approach to gravity to date and the impact this may have on the prosecuting of UN military peacekeepers for sexual offences before the ICC.

The ICC Prosecutor has highlighted that gravity is both an integral factor in assessing the nature of crimes and their admissibility.[129] Gravity is central to the selection of situations and cases by the Prosecutor. It is also a key consideration for the PTC in determining admissibility. The PTC serves as a check and balance on prosecutorial discretion in making gravity assessments.[130] Stegmiller states that the gravity assessment may be separated into two categories under the Rome Statute, namely 'legal' (Article 53(1)(b) and 17(1)(d)) and 'discretionary' (Article 53(1)(c)). 'Legal' is linked to admissibility, and 'discretionary' (alternatively 'relative' gravity) is premised on prosecutorial discretion.[131] The discretionary element relates to the Prosecutor's role in weighing the relative gravity of

[126] Art. 5 provides "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole […]". Rome Statute, *supra* note 23; See further Mohammed El Zeidy, "The Gravity Threshold under the Statute of the International Criminal Court", in *Criminal Law Forum,* 2008, vol. 19, pp. 35, 36.

[127] *Ibid.*; "Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs", New York, 24 October 2005, pp. 5–6.

[128] For example Ray Murphy, "Gravity Issues and the International Criminal Court", in *Criminal Law Forum*, 2006, vol. 17, p. 282; Margaret deGuzman, "Gravity and Legitimacy of the International Criminal Court", in *Fordham International Law Journal,* 2009, vol. 32, p. 1400.

[129] "Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs", New York, 24 October 2005, pp. 8–9

[130] That stated, the Prosecutor and PTC are not obligated to follow each other's approaches to gravity.

[131] See further deGuzman, 2009, pp. 1400, 1405–1406, *supra* note 128.

situations, and cases within situations, when selecting situations and cases. Stegmiller notes that contextually the question of gravity arises at two stages: (1) on commencing an investigation; and (2) when an actual case must be assessed for gravity.[132] Admissibility is in turn made up of gravity and complementarity, the latter concept will be addressed presently.[133]

'Gravity' first appears in Article 17(1)(d) which relates to admissibility, providing that a case must be of sufficient gravity to justify further action by the ICC.[134] The use of the terminology "shall consider" in Article 17(1)(d) means that the PTC is required to consider gravity in assessing admissibility of a case. The PTC in the *Lubanga* case, however, noted that an assessment of gravity at the admissibility phase can occur at two separate stages: firstly in relation to the gravity of a particular situation, and secondly with respect to the gravity of a particular case within that situation.[135]

Gravity must also be assessed before the initiation of an investigation or prosecution. Article 15(1) provides that the Prosecutor "may initiate investigations *propio motu* on the basis of information on crimes within the jurisdiction of the Court". Article 15(2) requires the Prosecutor to assess this information for its seriousness when determining whether to initiate an investigation *propio motu*.[136] If on the basis of this analysis, and of any additional information received on request,[137] the Prosecutor determines that there is a "reasonable basis to proceed with an investiga-

[132] Ignaz Stegmiller, "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*", in *International Criminal Law Review*, 2009, vol. 9, pp. 547, 550.

[133] *Ibid.*, pp. 547–548.

[134] Rome Statute, *supra* note 23.

[135] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, ICC-01/04-01/06, 10 February 2006, para. 44.

[136] Rome Statute, *supra* note 23; For a discussion of Art. 15 of the Rome Statute see further: Morten Bergsmo and Jelena Pejić, "Article 15", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Second edition, 2008, pp. 581–593.

[137] At either the investigative phase or even the prosecution stage the Prosecutor may receive information from various states, intergovernmental, non-governmental, etc sources. Rule 104 of the Rules of Procedure and Evidence permit the Prosecutor to "seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or other reliable resources […]".

tion" he must request "authorisation" from the PTC.[138] If the Prosecutor was to pursue incidents of sexual violence by UN military peacekeeper this might include any investigative material gathered by UN investigative, such as the Conduct and Discipline Unit or Teams ('CDU/CDT') and the Office of Internal Oversight Services ('OIOS').[139]

Article 15 is linked to Article 53(1)(c) insofar as the latter requires the Prosecutor, prior to the initiation of an investigation, to consider whether, "taking into account the *gravity* of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".[140] Article 53(1)(c) however appears to have broader application as it applies to the initiation of all investigations, not solely those initiated *proprio motu*.[141] Article 53(2)(c) refers to the decision to prosecute, and also allows the Prosecutor to exercise his discretion in deciding not to proceed where:

> [a] prosecution is not in the interests of justice, taking into account all the circumstances, including the *gravity* of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.[142]

[138] Art. 15(2) and (3). Pursuant to Art. 15(4) the PTC must first authorise an investigation by the Prosecutor where he acts *propio motu*. Under Art. 15(4), if the PTC "considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case". Rome Statute, *supra* note 23.

[139] Cooperation where appropriate and exchange of information's in relation to cases between the ICC and the UN is envisaged by the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*. See Arts. 3, 5, 15 and 18, available at http://cdu.unlb.org/, last accessed on 11 October 2011; see also http://www.un.org/Depts/oios/, last accessed on 18 August 2011.

[140] Rome Statute, *supra* note 23.

[141] Some authors have pointed to the lack of clarity between the two provisions. deGuzman, 2009, p. 1410, *supra* note 128; Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers, 2005, pp. 70–71.

[142] This discretionary power of the Prosecutor is not unqualified, he must inform the PTC, and the referring State, or the SC if it referred the situation, of any decision not to proceed with an investigation or prosecution, if the decision is made on basis of Art. 53(1)(c) or 53(2)(c), who may in turn request the Prosecutor to reconsider. Rome Statute, *supra* note 23.

Stegmiller refers to this as a 'discretionary' assessment of the gravity threshold, distinguishing it from the required legal assessment of gravity required by Articles 53(1)(b) and 17(1)(d).[143]

Article 53(1)(c) seems to require the Prosecutor, in exercising his discretion, to balance the 'interest of justice' with 'gravity' and the 'interests of victims'. Similarly, Article 53(2)(c) requires the Prosecutor again to make such a discretionary assessment in deciding not to prosecute, adding to the aforementioned consideration the "age or infirmity of the alleged perpetrator, and his or her role in the alleged crime".[144] Prosecutorial discretion with respect to the 'interests of justice' will be returned to presently.

As a preliminary it is important to distinguish between the gravity of 'situations' and gravity of 'cases' within a situation. According to the Prosecutor, a 'case' is defined as:

> [c]omprising one or more alleged suspects and one or more alleged crimes within the Court's jurisdiction, while "situation" is a broader concept referring to a territorial and temporal context in which such crimes have allegedly been committed.[145]

In assessing gravity when it comes to sexual offences by UN military personnel we first need to ask are we looking at a particular 'situation', which may require the choosing of a particular geographic area, or are we referring to 'cases' within a situation that has or may in the future be referred to the ICC or where the Prosecutor may act *priopio motu*?

14.1.4.1. Quantitative

The Prosecutor's approach to gravity in the selection of situations and cases appears to have been hinged to date primarily on a quantitative assessment of numbers of victims.[146] This approach has been criticised by

[143] Stegmiller, 2009, p. 550, *supra* note 132.

[144] Rome Statute, *supra* note 23.

[145] See ICC-OTP, *Draft for Discussion: Criteria for Selection of Situations and Cases*, 1 June 2006, quoted in deGuzman, 2009, p. 1409, fn. 35, *supra* note 128.

[146] See for example "Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court", Fourth Session of the Assembly of States Parties, The Hague, 28 November – 3 December 2005.

numerous legal commentators.[147] That stated, the Prosecutor's approach to attacks on peacekeepers took a different trajectory. The Prosecutor in his response to the Communication received on crimes within the jurisdiction of the court allegedly committed by British forces in Iraq took a quantitative approach. He stated that while the crimes committed could reasonably be believed to fall with the ICC's jurisdiction, the "estimated 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons" was an insufficient basis to proceed.[148] The Prosecutor stipulated that:

> [t]he Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied […] as the Court is faced with multiple situations involving hundreds or thousands of crimes […].[149]

It was noted that a key factor to be considered in assessing gravity is the number of victims. The Prosecutor proceeded to compare the number of victims of crimes by British forces in Iraq, which in his view were simply not comparable to the hundreds or thousands of victims of serious crimes in other situations under investigation by the OTP, including Northern Uganda, the DRC and Darfur.[150]

He did not consider the overall situation in Iraq, but only the conduct of British troops, bearing in mind Britain is a State Party to the Rome Statute and Iraq is not.[151] Other factors that might feed into the gravity of particular conduct were not assessed, such as 'social alarm' – manner in which offences were committed; the impact of the crimes and other potentially aggravating factors.[152]

The Prosecutor has been criticised for placing too much emphasis on quantity of victims in assessing gravity, and for inconsistency in doing

---

147 *William Schabas*, "Prosecutorial discretion v. judicial activism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, pp. 731, 743; Heller, "Situational Gravity under the Rome Statute", 2010, *supra* note 43.

148 Iraq Communication, OTP letter, 9 February 2006, p. 8.

149 *Ibid.*

150 *Ibid.*

151 Note that Iraq was not a State Party, and unless it accepted the ICC's jurisdiction or the SC had referred the situation, the Prosecutor could only look at the situation insofar as it related to British troops, or other States Party to the Rome Statute deployed in Iraq.

152 The sentencing judgments of the *ad hoc* tribunals may provide some guidance as to what factors might render conduct more or less "grave".

so. Schabas argues that the Prosecutor's comparison of the situation of British forces in the Iraq to the DRC and Uganda is questionable in so far as quantitatively the number of deaths was possibly much higher in Iraq since the war commenced. He argues that a comparison of 'situations' would have revealed as much.[153] DeGuzman posits that what is required by the text of the Rome Statute is some form of gravity threshold (that is, "not of *sufficient* gravity to justify further action") rather than a comparison of situations.[154]

With respect to war crimes, in responding to the Iraq Communication, the Prosecutor expressed the contention that the terms "*in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes" in Article 8(1) of the Rome Statute, while not an element of the crime, provide guidance as to the types of situations that ought to be examined by the ICC.[155] The ICC Appeals Chamber has since held that such a position fails to distinguish between war crimes and crimes against humanity.[156]

Even if the Prosecutor takes a quantitative approach in assessing the gravity of situations it is plausible that a case involving serious sexual offences by UN military peacekeepers could arise within a current or future situation. The Prosecutor could exercise his discretionary powers in making a relative assessment of gravity within a situation.[157] For instance in the DRC, 132 SEA allegations involving UN MONUC/MONUSCO military personnel, including military observers, have been made since 2007.[158] 108 incidents of SEA have been substantiated by the UN, since

[153] See further, Schabas, 2008, p. 747, *supra* note 147.

[154] DeGuzman, 2009, p. 1432, *supra* note 128.

[155] Iraq Communication, OTP letter, 9 February 2006, p. 8. Beyond the quantitative dimension, the Prosecutor might also consider the geographic and temporal scope crimes, which is also suggested by the terms 'in particular'. ICC-OTP, Policy Paper on Preliminary Examinations, 4 October 2010, pp. 13–14. See also deGuzman, 2009, p. 1451, *supra* note 128.

[156] *Situation in DRC*, 2008, para. 70, *supra* note 93.

[157] DeGuzman argues that this is distinct from an assessment of gravity under admissibility as the case may be of sufficient gravity to be admissible, but that the Prosecutor may choose to prioritize cases within the situation on the basis of relative gravity to other cases within that same situation. DeGuzman, 2009, pp. 1432–1435, *supra* note 128.

[158] There is no further data on the categories of such personnel and the actual types of offences involved.

2007, with respect to this mission alone. Since 2008 at least 75 of these allegations have involved minors.[159] There is little further information on the actual action that was taken by TCCs or detail as to the exact nature of the allegations.[160] Nevertheless, it could be argued, in the context of the DRC situation at least, that SEA by UN military peacekeepers is quantitatively high. That stated, the question remains whether even if many of these acts could be consider war crimes or crimes against humanity are they of sufficient gravity to warrant investigation and/or prosecution by the ICC, considering the fact that thousands of Congolese women and children are raped every year.[161] It is this author's contention that if the ICC Prosecutor and/or PTC focus on quantity of victims, sexual violence by UN peacekeepers is unlikely to be considered to be of sufficient gravity to warrant investigation or prosecution by the ICC.

Heller notes comparisons of the seriousness of crimes are frequently made in domestic criminal law systems and international tribunals.[162] He argues that it is more logical to take a "category-based" as opposed to a quantitative approach, as "[a]n approach to gravity that focuses solely on enumerated acts thus fails to capture the specific factor that transforms an 'ordinary' domestic crime into a more serious international crime".[163] This approach has also been suggested by a number of legal commentators.[164] If the Prosecutor were to take this approach it might allow greater focus to be placed on serious sexual offences committed by UN military peacekeepers.

---

[159] Numerous other investigations are pending. With respect to allegations across all UN missions since 2007, the UN has issued 330 note verbales to TCCs, but has only received a total of 86 responses. Prior to 2008 statistics on the age of victims was not consolidated.

[160] UNCDU, available at http://cdu.unlb.org/, last assessed on 18 July 2011.

[161] Some studies suggesting that the figure could be as great as 1150 women between 15 and 49 being raped every day. Amber Peterman, Tia Palermo and Caryn Bredenkamp, "Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of the Congo", in *American Journal of Public Health*, 2011, vol. 101, no. 6, pp. 1060, 1064.

[162] Heller, 2010, p. 230, *supra* note 43.

[163] *Ibid.*, p. 231.

[164] K. Glassborow, "DRC: ICC Investigative Strategy Under Fire", Institute for War and Peace Reporting, 17 October 2008, available at http://iwpr.net/report-news/icc-investigative-strategy-under-fire, last accessed on 18 June 2011.

14.1.4.2. Social Alarm

'Social alarm' has been highlighted by a number of legal commentators as a factor that might be taken into account in assessing gravity.[165] Heller posits that "social alarm is a function of how widely a crime is committed; the more global the crime, the greater the social alarm it creates in the international community".[166] The *Lubanga* PTC first introduced the notion of 'social alarm'.[167] It stated that in making a gravity assessment at the admissibility phase the Court will look at whether the conduct is either systematic or widespread; the most senior leaders in the situation; the individual's role; and the 'social alarm' caused to the international community.[168] It then stated that the enlistment of children, under 15 years, into armed groups causes such 'social alarm'.[169] However, it did not elaborate on why 'social alarm' should be taken into account.[170]

The Appeals Chamber in the in a 2006 decision concerning Bosco Ntaganda, rejected the notion of 'social alarm' as a factor that should be considered in assessing gravity given that it does not appear in the Rome Statute, and that such an assessment is subjective.[171] That stated, the Preamble of the Rome Statute does provide that 'the most serious crimes of concern to the international community as a whole must not go unpunished' and refers to 'atrocities that deeply shock the conscience of humanity'.[172] According to the Oxford English Dictionary 'alarm' is defined as to 'make (someone) feel frightened, disturbed, or in danger'.[173] 'Concern' is defined as to "make (someone) anxious or worried".[174] The idea of

[165] See generally Heller, 2010, p. 227, *supra* note 43.

[166] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, ICC-01/04-01/06, 10 February 2006, para. 46.

[167] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, ICC-01/04-01/06, 10 February 2006.

[168] *Ibid.*, para. 64.

[169] *Ibid.*, paras. 65–66.

[170] See contrary opinion of Lubanga in Appeals Chamber. Appeals Chamber of view that PTC is incorrect in its application of Art. 17(1)(d). *Situation in DRC*, 2008, para. 3, *supra* note 93. El Zeidy describes 'social alarm' as a "weird novelty" of the PTC. Mohammed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff, 2008, p. 45.

[171] *Situation in DRC*, 2008, para. 72, *supra* note 93.

[172] Rome Statute, Art. 1 and 5, *supra* note 23.

[173] *Oxford English Dictionary.*

[174] *Ibid.*

causing anxiety or fear in the international community as a whole or shocking 'the conscience of humanity' therefore arguably is suggested by the Preamble.

'Social alarm' as a category is interesting for our purposes, as it gives rise to the question: does the international community consider UN peacekeeper complicity in rape, sex trafficking, sex with children, and other forms serious sexual abuse "alarming"; does it cause "concern to the international community as a whole"; and does such conduct "deeply shock the conscience of humanity"? Presumably the enlisting of children into armed groups alarms or concerns the international community because of their age, but so too should sex with children under the age of 15. In the SCSL's view children under the age of 15 are particularly vulnerable and age adds to gravity of offences.[175] That said, the prioritisation by the Prosecutor of recruitment of child soldiers over what many Congolese locals considered graver atrocities occurring in the DRC caused considerable discontent in the local population.[176]

14.1.4.3. Perpetrator's Seniority and Role in Crime

The PTC in *Lubanga* also stated that in assessing gravity focus ought to be placed on the "most senior leaders" in a situation. In its view the greatest deterrent value of the Court is in focusing on those best places to prevent systematic or large-scale crime.[177] The Prosecutor in 2003 and 2006 Policy Papers stipulated that (s)he will "focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible or those crimes".[178] The Rome Statute requires the court, however, to concentrate on the "most serious crimes of concern to the international community". This does not necessarily equate to the "most senior leaders".[179]

---

[175] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao,* Sentencing Judgment, Trial Chamber I, SCSL-04-15-T, 8 April 2009, paras. 172–188, 204.

[176] On basis of interview conducted by author with UN Public Info and Outreach Office based in the DRC. Elena Baylis, "Reassessing the Role of International Criminal Law: Rebuilding National Through Transnational Networks", in *Boston College Law Review,* 2009, vol. 50, pp. 1, 21.

[177] *Situation in DRC*, 2008, paras. 54–55, *supra* note 93.

[178] OTP, "Paper on Some Policy Issues before the Office of the Prosecutor", 2003, p. 7.

[179] PTC has been subject to criticism for focus on senior leaders for setting too high a threshold. See for example Stegmiller, 2009, pp. 547, 551, *supra* note 132.

The ICC Appeals Chamber criticised the PTC's approach. In its view "the deterrent effect of the Court is highest if no category of perpetrators is *per se* is excluded from potentially being brought before the Court".[180] Furthermore, it stated that focusing only on the most senior leaders would achieve neither retribution nor prevention.[181] In essence it would prevent it from looking at lower level perpetrators.[182]

In a 2005 statement, the Prosecutor highlighted the need to prosecute "[…] those who bear the greatest responsibility for the most serious crimes" as "[i]t is not feasible to bring charges against all apparent perpetrators".[183] However, in its 2003 Policy Paper the Prosecutor noted that sometimes "[t]he focus of an investigation […] may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case".[184] DeGuzman correctly observes that factors feeding into the gravity assessment that relate to the perpetrator can logically only relate to the selection of cases, and not situations.[185]

If the perpetrator's role in the commission of a crime is only marginal it is unlikely that he or she would be brought before the ICC.[186] Article 53(1)(c) supports this contention in so far as the Prosecutor may find it not in the 'interests of justice' to proceed with the prosecution of such an individual.[187]

The UNFC or UN Contingent Commanders are unlikely to ever order the commission of sexual offences by their troops. The UNFC com-

[180] *Situation in DRC*, 2008, paras. 73, 76, *supra* note 93.

[181] *Situation in DRC*, 2008, para. 74, *supra* note 93.

[182] The Appeals Chamber further criticized the *Lubanga* PTC for drawing on the practice of the ICTY and Rule 11*bis* in justifying this approach, while ignoring the fact the ICTY's approach occurred within the context of its completion strategy. *Situation in DRC*, 2008, paras. 54–55, *supra* note 93; Schabas, 2008, p. 746, *supra* note 147; Stegmiller, 2009, p. 552, *supra* note 132.

[183] L. Moreno-Ocampo, "Statement of Informal Meeting of Legal Advisors of Ministries of Foreign Affairs", 24 October 2005, p. 5.

[184] OTP, *supra* note 178.

[185] deGuzman, 2009, p. 1451, *supra* note 128.

[186] *Ibid.*, p. 1454.

[187] Rome Statute, *supra* note 23; Morten Bergsmo and Pieter Kruger, "Investigation and Prosecution", in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Second Edition, Hart Publishers, 2008, pp. 1065, 1073.

mander could not realistically be held to be among those most responsible for failure to discipline crimes by troops that are not related to official duties, given that only contingent Commanders or the TCC can exercise any criminal or disciplinary control over troops. It could be argued that a Contingent Commander's failure to hold perpetrators to account could lead to some level of responsibility, but it seems unlikely that such a failure would warrant him being brought before the ICC. The seniority and role of the perpetrator with respect to sexual violence committed by peacekeepers might perhaps be more relevant in situations such as trafficking or sexual slavery, or where individuals act in concert.

14.1.4.4. Impact of Crimes

The nature of crimes and their impact on victims and the greater community might also feed into an assessment of gravity.[188] Regulation 29(2) of the OTP's 2009 Regulations provides that:

> [i]n order to assess the gravity of the crimes allegedly committed in the *situation* the Office shall consider various factors including their scale, nature, manner of commission, and impact.[189]

These factors are recognised as being equally applicable to both situations and cases.[190] The OTP has stated that it will not attempt any prioritisation of these factors when assessing gravity.[191] The Prosecutor on a number of occasions has noted that consideration will be given to the

[188] Luis Moreno-Ocampo, "Key-Note Address: Integrating the Work of the ICC into Local Justice Initiatives", *American University International Law Review*, vol. 21, 2006, pp. 497, 498.

[189] Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, entered into force 23 April 2009; Rod Rastan states that factors the Prosecutor is likely to take into account when assessing gravity include "[…] severity; scale; systematicity; impact; and particularly aggravating aspects". Rod Rastan, Legal Officer OTP, "The Power of the Prosecutor in Initiating Investigations", February 2007, Beijing, China (paper delivered for a Symposium on the International Criminal Court), available at http://www.icclr.law.ubc.ca/site%20map/icc/poweroftheprosecutor.pdf, last accessed on 15 June 2011.

[190] *Prosecutorial Strategy 2009–2012,* 1 February 2002, p. 20; Kai Ambos, *The Columbian Peace and the Principle of Complementarity of the International Criminal Court*, Springer, 2010, p. 45.

[191] ICC Office of the Prosecutor, "Draft for Discussion: Criteria for Selection of Situations and Cases 4–5" (hereafter 'Draft Criteria for Selection'), June 2006, cited in Schabas, "Prosecutorial Discretion and Judicial Activism", 2008, pp. 736–48, *supra* note 147.

"impact of crimes on the community and on regional peace and security [...]".[192] Additional factors that might feed into impact include "crimes committed with the aim or consequence of increasing the vulnerability of civilians' or to spread terror".[193] According to the Prosecutor "[t]his factor includes attacks on persons involved in humanitarian assistance and peacekeeping missions".[194]

It remains to be seen how impact will be interpreted.[195] Stegmiller posits that 'impact' could be understood in two ways: (1) "community-related" impact; and (2) "victim-orientated impact".[196] If impact is to be understood as "community-related", sexual offences by UN peacekeepers may well undermine international peace and security, and UN mission mandates given the effect such can have on relationships with local populations. Furthermore, such abuse can undermine efforts to re-establish the RoL in conflict and post-conflict States. On the other hand if impact is "victim-orientated" then SEA can have a profound psychological, physical and social impact on victims, and cause further fear and distrust in their communities. On the other hand the Prosecutor in a statement to the SC appeared to link impact with deterrence, stating that in assessing gravity amongst the factors it will take into account is "the impact of ICC investigations and prosecutions in the prevention of further crimes".[197] Impact has been linked to the seriousness of attacks on peacekeepers as they are mandated to protect civilians and that such attacks could affect millions under the protection of such personnel.[198] SEA could also un-

[192] "June 2006 Draft Policy Paper on Selection Criteria", cited in Ambos, 2010, p. 46, *supra* note 190; "Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs", New York, 24 October 2005, p. 6.

[193] OTP, "Policy paper on Preliminary Examinations", 2010, p. 15.

[194] ICC Office of the Prosecutor, 2006, p. 742, *supra* note 191; Moreno-Ocampo, "Statement of Informal Meeting of Legal Advisors of Ministries of Foreign Affairs", 24 October 2005, p. 6.

[195] Ambos notes that there is some resemblance between 'impact' and 'social alarm'. Ambos, 2010, p. 46, *supra* note 190.

[196] Stegmiller, 2009, p. 561, *supra* note 132.

[197] UN Doc. S/PV.5459, p. 2.

[198] "Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo to the UN Security Council pursuant to UNSCR 1593 (2005)", 14 June 2006, p. 2.

dermine the security of UN missions and their ability to achieve mission mandates.

14.1.4.5. Manner of Commission

Finally, manner of commission of crimes is a factor that may feed into gravity. In 2010 Draft Policy Paper on Preliminary Examinations the OTP noted a number of factors relevant to the "manner of commission" of a crime, including:

> […] the means employed to execute the crime, the degree of participation and intent in its commission, the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying communities.[199]

Probably the most relevant aspects to SEA by UN military peacekeepers are the elements of "abuse of power or official capacity", in addition to the "vulnerability of the victims". This has been addressed previously.[200]

14.1.4.6. Conclusion

What renders sexual offences by UN peacekeeping personnel particularly grave is that it violates the relationship of trust between the UN and the local civilian population. The gravity of crimes by peacekeepers, akin to the gravity of crimes against peacekeepers, rests in their special role as protectors of international peace and security. They are often specifically mandated to protect civilian populations and promote respect for human rights.[201]

---

[199] ICC-OTP, Policy Paper on Preliminary Examinations, 4 October 2010, p. 14; Prosecutor in the 2006 Policy Paper noted that abuse of power might be relevant to gravity – Draft Selection Criteria, p. 5, cited in deGuzman, 2009, p. 1453, *supra* note 128; Schabas, "Prosecutorial discretion v. judicial activism", 2008, p. 742, *supra* note 147.

[200] *Ibid.*, pp. 7–8.

[201] See also Report of the Secretary General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999, para. 35; Roberta Arnold, *Law Enforcement in the Framework of Peace Support Operations,* Martinus Nijhoff Publishers, 2008, p. 317. The promotion and encouragement of respect for IHRL is also embedded in the Preamble and Arts. 1(4), 55(c) of the UN Charter. UN Charter, *supra* note 113.

It is worth noting that the has ICC charged two rebel leaders, Abdallah Banda Abkaer Nourain and Saleh Mohammed Jerbo Jamus, with war crimes for attacks on African Union peacekeepers in Darfur, which resulted in the deaths of twelve and the injuring of eight peacekeepers.[202] It found that:

> […] the consequences of the alleged attack on MGS Haskanita were grave both for the direct victims of it […] and for the local population, in light or the initial suspension and ultimate reduction of AMIS activities in the area as a result […].[203]

Similarly, not only does SEA by UN military peacekeepers violate the victim directly it also undermines the broader mission mandate. Whole contingents have had to be repatriated due to SEA allegations. To ignore the seriousness of these crimes, ignores not only the abhorrent nature of these offences, but also undermines international peace and security, and puts the physical security of other peacekeepers at risk.[204]

That stated, it must be borne in mind that the Prosecutor was granted discretion in the selection of situations and cases in recognition of the fact that it is not feasible for the ICC to investigate and prosecute each and every incident coming within the jurisdiction of the Court.[205] The ICC Prosecutor receives hundreds of communications each year. Presently, the ICC however has only six situations and 10 cases before it. One of the primary rationales for the insertion of gravity, as an additional element to be considered, was to avoid overburdening the Court with cases.[206] While SEA by UN peacekeepers is abhorrent, it seems that the Prosecutor is unlikely to consider such cases of sufficient gravity, in particular should it focus on quantity of victims or solely senior leaders. Arguably 'social alarm' and 'impact of crimes' might leave greater scope for the court to pursue such cases, as might a category-based approach. It is this author's

---

[202] *Prosecutor v. Abdallah Banda Abkaer Nourain and Saleh Mohammed Jerbo Jamus*, 02/05-03/09, Decision on the Confirmation of Charges, 7 March 2011.

[203] *Ibid.*, para. 27.

[204] Secretariat Note, UN Doc. A/62/329 paras. 11–12; see also ICC-OTP, *Eight Report Security Council to the Security Council pursuant to UNSCR 1953* (2005), para. 9, pp. 55–56.

[205] Matthew Brubacher, "Prosecutorial Discretion within the International Criminal Court", in *Journal of International Criminal Law*, 2004, vol. 2 pp. 71, 75.

[206] See further, Susanna SáCouto and Katherine Cleary, "The Gravity Threshold of the International Criminal Court", in *American University International Law Review*, 2008, vol. 23, issue 5, p. 807.

contention, however, that even were such an approach taken cases of SEA by UN peacekeepers are likely to overcome the gravity threshold.

14.1.5. Prosecutorial Discretion: Other Considerations

In addition to considerations of gravity as an element of prosecutorial discretion several other factors come into play. As the Prosecutor has noted, other considerations that might feed into selecting situations or cases, may include: legal, budgetary, strategic, the ability to take the suspect into custody,[207] the likelihood of state co-operation, the ability to gather evidence, *et cetera*.[208] Political considerations may well influence the workings of the court, in particular given its reliance on State co-operation.[209] As stated by the ICC Chief Prosecutor, Moreno-Ocampo,

> […] there seems to be a paradox: the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community.[210]

It is not hard to imagine that these factors would feature heavily were the Prosecutor to decide pursue a case against UN military personnel for complicity in SEA.

Articles 53 (1) and (2) also permit the Prosecutor to exercise his/her discretion not to proceed with an investigation on the basis of the 'interests of justice'.[211] When making a decision to investigate the Prosecutor, under Article 53(1)(c), must take "into account the gravity of the crime and the interests of victims". Under Article 53(2)(c) when deciding not to proceed with a prosecution, on the basis of the 'interests of justice', the Prosecutor must weigh this against the "gravity of the crime, the interests

[207] Suggestion that this was a factor that played into the decision to charge Lubanga. See further James Goldston, "More Candour about Criteria: The Exercise of Discretion by the prosecutor of the International Criminal Court", in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 383, 394–395.

[208] This list is merely illustrative. See further SáCouto and Cleary, 2008, *supra* note 206; Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", in *European Journal of International Law*, 2003, vol. 14, issue 3, p. 488.

[209] Rome Statute, Arts. 86 and 99(1), 57(3)(d), *supra* note 23.

[210] Statement by Luis Moreno-Ocampo, 16 June 2003.

[211] Rome Statute, *supra* note 23.

of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime".[212]

The Rome Statute does not define what the 'interests of justice' mean. The OTP has noted that a clear definition is not appropriate as situations differ.[213] The OTP stated that the exercise of prosecutorial discretion with respect to the 'interests of justice' is exceptional, and that it will be guided in making such decisions by the objectives and purposes of the Rome Statute. It highlighted that in its view there is a distinction between the 'interests of justice' and the 'interests of peace', and that it must only consider the former.[214] Conversely, Schabas argues that the drafting history of the Rome Statute shows no evidence that the 'interests of justice' was supposed to be distinct from the 'interests of peace'.[215] Taking Schabas's approach the Prosecutor would have to consider whether prosecution of UN peacekeeping personnel is in the 'interests of justice', in particular given the broader implications it could have on peace and security.[216] As stated, the reaction of TCCs could be to refuse to contribute troops to future UN peacekeeping operations.[217] The 'interests of justice' could therefore serve as an additional impediment to prosecution of peacekeepers for SEA by the ICC.

---

[212] The PTC, however, may review decisions made solely on the basis of the 'interests of justice'. Pursuant to Art. 53(3)(a) a referring State can request the PTC to review a decision made the Prosecutor not to proceed with an investigation or prosecution and may ask it to reconsider. The PTC may also do so on its initiative if the Prosecutor's decision is based solely on the 'interests of justice'. See Rome Statute, Art. 53(3)(b), *supra* note 23; See also OTP, *Policy Paper on the Interests of Justice*, September 2007, pp. 6–9.

[213] OTP, *Policy Paper on the Interests of Justice*, September 2007, p. 1; See also Hector Olásolo, "The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or Political Body", in *International Criminal Law Review*, 2003, vol. 3, pp. 87, 141.

[214] OTP, *Policy Paper on the Interests of Justice*, September 2007, pp. 1, 3, 4.

[215] Schabas, 2008, p. 749, *supra* note 147.

[216] Brubacher argues that the 'interests of justice' "requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction". Brubacher, 2004, *supra* note 205.

[217] Any decision of the Prosecutor to proceed in such circumstances could however be counterbalanced by UNSC powers to defer case under Art. 16 of the Rome Statute.

14.1.6. Complementarity and Its Implications

A foundational principle of the ICC is that it is to operate on the basis of complementarity, wherein States have primary jurisdiction over crimes under its jurisdiction. Complementarity is not a new concept, unique to the ICC.[218] It appears to be derived from two streams of thought, the principles of *aut dedere auth judicare*,[219] and subsidiarity in European Union law.[220] The principle of complementarity is primarily set out in Article 17 of the Rome Statute. However, the actual term 'complementarity' does not appear in the Statute itself. Article 17 provides that a case must be determined to be inadmissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwill-ing* or *unable genuinely* to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the *unwillingness* or *inability* of the State *genuinely* to prosecute[221]

Complementarity protects the sovereign prerogative of States to prosecute crimes over which they have jurisdiction.[222] Criminal jurisdiction over military personnel is inextricably linked to notions of national sovereignty. The exercise of criminal jurisdiction by the ICC is exceptional.

---

[218] On the history of the principle of complementarity and its development see Mohammed El Zeidy, "The Relationship between National Jurisdictions and International Criminal Jurisdictions: Historical Development of the Principle of Complementarity", in *Michigan Journal of International Law*, 2002, vol. 23, p. 870; El Zeidy, 2008, *supra* note 170.

[219] M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, 2003, p. 314; William Burke-White, "Implementing a System of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, pp. 59, 62, 65–66; Geert-Alexander Knoops, *Surrendering to the International Criminal Courts: Contemporary Practice and Procedure*, Transnational Publishers, New York, 2002, p. 314.

[220] Subsidiarity in EU law essential relates to idea that the EU will step in areas where States are incapable of achieving the end on their own. It is not the scope of this chapter to deal with the relationship between these principles and complementarity. See further Nidal Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*, Ashgate, 2011.

[221] Rome Statute, *supra* note 23.

[222] *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction, IT-94-1-AR72, A. Ch., 2 October 1995, para. 58.

Under the principle of complementarity for a case to be admissible before the ICC, a state with jurisdiction must not be investigating or prosecuting the case, or have already investigated and decided not to prosecute, unless deemed unwilling or unable genuinely to carry out such an investigation or prosecution.[223] Any national proceedings must cover both the accused and the conduct.[224] In the context of UN peacekeeping operations TCCs, under UN SOFAs, are granted exclusive criminal jurisdiction over their military personnel. Where a SOFA exists the host State is debarred from exercising its jurisdiction over UN military personnel.[225] Therefore any assessment of willingness and ability of a State to investigate or prosecute will relate to the TCC. A case will also be inadmissible under Article 17(1)(c) if "[t]he person concerned has already been tried for conduct which is the subject of the complaint".[226] Article 17(1)(d) provides that the case will be inadmissible if "not of sufficient gravity". This section will focus on the principle of complementarity set out in Article 17(1)(a) and (b).

Article 17 covers 'inaction', 'unwillingness' and 'inability'. Where there is 'inaction' no further analysis of willingness or ability is required for the case to be admissible.[227] When a State Party refers a case to the

[223] Note that the revised MOU similarly provides that the UN may commence an investigation into alleged incidents of SEA by UN military peacekeepers where the TCC proves "unwilling or unable" to do so. Such an investigation however is a preliminary, fact-finding exercise, in order to preserve evidence. The authority to prosecute remains with the TCC. For the text of the revised MOU, see "2008 COE Manual", *supra* note 16.

[224] *Prosecutor v. Ntaganda* , Annex II, Decision on the Prosecutor's application for warrants of arrest, Art. 58 of 10 February 2006, incorporated in the record of the case pursuant to decision ICC-01/04-520, 21 July 2008, ICC-01-04-02-06-20-Anx2, para. 38.

[225] *Model Status of Forces Agreement between the United Nations and Host Countries,* GA 45th Session Agenda Item 76, UN Doc A/45/594, 9 October 1990.

[226] Rome Statute, *supra* note 23.

[227] Informal Expert Paper on Complementarity, ICC-OTP, 2003, p. 7; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA8, Appeals Chamber, 25 September 2009, paras. 78–79; William W. Burke-White and Scott Kaplan, "Shaping the Contours of Domestic Justice/The International Criminal Court and the Admissibility Challenge in the Ugandan Situation", in *Journal of International Criminal Justice*, 2009, vol. 7, pp. 257, 260; Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008, p. 103. As stated by

ICC, or where the Prosecutor acts *propio motu*, Article 18 of the Rome Statute requires that the Prosecutor notify State Parties and States that would normally exercise jurisdiction.[228] A State that ordinarily exercises jurisdiction then has one month to inform the Court that it has or is investigating. If there is no response then the adverse inference is the absence of national proceedings.[229] If the State does respond and requests the Prosecutor to defer to its investigation, the Prosecutor shall defer, save where the PTC nevertheless authorises an investigation. The State's proceedings are then subject to review by the Prosecutor within six months or at such other time as deemed necessary.[230]

If a crime by a UN peacekeeper came under the jurisdiction of the Court the TCC would then have the opportunity to inform the Court that it is taking action and request that any investigation be deferred. Article 18 operates in a sense as an additional complementarity provision, wherein informing States gives them yet another opportunity to exert their primary

---

the Prosecutor in relation to Sudan, "I determined that there are cases that would be admissible in relation to the Darfur situation. This decision does not represent a determination on the Sudanese legal system as such, but is essentially a result of the absence of criminal proceedings related to the cases on which I focus", Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR159, 29 June 2005.

228 While notification is not required when SC refers case presumably that process will lead to notification in practice anyway. Michael Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court", in *Military Law Review*, 2001, vol. 167, pp. 20, 55.

229 Informal Expert Paper on Complementarity, ICC-OTP, 2003, p 18; The term 'proceedings' relates to both investigations and prosecutions. Update on Communication received by the Prosecutor, Iraq response, 9 February 2006; Update on Communication received by the Prosecutor, Venezuala response, 9 February 2006. Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff, 2008, p. 186; The PTC in *Lubanga* stated,

> [c]oncerning the first part of the admissibility test, […] no State with jurisdiction over the case against Mr. Thomas Lubanga Dyilo is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.

See *The Prosecutor* v. *Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, Case no. ICC-01/04-01/06, Pre-trial Chamber I, 10 February 2006, para. 40.

230 Art. 18 of the Rome Statute, *supra* note 23.

jurisdiction.[231] TCCs are required under the revised MOU to inform the UN of any action taken against troops, yet such responses have often not been forthcoming.[232] Threat of an investigation by the ICC might well provide a greater incentive to respond.

Article 20(3) of the Rome Statute provides that the ICC cannot prosecute if an individual has already been tried by another court, unless the prior trial was conducted for the purpose of "shielding" the perpetrator from criminal responsibility or:

> [o]therwise was not conducted independently or impartially […] and were conducted in a manner which, in the circum-stances, was inconsistent with the intent to bring the person concerned to justice.[233]

This is incorporated into the admissibility criteria under Article 17(3).[234]

14.1.6.1. "Genuinely" Investigate and Prosecute

Article 17 requires the State to conduct an investigation or prosecution 'genuinely'.[235] The question arises as to how the genuineness of an investigation or prosecution is to be assessed. The Oxford dictionary definition of 'genuine' is "having the supposed character, not a sham or feigned".[236] Some authors argue that the term is analogous to the concept of good faith.[237] The term 'genuine' was favoured over 'effective' or 'efficient' by

---

[231] Gregory Gordon, "Complementarity and Alternative Justice", in *Oregon Law Review*, 2009, vol. 88, issue 3, pp. 621, 630. The requirement to inform States where it involves a SC referral is less apparent. Although in all probability the Prosecutor would nevertheless inform these States.

[232] Revised Model MOU, text available in COE Manual, *supra* note 16; See also UN Doc. A/C.5/60/26, 11 January 2006; and UN Doc. A/C.4/61/L.21, 28 June 2007. While TCCs are supposed to provide feedback to the UN on action taken against those complicit in SEA, responses have only been forthcoming in a minority of incidents. See further, Note by the Secretary-General, UN Doc. A/61/494, 3 October 2006, pp. 14–15.

[233] Art. 20(3)(a) and (b) of the Rome Statute, *supra* note 23.

[234] While this rule is contained in a number of treaties and domestic laws, it constitutes CIL only with respect to being tried within one state or jurisdiction. Stigen, argues that the ICC could be regarded as a "prolongation of the states parties" jurisdictions', complementing national jurisdiction. Stigen, 2008, pp. 207–208, *supra* note 229.

[235] Informal Expert Paper on Complementarity, ICC-OTP, 2003, p. 8.

[236] *Oxford English Dictionary*.

[237] See further El Zeidy, 2008, pp. 164–165, *supra* note 170.

the drafters of the Rome Statute, given that it was less specific.[238] It was intended to allow for a degree of flexibility.[239] According to an informal expert paper on complementarity, the term 'genuinely' should be applied both to 'unwillingness' and 'inability'. So either the State is genuinely unwilling or genuinely unable. 'Genuinely' has both objective and subjective elements. As Ambos notes it was intended to make the meaning of 'unwilling' or 'unable' more objective, however it nevertheless requires an assessment of whether a State acts in good faith.[240]

'Genuinely' unwilling or unable refers to the national criminal justice process as opposed to the outcome of proceedings.[241] So a State can decide not to prosecute so long as it is a result of genuineness.[242] The burden of proof in demonstrating that proceedings were not genuine will generally be on the Prosecutor.[243] Proving that investigations or prosecutions by TCCs in the context of their troops' complicity in SEA are not 'genuine' would likely prove notoriously difficulty and highly politically sensitive.[244]

14.1.6.2. Unwillingness

Article 17(2) provides some clarification on when a State might be deemed 'unwilling':

> (a) The proceedings were or are being undertaken or the national decision was made for the *purpose of shielding* the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
>
> (b) There has been an *unjustified delay* in the proceedings which *in the circumstances is inconsistent with an intent to bring a person to justice*;

---

238 Xavier Philippe, "The Principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?", *International Review of the Red Cross*, 2008, vol. 88, no. 862, pp. 375, 382.

239 Newton, 2001, p. 54, *supra* note 228.

240 Ambos, 2010, pp. 64–65, *supra* note 190.

241 Stigen, 2008, pp. 216–217, *supra* note 256.

242 Stigen, 2008, pp. 217, *supra* note 229. See also El Zeidy, 2008. pp. 166, *supra* note 170.

243 Informal Expert Paper on Complementarity, ICC-OTP, 2003, p. 17.

244 Sharon Williams and William Schabas, "Article 17", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart Publishing, 2008, pp. 605, 617.

> (c) The proceedings were not or are not being *conducted independently* or *impartially*, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an *intent* to bring the person concerned to justice.

'Unwillingness' according to the Oxford Dictionary means "not intending, purposing, or desiring (to do a particular thing)".[245] Making a determination of 'unwillingness' will obviously be politically sensitive, and will involve at least some subjectivity. It requires an assessment of the 'intent' of the State and the concept of 'good faith' and the 'purpose' of national decisions.[246] The elements of "unjustified delay" and "independently or impartially" require a more objective assessment.[247]

14.1.6.2.1. Shielding

Article 17(2)(a) provides that the Court shall consider whether proceedings were only conducted for the "purpose of shielding the person concerned from criminal responsibility". The question arises whether prosecuting an individual for a lesser offence can be considered as shielding.[248] In the context of UN peacekeepers and SEA, if a crime for instance meets the threshold of a war crime, and the State prosecutes the individual for a disciplinary offence, for example "conduct unbecoming of an officer and a gentleman", can this amount to shielding?[249] This would require an assessment of proceedings taken against peacekeepers by TCCs.[250] With respect to UN military peacekeeper complicity in SEA and other serious offences, investigations have often proved to be lacking, and in the past there has been evidence of efforts to frustrate proceedings and cover-up

---

[245] *Oxford English Dictionary.*

[246] Jessica Gavron, "Amnesties in Light of the Developments in International Law and the Establishment of the International Criminal Court", in *International and Comparative Law Quarterly*, 2002, vol. 51, p. 111; Jurdi, 2011, p. 38, *supra* note 220.

[247] Benjamin Perrin, "Making Sense of Complementarity: The Relationship between the International Criminal Court and National Jurisdictions", in *Sri Lanka Journal of International Law,* 2006, vol. 18, issue 2, pp. 301, 306.

[248] Stigen, 2008, p. 260, *supra* note 229.

[249] Art. 133 of the Uniform Code of Military Justice ('UCMJ'), 10 UCMJ 832.

[250] Kleffner, "*Complementarity in the Rome Statute and National Criminal Jurisdictions*", 2008, p. 135, *supra* note 227.

evidence.[251] Such scenarios leave open the question of proceedings being conducted with the sole purposes of shielding the perpetrator from justice.

The 'purpose' element is, however, difficult to prove as it involves an assessment of the State's intent. The purposive element might be demonstrated where there is written or testimonial evidence. However, it is more likely that reliance will have to be placed on circumstantial evidence. Stigen suggests a list of factors that might be indicative of shielding.[252] Some of these factors might include:

- Few if any successful investigations and prosecutions (Prosecution by TCCs of SEA by UN military personnel is rare).
- Shared purpose between the State and the suspect. It may well not either be in the interests of the TCC or the perpetrator for a prosecution to go ahead, in particular given the reluctance of States to be named and shamed.
- Inadequate legislation. The TCC may simply not have adequate legislation covering the particular offence or ability to act extraterritorially.
- Inadequate allocation of resources. TCC may not have allocated sufficient resources to conduct what could prove to be costly investigations and prosecutions extraterritorially, in particular given the security environment in some mission host States.

[251] Investigation by the Office of Internal Oversight into allegations of sexual exploitation and abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo, UN. Doc. A/59/661. This issue was highlighted, for instance, an early 1990s inquiry into serious human rights abuses, including the rape and torturing to death of a teenage boy, committed by Canadian UN peacekeepers deployed in Somalia. See Sherene Razaak, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping and the New Imperialism*, University of Toronto Press, 2004.

[252] See further, Stigen, 2008, pp. 262–268, *supra* note 229; See Prince Zedi Ra'ad Zeid Al-Hussein, "United Nations Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations", A/59/710, 24 March 2005; On the basis of analysis of IHRL, El Zeidy indentifies a number of other factors that might suggest an individual is being shielded by the State concerned, such as: lack of an effective or serious investigation; lack of records on the investigation; investigation of conduct of armed forces by the same armed forces; hiding reports; cover-ups; manipulation of evidence, *etc*. El Zeidy, 2008, pp. 175–180, *supra* note 170; *Nachova et al. v. Bulgaria*, applications no. 43577/98 and 43579/98, European Court of Human Rights ('ECtHR'), Judgment, 6 July 2005, para. 113.

- Access and security of investigators, and the intimidation of actors in the proceedings.
- Failure to take essential investigative steps. TCCs sometimes have failed to take any investigative steps with respect to serious crimes committed extraterritorially by their troops.
- Inadequate collection and use of evidence. An obvious problem is that when TCCs fail to send experts on national criminal or military law and procedures any evidence gathered by UN investigative bodies. This may not meet evidentiary requirements to be admissible in TCC courts.

It has been suggested that the language of Article 17(2)(a) encompasses the situations envisaged by (b) and (c), namely "unjustified delay", "inconsistent with intent to bring the person to justice" and lack of "independence and impartiality", these merely being illustrative of might be determined an exercise in shielding.[253]

14.1.6.2.2. Unjustified Delay Inconsistent with Intent to Bring to Justice

Article 17(2)(b) provides that a State may be deemed 'unwilling' when there is an "*unjustified delay* […] which in the circumstances is inconsistent with an *intent* to bring the person concerned to justice" (emphasis added).[254] There are three elements to this provision. First the Court must determine that there is a delay. Secondly, such delay must be unjustified; and thirdly it must be "inconsistent with the intent to bring the person concerned to justice" in the particular circumstances. The term 'unjustified' suggests that the State must be granted the opportunity to justify the delay. The term, however, is not further elaborated on in the Statute.[255] El Zeidy argues that 'unjustified delay' in the context of the Rome Statute refers to the whole criminal justice process.[256] The approach of the various IHRL bodies is that persons should be tried without 'undue delay' and

[253] El Zeidy, 2008, p. 170, *supra* note 170; Stigen, 2008, pp. 256–257, *supra* note 229.
[254] Rome Statute, *supra* note 23.
[255] Rome Statute, *supra* note 23.
[256] El Zeidy, 2008, pp. 183–184, *supra* note 170.

'within a reasonable time', which ought to be assessed on a case-by-case basis.[257]

The difficulty with delays in proceedings, in particular when it comes to sexual offences, is that it may render witnesses or evidence unavailable. El Zeidy identifies a number of factors that might be taken into account in assessing whether a delay can be justified, namely: (1) the complexity of the case; (2) the nature of the applicants conduct during proceedings; and (3) the conduct of relevant authorities.[258] Other factors might include the size of the case and the number of victims and witnesses, or the distance between the investigative and prosecuting bodies and the witnesses and evidence, *et cetera*. A comparative approach might be used in assessing whether delay can be justified by comparing the length of time of other national proceedings dealing with similar crimes.[259]

The use of the terms 'in the circumstances' means that the Court needs to consider the surrounding circumstances in order to ascertain the intent of the State in 'unjustifiably' delaying proceedings.[260] This relates to all parts of the proceedings. In the context of SEA by UN military peacekeepers a certain degree of delay seems inevitable given the need to make arrangements for the investigation and prosecution of offences occurring extraterritorially, often in environments with little infrastructure, collapsed or partially collapsed criminal justice systems, *et cetera*. Added to this, any investigation or prosecution activities occurring in the host State requires obtaining the consent of the host State. Furthermore, given

[257] ECHR, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS no. 5, Art. 6(1), available at http://www.unhcr.org/refworld/docid/3ae6b3b04.html, last accessed on 28 August 2011 (hereafter 'ECHR'); Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, Art. 8(1), available at http://www.unhcr.org/refworld/docid/3ae6b36510.html, last accessed on 28 August 2011 ('IACHR'); Art. 7(1)(d) Organization of African Unity, African Charter on Human and Peoples' Rights (hereafter 'Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58, 1982, available at http://www.unhcr.org/refworld/docid/3ae6b3630.html, last accessed on 28 August 2011. See further, El Zeidy, 2002, pp. 184–185, *supra* note 218; Kleffner, 2008, p. 139, *supra* note 227; Art. 21(3) of the Rome Statute requires that the Statute be interpreted in line with IHRL. That stated Art. 21(3) of the Rome Statute does require that the Statute be interpreted in line with IHRL.

[258] El Zeidy, 2008, *supra* note 170.

[259] *Ibid.*, p. 194.

[260] Kleffner, 2008, p. 139, *supra* note 227.

the security situation, societal factors, and the nature of sexual offences, victims may be unwilling to give evidence. When delay becomes 'unjustified' in such circumstances would be difficult to demonstrate.

14.1.6.2.3. Independence and Impartiality

Article 17(2)(c) deals with situations where "*proceedings* were not or are not being conducted *independently* or *impartially*" (emphasis added). The terms 'independently or impartially' may relate to the due process rights of the accused,[261] but it seems in the context of Article 17 they have broader application, given that the lack of independence and impartiality may have the diametrically opposed result of actually working to the advantage of the accused.[262]

'Independence' generally denotes a separation of powers of investigation, prosecution and adjudication, roles which ought to be free from executive interference.[263] According to the ECrtHR 'impartiality' implies "lack of prejudice or bias".[264] 'Independence' and 'impartiality' appear to have a broader meaning under the Rome Statute than in IHRL, as they relate to the whole of the 'proceedings', including investigative organs.[265] There is ample reference to what might constitute sufficient independence and impartiality in the context of judicial proceedings by the various IHRL monitoring bodies and *ad hoc* criminal tribunals. El Zeidy notes that elements that might feed into an assessment of impartiality and inde-

[261] Art. 6(1) ECHR, *supra* note 257; Art. 8(1) IACHR, *supra* note 257; Art. 14(1), *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 United Nations General Assembly Official Records ('UNGAOR') Supp. no. 16, p. 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976 (hereafter 'ICCPR'); Art. 7(1) Banjul Charter, *supra* note 257; See further Kevin Heller, "The Shadow Side of Complementarity: The Effect of Art. 17 of the Rome Statute on National Due Process", in *Criminal Law Forum,* 2006, p. 255.

[262] For a detailed discussion of what independence and impartiality might entail, in particular in light of the jurisprudence of the various IHRL monitoring bodies. See further El Zeidy, 2002, pp. 196–203, *supra* note 218; See also Kleffner, 2008, p. 130, *supra* note 227.

[263] Stigen, 2008, pp. 300–301, *supra* note 229.

[264] *Piersack v. Belgium*, Series no. 53, 1 October 1982, cited in William Schabas 'The Rights to Fair Trail' in Flavia Lattanzi and William Schabas (ed) *Essays on the Rome Statute of the International Criminal Court, Vol II,* Editrice il Sirente, 2003, pp. 90, 276.

[265] Stigen, 2008, p. 300, *supra* note 229.

pendence might include, the independence of an adjudicating body from the executive, and "guarantees against outside pressure".[266]

Military courts have been widely criticised for their lack of independence and impartiality.[267] The European Court of Human Rights ('ECrtHR') noted on a number of occasions that independence includes "[n]ot only a lack of hierarchical or institutional connection but also practical independence".[268] Military disciplinary proceedings or courts martial may give rise to questions of impartiality and independence given the hierarchical structure under which such proceedings tend to operate. This is relevant for our purposes as many UN military peacekeepers complicit in sexual offences may be subject to such proceedings.[269]

14.1.6.2.4. Conclusion

The ICC's Rules of Procedure and Evidence lend some interpretative guidance as to when a State may be deemed 'unwilling'. States may provide the ICC with information on the national justice system and processes, which can feed into an assessment of 'unwilling' or 'unable'.[270] Eval-

[266] El Zeidy, 2002, pp. 202–203, *supra* note 218.

[267] John McKenzie, "A Fair and Public Trial", in Eugene Fidell and Dwight Hall Sullivan (eds.), *Evolving Military Justice*, Naval Institute Press, 2002, p. 230; Report of the Special Rapporteur on the Independence of Lawyers and Judges, 30 March 1998, Report of Mission to Columbia, UN Doc. E/CN.4/1998/39/Add.2; The HRC in its Concluding Observations on Guatemala highlighted that the wide jurisdiction of the military court there "to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations […]". *Concluding Observations of the Human Rights Committee 27 august 2001 (Guatemala)*, para. 20, cited in Stigen, 2008, p. 308, *supra* note 229.

[268] In the Hugh Jordan case before the ECtHR, the Court found that there was lack of insufficient impartiality given the hierarchal link between those police officers under investigation and those conducting it, and those instituting disciplinary or criminal proceedings. *Hugh Jordan v. United Kingdom*, Judgment, application no. 24746/94, 4 May 2001, para. 120; See also *Finucane v. The United Kingdom*, Application no. 29178/95, ECrtHR, Judgment (Merits and Just Satisfaction), 4 May 2003, para. 68*; Hugh Jordan v. United Kingdom*, Judgment, application no. 24746/94, 4 May 2001, para. 120.

[269] Others may be tried before civilian courts for serious criminal offences committed abroad, depending on the laws on the particular TCC.

[270] Such information should show "that its Courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". Rule 51, ICC *Rules of Procedure and Evidence*.

uations of 'unwillingness' with respect to the investigation and prosecution of UN military peacekeepers would have to be made on a case-by-case basis. This could prove complex, in particular given the extraterritorial nature of these offences and the environments in which they are committed. The granting of immunity under the terms of the Status of Forces Agreement ('SOFA') from host State jurisdiction could also be deemed a form of unwillingness on the part of the host State. Assessment would need to focus of the TCC's proceedings or lack thereof. Different parts of a State makeup may display a greater or lesser degree of willingness.[271] For instance, while a State's judiciary might be willing to investigate and prosecute, the military may attempt to hinder the investigation through refusal to co-operate.

14.1.6.3. Inability

Article 17(3) relates to a States inability to bring a perpetrator to justice, wherein, "due to a *total or substantial collapse* or *unavailability* of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (emphasis added).[272] This sets forth two scenarios amounting to inability, which are phrased in the alternative. Firstly, a State may be unable due to its judicial system being in a state of "total or substantial collapse", rendering it either "unable to obtain the accused or the necessary evidence and testimony *or* otherwise unable to carry out its proceedings". The second scenario is where a State's judicial system is "unavailable" rendering it either "unable to obtain the accused or the necessary evidence and testimony *or* otherwise unable to carry out its proceedings".

Inability, at first sight, appears more straightforward than unwillingness, as an assessment of inability is more objective. It is significant that Article 17(3) refers to 'collapse' or 'unavailability'. It may entail inability to obtain the accused or evidence and witness testimony or there may be some other factor causing inability. This provision is of particular relevance to cases of SEA by UN military peacekeepers. Firstly, the host State may be unable to exercise its jurisdiction due to the exclusive criminal jurisdiction of the TCC granted under the SOFA. Secondly, in environments where UN peacekeeping missions are deployed the host State

[271] ICC-OTP, "Informal Expert Paper on Complementarity", 2003, p. 14.
[272] Rome Statute, *supra* note 23.

judicial system may be in a state of "total or substantial" collapse. The TCC's judicial system, however, is unlikely to be in a state of "total or substantial" collapse.

That said, while TCCs will generally have a functioning judicial system at national level, they may nevertheless be unable to render this fully operative in the host State. Therein "*or* unavailability" may apply. A number of factors may feed into this. Firstly, lack of infrastructure in addition to broad geographic areas may make it difficult or impossible to locate victims, witnesses and evidence. Secondly, host State co-operation and consent is necessary for any part of criminal proceedings to take place in its territory. Thirdly, with respect to conducting criminal proceedings in the host State, many TCCs may not have the capacity or the necessary domestic legislation to conduct on-site courts martial or other proceedings, and distance may render prosecution in TCC ineffective, or at least extremely difficult. [273] Fourthly, conducting criminal investigations abroad, in particular in conflict or post-conflict environments, may prove extremely costly. Fifthly, the TCC may lack expertise in prosecuting offences, in particular offences that violate international law, occurring extraterritorially; and expertise in dealing with sexual offences against women and children. Other barriers may include lack of cultural awareness, victim and witness protection, evidentiary requirements, or the ability to use evidence gathered by host State authorities or by the UN CDU or OIOS, and obvious linguistic issues. This list could go on.

One of the difficulties with complementarity is that it may require a detailed examination of, and certainly knowledge of States' legal systems.[274] That stated admissibility may only necessitate an assessment of a State's legal system insofar as it relates to specific misconduct by military personnel deployed overseas.

In the OTP's report on complementarity, it listed the following factors as indicative of 'inability':

> lack of necessary personnel, judges, investigators, prosecu-tor; lack of judicial infrastructure; lack of substantive or procedural penal legislation rendering system "unavailable"; lack of access rendering system "unavailable"; obstruction by uncontrolled

[273] United Nations General Assembly, "Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, delivered to the General Assembly", UN Doc. A/59/710, 24 March 2005 (hereafter 'Comprehensive Review').

[274] Stegmiller, 2009, p. 548, *supra* note 132.

> elements rendering system unavailable; amnesties, immunities rendering system "unavailable".[275]

Some authors suggest that the inadequacy of domestic laws in reflecting crimes under the Rome Statute could arguably amount to 'inability', as this might result in an otherwise ICL offence been prosecuted as a lesser offence.[276] This raises the question of whether a case can be deemed admissible if prosecuted as a lesser offence under national law, for example as rape instead of a war crime.[277] The Special Rapporteur on rape, sexual slavery and slave-like practices in armed conflict stated:

> [I]n evaluating the competence of national judicial systems to adjudicate international crimes is the extent to which the national system in question protects the rights of women. In particular the existence of gender biases in municipal laws of procedures must be taken into account when assessing the general competence of domestic courts.[278]

The principle of legality or *nullem crimen, nulla poena sine lege* may mean that domestic courts in such scenarios are unable to prosecute, at least for the relevant international law offence.[279] However, the Rome Statute refers to unavailability of domestic judicial systems as opposed to domestic legislation.[280] Under Article 88, States are not required to adopt legislation implementing Statute crimes at national level, but rather legis-

---

[275] Informal Expert Paper on Complementarity, ICC-OTP, 2003, p. 15.

[276] Kleffner, 2008, p. 130, *supra* note 227; El Zeidy, 2002, pp. 228, *supra* note 218; See Dawn Sedman, "Should the Prosecution of ordinary crimes in Domestic Jurisdictions Satisfy the Complementarity Principle?", in Carsten Stahn and Larissa van den Hreik (eds.), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, 2010; M. Benzig, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty an Fight against Impunity", in *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, p. 59; Katherine L. Doherty and Timothy L.H. McCormack, "'Complementarity' as a Catalyst for Comprehensive Domestic Penal Legislation", in *U.C. Davis Journal of International Law and Policy*, 1999, vol. 5 p. 147.

[277] Note that the *ne bis in idem* principle set out under Art. 20(3) of the Rome Statute focuses on trying a person for the same conduct twice. Schabas, 2004, p. 88, *supra* note 42; Sedman argues that what matters is that the same conduct is not prosecuted, but does not preclude prosecution for a separate offence that does not involve the same conduct. Sedman, 2010, pp. 259, 262, *supra* note 276.

[278] Special Rapporteur Gay McDougall, "Systematic Rape, Slavery and Slave-like Practices During Armed Conflict", UN Doc E/CN.4/Sub.2/2000/21, 6 June 2000, para. 42.

[279] Kleffner, 2008, p. 130, *supra* note 227.

[280] On possible inadequacy of some States domestic laws to prosecute crimes under Rome Statute, see further Perrin, 2006, p. 310, *supra* note 247.

lation enabling them to co-operate with the Court.[281] Perrin suggests, however, that it is plausible that the Prosecutor could argue that the crime under the Rome Statute had not actually been prosecuted.[282]

14.1.6.4. Conclusion

While the principle of complementarity at first glance might suggest that the ICC works as system of 'proxy-justice' for ICL offences where states prove unwilling or unable to act, this goes too far, romanticising the institution and its capabilities.[283] When it comes to SEA by UN peacekeepers it seems possible that complementarity could in exceptional circumstances be overcome, but it would likely prove extremely contentious. This added to the other barriers, mentioned above, make prosecution by the ICC extremely improbable, save in the most exceptional of circumstances, and even in such cases it is questionable whether it would even be desirable for it to do so. Having said that, I would like to address a related question, how else might the ICC play a role in encouraging the enforcement of ICL either through domestic of hybrid courts?

Perrin argues that complementarity under the Rome Statute is best understood in terms of six separate roles to be played by the ICC, namely: "a safety net", where no state takes action; a "catalyst"; a "monitor" of states willingness or ability; "a passive standard setter"; an "intervener", where it proceeds to investigate and prosecute; and a "burden sharer" where a division of labour is agreed between the ICC and a State.[284] The

[281] Art. 88 of the Rome Statute, *supra* note 23; On State obligations to prosecute or extradite pursuant to the Rome Statute, see further Payam Akhavan, "Whither National Courts? The Rome Statute's Missing Half", in *Journal of International Criminal Justice*, 2010, vol. 8, pp. 1245–1266.

[282] Perrin, 2006, p. 310, *supra* note 247.

[283] Robert Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law", in *Stanley Journal of International Law*, 2007, vol. 43, pp. 39, 50.

[284] "A safety net" refers to the ability of the ICC to step in where no State with jurisdiction takes action against the perpetrator. The "monitor" role most clearly arises when the ICC defers to State jurisdiction under Art. 18. However, it might also arise when examining the 'inability' or 'unwillingness' of a State to investigate or prosecute. The monitoring of national proceedings may well encourage States to ensure such proceedings are effective. The "passive standard setter" role is reflected by the mere existence of the ICC and threat of ICC intervention, which has pushed many States to implement the crimes set out in the Rome Statute domestically. The role of "interven-

possible 'catalyst' function refers to the potential for the Prosecutor to encourage States to exercise their jurisdiction, for instance through using the notification requirement as a method by which to pressurise States.[285] It is solely to this possible role of the ICC as a 'catalyst' that we will turn to in the proceeding Section, in the context of positive complementarity.

14.1.7. Positive Complemetarity

The Preamble of the Rome Statute emphasises "that it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes".[286] It further provides:

> […] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[287]

Therefore the primary obligation to prosecute international crimes rests with States.[288] It is widely accepted that international and/or internationalised courts should only exercise jurisdiction over serious international crimes where national courts prove unable or unwilling.[289] One of the primary objectives of complementarity is "[t]o serve as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes".[290] Alternatively this might be referred to as a 'catalyst' function of the ICC, acting indirectly to encourage States to meet their international law obligations to

er" is when the ICC proceeds to investigate and prosecute alleged crimes. Finally, the "burden sharer" role, while also involving ICC intervention, works in cooperation with the State, wherein the ICC takes on certain cases that may be difficult for the State to pursue, yet the State proceeds with cases against other perpetrators within the situation. Perrin, 2006, pp. 301–302, *supra* note 247. In relation to the possible division of labour between the ICC and the DRC, see "Statement of the Prosecutor Luis Moreno-Ocampo to Diplomatic Corps", The Hague, Netherlands, 12 February 2004.

285 Perrin, 2006, p. 312, *supra* note 247.

286 Rome Statute, *supra* note 23.

287 *Ibid.*

288 Jurdi, 2011, pp. 1, 3, *supra* note 220.

289 See for example, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies", Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, para. 40.

290 Informal Expert Paper on Complementarity, ICC-OTP, 2003, p. 3.

prosecute those responsible for core international crimes.[291] The Prosecutor stated that the ICC should be measured not on the number of cases that come before it, but the absence of trials coming before the Court "as a consequence of the regular functioning of national institutions".[292]

Bearing in the mind that the ICC has limited resources, even if a case could be deemed admissible, how many UN military peacekeepers complicit in SEA could realistically be brought before the ICC? It is worth noting that offences which may be grave in nature but which do not meet the stringent jurisdictional requirements, or other barriers posed by the Rome Statute, may be easier to prosecute under a domestic or other legal framework which also covers lesser offences. The encouragement of prosecutions at a national of hybrid level may produce more effective outcomes, both in terms of deterrence and the expressive value of prosecution of such personnel.[293] I will return to this presently. Here it will be argued that the ICC may nevertheless have an important residual role to play, which is best expressed through positive complementarity, through acting as a catalyst for prosecutions at TCC or failing this a hybrid court level. The OTP has stated, while it will concentrate on those most responsible for international crimes it will "encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means".[294]

'Positive complementarity' is the idea that the ICC should use its position to encourage national prosecutions and to increase avenues for

[291] Individual criminal responsibility and State responsibility and even international organisation responsibility might be regarded as component parts of international responsibility. André Nollkaemper, "Concurrence between individual criminal responsibility and state responsibility in international law", in *International Criminal Law Quarterly*, 2003, vol. 52, p. 615.

[292] Statement by the Prosecutor, 16 June 2003, available at http://www.iccnow.org/ documents/MorenoOcampo16June03.pdf, last accessed on 18 June 2011.

[293] Lisa Laplante, "The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence", in *John Marshall Law Review*, 2010, vol. 43, pp. 635, 645–646.

[294] "Paper on Some Policy Issues Before the Office of the Prosecutor", September 2003, available at http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf, last accessed on 1 June 2011.

criminal justice to be delivered.[295] According to the OTP in taking a positive approach to complementarity, it encourages national proceedings where possible, relies on national and international networks, and participates in a system of international co-operation.[296] Laplante refers to this idea as envisaging the ICC as a 'catalyst', encouraging states to realise their own pre-existing obligations under international law.[297] The mere threat of ICC investigations may encourage States to exercise their primary jurisdiction.[298] The OTP notifies States with jurisdiction very early on of any action that might be taken.[299] This is one mechanism that can be used to promote national prosecutions, wherein States may wish to avoid adverse political reaction and "naming and shaming". Danner identifies a number of levels at which the ICC Prosecutor interacts with national systems, including: "with states' executives (through requests for co-operation), with states' legislatures (by seeking legislation enabling co-operation between the state and the Court), and, indirectly, with states' judiciaries (by monitoring whether domestic proceedings fulfil the requirements of the admissibility regime)".[300] These interactions can be used for encouraging domestic prosecutions, as might provisions in the Rome Statute requiring State Parties to co-operate with the ICC.[301] The ICC

[295] Laplante, 2010, pp. 635, 646, *supra* note 293; See further William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", in *Harvard International Law Journal*, 2008, vol. 49, pp. 53, 54.

[296] Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003; See also "Statement of the Prosecutor Luis Moreno-Ocampo to Diplomatic Corps", The Hague, Netherlands, 12 February 2004.

[297] Laplante, 2010, p. 648, *supra* note 293.

[298] Burke-White, 2008, p. 73, *supra* note, 295; Heller, 2010, p. 248, *supra* note 43.

[299] *Referrals and Communications*, Annex to "Paper on some policy issues before the Office of the Prosecutor", September 2003, para. I(B).

[300] Danner, 2001, pp. 474–477, *supra* note 57.

[301] Under Art. 86 of the Rome Statute, State Parties are required to co-operate with ICC investigations and prosecutions. Art. 88 requires states to adopt laws allowing them to co-operate with Court. Under Art. 87, non-State Parties whose personnel deployed on UN operations commit serious offences under the jurisdiction of the Court are not obliged to co-operate, unless they voluntarily enter into an agreement with the ICC to do so. Under Art. 54(3) of the Rome Statute the Prosecutor can enter into cooperation's arrangement with States and International Organisations in order to facilitate investigations. Rome Statute, *supra* note 23.

might also serve as a catalyst for domestic justice sector reform.[302] Where genuine investigations and prosecutions can be encouraged by the Prosecutor it is clearly more resource effective for the State to prosecute than the ICC.[303]

While positive complementarity is not provided for in the Rome Statute, Burke-White puts forward three justifications for a role for the Prosecutor through positive complementarity: (1) it is not prohibited by the Rome Statute; (2) the Prosecutor's express powers could allow him to employ this tactic; and (3) as do the Prosecutor's inherent powers.[304] Articles 15, 18 and 53, as discussed above, allow for a series of communications between the Prosecutor and States, and continued monitoring of national proceedings when the Prosecutor defers to State jurisdiction.[305] Arguably these communications can be used as a conduit through which to encourage, advise, and perhaps even lend some support to genuine national level investigations and prosecutions.[306] Moreover, Article 54(3) specifically allows the Prosecutor to enter into co-operation agreements with States.[307] Burke-White suggests that the Prosecutor may also have inherent powers to advance the principle of positive complementarity given the object and purpose of the Statute is to eradicate impunity for the core crimes set out therein.[308]

According to an informal expert paper produced by the OTP, "partnership" and "vigilance" are key "guiding principles" of complementarity.[309] It further envisages enhancing the impact of the ICC in part through "encouragement and co-operation"; "through the prospect of the ICC exercising jurisdiction"; "through its own exemplary and standard-setting

[302] William Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Governance in the Democratic Republic of the Congo", in *Leiden Journal of International Law*, 2005, vol. 18, pp. 557, 568–574.

[303] William Burke-White, 2008, p. 62, *supra* note 219.

[304] *Ibid.*, p. 63.

[305] Rome Statute, *supra* note 23.

[306] See further, Burke-White, "Implementing a System of Positive Complementarity", 2008, pp. 67–68, *supra* note 219.

[307] Art. 54(3) of the Rome Statute, *supra* note 23; Burke-White, "Implementing a System of Positive Complementarity", 2008, p. 68, *supra* note 219.

[308] Burke-White, 2008, pp. 68–69, *supra* note 219.

[309] Informal Expert Paper on Complementarity, ICC-OTP, 2003, pp. 3-4.

proceedings"; and "through its moral presence".[310] Article 93(10) Of the Rome Statute contemplates this:

> The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.[311]

This may include requests for assistance also from non-State parties,[312] expanding its potential field of influence. Assistance might include statements, documents and other forms of evidence, or potentially even technical assistance, training, and brokering assistance between states.[313]

The ICC's OTP could potentially provide technical support to national judiciaries through the OTP's outreach programme. Various legal experts have suggested mechanisms for doing so including: legislative and technical assistance, capacity building, "assistance with construction of physical infrastructure",[314] assistance with investigations, training, resources,[315] and dissemination of codes of best practices for domestic prosecutions.[316]

The OTP's Jurisdiction, Complementarity, and Co-operation Division ('JCCD') is already working on establishing networks for international co-operation, not only through engagement with States but also with other stakeholders.[317] It is possible that such networks could be developed to include transnational networks, which could through mutual agreements be used to exert ICC influence over effective national level prosecutions. Such networks might incorporate bodies already involved in RoL capacity-building efforts in many peacekeeping mission States. The ICC has also made available legal tools, including a case matrix, an ele-

---

310 *Ibid*., pp. 4-5.

311 Rome Statute, *supra* note 23.

312 Art. 98(10)(c) of the Rome Statute, *supra* note 23.

313 ICC-OTP, "Informal Expert Paper on Complementarity", 2003, p. 6.

314 *I.e*., courts, detention facilities, *etc*. "Report of the Bureau on Stocktaking: Complementarity", CC-ASP/8/51, 22–25 March 2010, pp. 4–5, para. 17.

315 Burke-White, 2008, pp. 92–93, *supra* note 295.

316 *Ibid.*, p. 93.

317 See International Criminal Court, "How is the Office of the Prosecutor Organized?", http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/faq/how%20is%20the%20office%20of%20the%20prosecutor%20organized_, last assessed on 10 July 2011.

ments digest, a proceedings digest, and a means of proof digest, which provide some basic guidance for domestic level prosecutions.[318]

Laplante notes that an obvious difficulty with positive complementarity is that it may give rise to disparities between national criminal legislation and the Rome Statute.[319] A number of authors are skeptical of the ICC's capacity to assist or support national courts in the prosecution of international crimes given resource constraints.[320] Just how much of a role the ICC can play through positive complementarity is uncertain, in particular given that it could divert resources from actual prosecutions by the Court. However, if the ICC was to work of the basis of positive complementarity this could also be a mechanism by which to encourage national level prosecutions of UN military peacekeepers if they are complicit in crimes under the Court's jurisdiction. It might also support any alternative mechanism to hold such persons to account, such as a hybrid or tri-hybrid justice mechanism, when TCC's prove unwilling or unable to exercise their primary jurisdiction, which is explored in section 14.2.

14.2. Alternative Justice Mechanisms

Firstly, it seems best to view the ICC as one of a number of bodies that could plausibly feed into the overall responsibility framework for SEA by UN military personnel, but one that cannot even begin to resolve the issue of responsibility for SEA. As discussed in section 14.1, practical and legal limitations make it unlikely and perhaps unjustifiable for the ICC to prosecute UN military personnel for SEA, save in exceptional circumstances. Furthermore, the ICC is obviously incapacitated to a large extent by resource constraints.[321] Many acts of SEA may not even constitute war crimes or crimes against humanity, in particular as set out under the Rome Statute. This is not to state that SEA committed by UN peacekeeping per-

[318] The case matrix is aimed at judges, investigators, prosecutors, defence, NGOs and victim representatives. These tools are designed to be adaptable to various national criminal justice systems to assist in the management of complex legal case involving elements of international criminal law. Available at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools/, last assessed on 10 July 2011.

[319] Laplante, 2010, pp. 660–661, *supra* note 293.

[320] Baylis, 2009, p. 25, *supra* note 176; Burke-White, 2008, p. 98, *supra* note 295.

[321] Gabriel Bottini, "Universal Jurisdiction After the Creation of the International Criminal Court", in *New York University journal of International Law and Politics*, 2004, vol. 36, pp. 503, 547.

sonnel is not of a serious nature or are simply ordinary criminal offences. Peacekeepers have a duty of care and a duty to protect civilian populations.[322] SEA breaches the special relationship of trust between the UN and local populations. The position taken by the UN Secretariat on this issue is that such crimes:

> […] should not be viewed as merely domestic crimes. The fact that alleged offenders are individuals who have been placed in a position of trust in the host State to serve the international community, as well as the impact that crimes have on the image and credibility of the international mandate, warrants the establishment of jurisdiction on an extradite or prosecute basis.[323]

It is further noted that the Convention on the Safety of United Nations and Associated Personnel provides this basis for jurisdiction for crimes committed against peacekeeping personnel given their special status, and that a similar rationale should apply when these persons commit serious offences against the civilians that they have been sent to protect.[324] To ignore the seriousness of these crimes disregards not only their abhorrent nature, but also how they undermine UN mission mandates and thereby international peace and security.[325] To date, TCCs have not proven the most successful avenue for holding such personnel to account, therefore some alternative form of institutionalised mechanism appears warranted.

Pursuant to Resolution 59/300, a Group of Legal Experts ('GLE') was established by the SG to examine the legal aspects of criminal accountability of UN officials and experts on mission.[326] In 2006, the GLE issued a report, which included a sample draft Convention on Criminal Accountability of UN Officials and Experts on Mission.[327] The GLE cor-

[322] According to the SG, SEA by UN military personnel is "a violation of the fundamental duty of care that all United Nations peacekeeping personnel owe to the local population that they are sent to serve". The Secretary-General, "Introduction", in *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects* ('Comprehensive Review'), 2005, *supra* note 273.

[323] Secretariat Note, UN Doc. A/62/329, 11 September 2007, para. 32.

[324] *Ibid.* Secretariat Note, UN Doc. A/62/329, paras. 32–33.

[325] *Ibid*., paras. 11–12.

[326] For developments in relation to this issue see further http://www.un.org/law/criminal accountability/index.html, last accessed on 20 August 2011.

[327] The draft Convention on Criminal Accountability of UN Officials and Experts on Mission was designed solely to illustrate what such a Convention might resemble. Report of the Group of Legal Experts, "Ensuring the Accountability of United Na-

rectly noted that SEA may well fall somewhere in between an ordinary criminal offence and an international crime, and suggested that balance is best sought through an "extradite or prosecute" approach, underpinned by a treaty.[328] One of the possibilities briefly explored in the GLE's report was the creation of a separate institutionalised hybrid justice mechanism at international level to address criminal offences, albeit solely with respect to those committed by UN officials and experts on mission. UN military personnel are a distinct category of personnel.[329] The report and suggestions made therein are currently under consideration by the UN.[330]

The GLE was not mandated to examine accountability of UN military contingents.[331] The GLE therefore did not consider the inclusion of UN military peacekeepers within the remit of its proposals, in part due to its terms of reference.[332] It was felt that unlike UN officials and experts on

tions Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations", UN doc. A/60/980, 16 August 2006. See further Marco Odello, "Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers", in *Journal of Conflict and Security Law*, 2010, vol. 15, issue 2, pp. 347, 354; Melanie O'Brien, "Issues of the Draft Convention on Criminal Accountability of United Nations Officials and Experts on Mission", in Noëlle Quénivet and Shilan Shah-Davis (eds.), *International Law and Armed Conflict Challenges in the 21st Century*, 2010, pp. 57–75.

328 Report of the Group of Legal Experts, "Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations", UN doc. A/60/980, 16 August 2006, para. 58 ('GLE Report').

329 See further Burke, 2011, pp. 63–104, *supra* note 17.

330 The item will continue to be considered until the 67th session of the GA. For developments in relation to this issue, see further http://www.un.org/law/criminalaccountability/index.html, last accessed on 24 August 2011.

331 I refer here solely to UN military personnel and not to military observers who generally come under the category of "experts on mission". I was also not mandate to consider issues of vicarious liability of the UN or Member States; GLE Report, 2006, fn. 3, *supra* note 328.

332 "Report of the Ad Hoc Committee on Criminal Accountability of United Nations Officials and Experts on Mission", First Session, UN Doc A/62/54, 9–13 April 2007, para. 21; The UN Secretariat however has stated that any Convention if drawn up should apply equally to Chapter VI and Chapter VII operations. See UN GA, "Note by the Secretariat: Criminal Accountability of United Nations Officials and Experts on Mission", UN Doc. A/62/329, 11 September 2007, para. 36; While not applicable to UN military contingents, the GA has passed a number of Resolutions in which it strongly urges or encourages states to take action to combat SEA, including through clarifying and/or extending their extraterritorial jurisdiction over nationals on UN operations and

mission, military contingents are already subject to TCC criminal/military justice systems, so no jurisdiction gap arises. Separately, but in parallel, the issue of accountability of UN military contingents was studied by another expert group.[333] Steps were taken to revise the Model MOU between the UN and TCCs in order to require TCCs to ensure their military personnel are held to account, however, there is little in the way of enforcement.[334] The problem is that while military personnel might not necessarily fall within a jurisdictional gap, impunity nevertheless is evident given the reluctance of TCC to hold soldiers to account. It is not within the scope of this Chapter to analyse revisions to the MOU.[335] Nor will I examine the possible advantages of a Convention on Criminal accountability, and its extended application to UN military personnel.[336]

through cooperation with other states and the UN. GA Resolution 64/110, 15 January 2010; GA Resolution 62/63, 8 January 2008; GA Resolution 63/119, 11 December 2008; GA Resolution 65/20, 10 January 2011; See also UN Docs A/62/448 (2007) and A/63/437 (2008).

333 See "Report of the Group of Legal Experts on making the standards contained in the Secretary-General's bulletin binding on contingent members and standardising the norms of conduct so that they are applicable to all categories of peacekeeping personnel", UN Doc. A/61/645, 18 December 2006.

334 For a copy of revised MOU, see COE Manual, *supra* note 16; For discussion of the revisions made to the MOU, see generally, Zsuzsanna Deen-Racsmany, "The Amended UN Model Memorandum of Understanding: A New incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", in *Journal of Conflict and Security Law*, 2011, vol. 16, issue 2, pp. 1–35.

335 Suffice to state that the revisions re-affirm TCC exclusive criminal jurisdiction over UN military contingents; they detail investigative procedures which, while somewhat weakening UN investigative capacity, strengthen the possible admissibility of evidence in TCC courts; and to some extent the revisions clarify applicable rules and standards of conduct. See generally Deen-Racsmany, 2011, pp. 1–35, *supra* note 334.

336 There has been some debate on the exclusion of military contingents from the remit of any proposed Convention by the first GLE. Mr. Bichet (Switzerland), UN Doc. A/C.6/62/SR.6, 6 November 2007; Mr Kanyimbue (DRC), 6th Committee, UN Doc. A/C.6/64/SR.7, 10 November 2009, paras. 19 and 41; Mr Saripudin (Indonesia), 6th Committee, UN Doc. A/C.6/63/3R.5, para. 52; For further discussion of the Draft Convention, see generally O'Brien, 2010, *supra* note 18; See also Deen-Racsmany, 2011, pp. 32–34, *supra* note 334; The adoption of a Convention could add weight to the prohibition of SEA, clarify what types of conduct are considered sexual exploitive or abusive, provide for the protection of victims and witnesses, in addition to providing for a more robust legal framework in which States and the UN could better cooperate. Furthermore such a Convention might cater better towards the unique environment in which these offences take place.

The GLE highlighted the need for primacy of host State jurisdiction over UN officials and experts on mission,[337] for reasons amongst which is respect for sovereignty, and to allow easier access to witnesses and evidence.[338] It correctly observed that host State prosecution would be in line with the requirement that peacekeepers respect local laws.[339] It is suggested that where the host State criminal justice system proves inadequate, it might be possible to locate partial or shared jurisdiction with other States in the various phases of proceedings.[340] It suggested that a hybrid mechanism could if necessary be established, incorporating international personnel to bolster the host State's criminal justice system.[341] Such tribunals could have an investigative, judicial, prosecutorial and administrative component.[342] For the purpose of this chapter, I will focus primarily on this singular aspect of the GLE's report, namely, the establishment of hybrid courts, in view of their possible application to UN military peacekeepers.

This section will question what might be the advantages and disadvantages of such an institutionalised mechanism. I will argue that a hybrid or tri-hybrid justice mechanism may provide for an appropriate alternative forum in which to prosecute UN military personnel.[343] That stated, the make-up of the GLE's hybrid model, which foresees locating jurisdiction in the host State, I contend is not suited to the prosecution of UN military personnel. Instead I will put forward some tentative suggestions for the establishment of some form of a tri-hybrid system with at least partial jurisdiction remaining located in the TCC legal system. It will be argued that a tri-hybrid justice mechanism might allow for partial or shared juris-

337 GLE Report, 2006, para. 44(a), *supra* note 328.

338 It noted that the major advantage of criminal trials being conducted in the host State is that it would, "avoid the cost, delays and inconvenience of witnesses having to travel overseas and evidence having to be transmitted abroad". *Ibid.*, para. 27(b).

339 *Ibid.*, para. 27 (c)(d).

340 *Ibid.*, paras. 40–44; See further, Noëlle Quenivét, "The dissonance between the United Nations Zero-tolerance Policy and the Criminalization of Sexual Offences on the International Level", in *International Criminal Law Review*, 2007, vol. 7, no. 4, pp. 657, 666.

341 GLE Report, 2006, paras. 29–33, *supra* note 328.

342 *Ibid.*, paras. 33–37.

343 See also Statement of the Swizz Representative at the Sixth Committee, UN Docs A/C.6/62/SR.6 (2007) para. 19; Mr Kanyiambue (Democratic Republic of the Congo), UN Doc A/C.6/64/SR.7 (2009), para. 41.

diction at multiple levels; the UN, the TCC and the host State. That stated, I do not contend that the establishment of a hybrid justice would not be met with significant practical and legal difficulties, not least TCC resistance to any external interference in prosecution of their soldiers. Finally, I will touch on some possible justifications for punishment of UN military peacekeepers complicit in SEA at an international or internationalised level. Focusing solely on deterrence and norm expression, I will posit that these goals might be better met by a hybrid or tri-hybrid justice mechanism than in the forum of the ICC.

14.2.1. Hybrid Justice Mechanism

Hybrid courts emerged largely as a response to what were perceived as failures or limitations of international courts, such as the ICTY and ICTR, not least on account of slow pace of trials and costs involved.[344] A hybrid court is not an international tribunal but rather an 'internationalised' national court; internationalised in terms of both the law applied and personnel involved in the investigative and trial process. The practice of applying an amalgamation of domestic and international law, and using domestic and international staff has precedence, such as courts created in Sierra Leone, East Timor, Cambodia and Kosovo.[345] The East Timorese hybrid tribunal, the Crimes Panels of the District Court of Dili, for instance had two international and one East Timorese judge on each panel. The Panels were charged with jurisdiction over a mixture of international and domestic crimes, including crimes against humanity, war crimes, murder, sexual offences, genocide and torture.[346] Prosecutors and investigators also were drawn from a mix of international and domestic personnel.[347] The hybrid justice system created in Sierra Leone was treaty-based and also

[344] Ralph Zacklin, "The Failings of Ad hoc International Tribunals", in *Journal of International Criminal Justice*, 2004, vol. 2, issue 2, pp. 541–545; Rosanna Lipscomb, "Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan", in *Columbia Law Review*, 2006, vol. 106, pp. 182, 205.

[345] Laura Dickinson, "The Promise of Hybrid Courts", in *American Journal of International Law*, 2003, vol. 97, pp. 295, 296–298.

[346] UNTAET, UN Reg. no. 2000/11, Section 10(1), 6 March 2000.

[347] David Cohen, "'Hybrid' Justice in East Timor, Sierra Leone and Cambodia: 'Lessons Learned' and Prospects for the Future", in *Stanford Journal of International Law*, 2007, vol. 43, p. 8; Dickinson, 2003, pp. 298–299, *supra* note 345.

had mixed jurisdiction.[348] While not operating under the national criminal justice system, it nevertheless applied both domestic and international law, and involved both international and national personnel.[349] It also had a mix of domestic and international judges, with a slight majority being international.[350] On the other hand, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') was integrated into the Cambodian domestic court system and applies Cambodian law, and has a majority of domestic judges with a minority of international.[351] In the Regulation 64 Panels in Kosovo, foreign judges and lawyers sat with their domestic counterparts, to try those suspected of war crimes and other serious ethically motivated crimes.[352] The majority of the judges were foreign. The law that was applied again consisted of an amalgamation of international and domestic law.[353]

While not without their flaws, a clear benefit of hybrid courts is that they have the capacity to draw on the advantages of national and international courts, and they tend to be more adaptable. The establishment of a hybrid justice system could allow for the gradual building of expertise if granted jurisdiction to deal with particular types of offences, such as serious extraterritorial criminal conduct by UN troops, in particular sexual offences. In this context, national systems, both TCCs and host States, could gain expertise in dealing with such cases. Hybrid courts provide a valuable process in which domestic legal professionals, including judges, prosecutors, investigators and researchers, can learn more about international law, how to interpret it, and its implementation through day-to-day interaction with their foreign counterparts.[354] The degree of capacity-building

[348] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, para. 9.

[349] Art. 5 covers a range of domestic law offences, including abuse of girls under 13/14. UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, available at http://www.unhcr.org/refworld/docid/3dda29f94.html, last accessed on 28 August 2011.

[350] Appendix, UN Doc. S/2002/246.

[351] Tanaz Moghadam, "Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals", in *Columbia Human Rights Law Review*, 2008, vol. 39, pp. 471, 493.

[352] Laura Dickinson, "The Relationship between Hybrid Courts and International Courts: The Case of Kosovo", in *New England Law Review,* 2003, vol. 37, pp. 1059, 1062.

[353] *Ibid.*, pp. 1063–1064.

[354] Baylis notes however that this international law expertise has however at times been absent in previous hybrid courts. See Baylis, 2009, p. 19, *supra* note 176.

achieved through these interactions, however, would depend largely on how well national and international staff work in collaboration with one another.[355] The Court and international staff might also engage with legal professionals outside the court itself, for instance through the provision of occasional training.[356]

However, one of the difficulties that arose, to varying degrees, with previous hybrid courts is that while international personnel are assumed to have more extensive knowledge of international law (which is not always the case), they may lack awareness of national laws.[357] Added to this, there may also be cultural and linguistic difficulties. Were a hybrid court to be established to prosecute serious offences by UN military personnel, these problems would likely be intensified given the number of nationalities involved. Furthermore, were a hybrid court established it might require the application of military law, and may require knowledge of varying command and control structures. International personnel may lack expertise in the application of such law.

The presence of international personnel in a hybrid court may give an increased perception of impartiality, and greater ability to ensure due process standards.[358] Practice has shown that victims or victim communities sometimes view purely international courts as foreign and illegitimate, in particular if not located in their territory.[359] Hybrid courts tend to be perceived as being more politically viable.[360] Such courts are less likely to be seen to infringe state sovereignty, if the State retains partial jurisdiction. However, as I will argue presently, TCC partial jurisdiction over

[355] Olga Martin-Ortega and Johanna Herman, "Hybrid Tribunals and the Rule of law: Notes from Bosnia and Herzegovina and Cambodia", in JAD-PbP Working Paper no. 7, May 2010, pp. 1, 19.

[356] *Ibid.* p. 16

[357] Baylis, 2009, p. 18, *supra* note 176.

[358] Jenia Iontcheva Turner, "Nationalizing International Criminal Law", in *Stanford Journal of International Law*, 2005, vol. 41, pp. 1, 16; William Burke-White, "Regionalization of International Criminal Law Enforcement: A Preliminary Examination", in *Texas International Law Journal*, 2003, vol. 38, pp. 1, 99; Baylis notes however that these claims have been criticised. See Baylis, 2009, pp. 11–13, *supra* note 176.

[359] Mark Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", in *Northwestern University Law Review*, 2005, vol. 99, pp. 539, 602–603; Turner, 2005, *supra* note 358; Dickinson, 2003, pp. 1066–1068, *supra* note 352.

[360] Turner, 2005, p. 2, *supra* note 358.

military personnel may be required. It must be borne in mind that TCCs consider criminal and disciplinary control over their troops as integral to command and control, as very much a sovereign prerogative.[361]

A number of authors have noted that distance between victim communities and international courts undermines the ability to communicate with victim communities.[362] Hybrid courts, when located in the territory where crimes take place, enable victim communities to attend trials, enabling greater communication with them and would-be perpetrators.[363] This enhances the expressive and deterrent value of prosecutions.

SEA by UN peacekeepers could plausibly amount to an ICL offence, a transnational crime and/or a crime against domestic laws of the host State and TCC. Unlike the ICC, a hybrid Court may draw on both domestic and international law and procedure, as appropriate, to prosecute individuals.[364] If a hybrid court was established its Statute could provide for broader definitions of war crimes or crimes against humanity than the Rome Statute.[365] A hybrid model could allow for the application of domestic laws, reformed in line with international standards.[366] The difficulty, however, would be determining the applicable law for incidents of sexual violence by UN peacekeepers, given that the hybrid would have to hear cases from multiple jurisdictions. A Convention might prove useful in this regard. A pre-agreed set of crimes and their elements could be relied on. Training could be provided to all peacekeepers on standards set out.

Domestic level prosecution of international crimes is generally seen as being more economically viable and less time-consuming than interna-

[361] See for example K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations,* Martinus Nijhoff Publishers, 1964, p. 24.

[362] Cohen, 2007, p. 4, *supra* note 347.

[363] On the problem of perceived legitimacy of international courts, see further Dickinson, 2003, pp. 232–233, *supra* note 345.

[364] *Ibid.*, pp. 294–295.

[365] While national or internationalized courts set in State Parties to the Rome State may draw on its definitions they are not obligated to do so. It is worth reminding ourselves that the international crimes codified by the Rome Statute may be narrower than and certainly do not cover all categories of offences prohibited by international law. See further Newton, 2001, p. 31, *supra* note 228.

[366] Dickinson, 2003, p. 295, *supra* note 345.

tional trials.[367] Nevertheless, hybrid courts, in particular if expected to serve capacity-building roles, will still require significant funding.[368] When it comes to extraterritorial offences by UN military peacekeepers costs will undoubtedly be higher given distances between TCCs, host States, perpetrators, victims, witnesses and evidence, in addition to the fact that there may be considerable security concerns in investigating and prosecuting such crimes in host States. For similar reasons such cases could prove lengthy. That stated, if a hybrid justice mechanism was established to operate on the basis of complementarity, it is likely that the majority of cases would predominantly be dealt with by the TCC.

The question arises whether the ICC would necessarily be debarred from exercising jurisdiction where some hybrid court exercised jurisdiction.[369] Turner suggests that the ICC should take a more versatile role, by supporting the work of hybrid courts to prosecute international crimes at domestic level.[370] There seems to be no reason why the existence of a hybrid court could not complement the role of the ICC and domestic prosecutions.[371] A hybrid justice mechanism might prove a useful halfway house for cases in which TCCs are either unwilling or unable to prosecute, but given the limitations discussed in section 14.1, cannot be brought before the ICC. Furthermore, with respect to core international crimes, the ICC could play a residual role here through positive complementarity.

Hybrid courts have the ability to bolster domestic justice mechanisms, as oppose to substituting them, where a State may be willing to genuinely investigate and prosecute but lacks or partially lacks the capacity to do so. Moreover, they have the potential to advance RoL and capacity-building efforts at domestic level through the sharing of expertise.[372] In the context of crimes by UN military personnel this might operate on two levels, namely, developing practice in dealing with these cases, and more

[367] Frédérc Mégret, "In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice", in *Cornell International Law Journal*, 2005, vol. 38, pp. 725, 731.

[368] Dickinson, 2003, p. 307, *supra* note 345.

[369] Schabas, 2004, p. 88, *supra* note 42.

[370] Turner, 2005, p. 3, *supra* note 358.

[371] Dickenson, 2003, pp. 295–310, *supra* note 345.

[372] Jane Stromset, "Pursing Accountability for Atrocities After Conflict", in *Georgetown Journal of International Law,* 2007, vol. 38, issue 2, p. 226.

generally a RoL demonstrating effect[373] both within the court structure itself and the host State and TCC national criminal justice systems. Many UN peacekeeping operations already have RoL components working alongside host States to re-establish a working criminal justice sector.[374] That stated, as demonstrated by the efforts of past hybrid courts, RoL and capacity-building is not without difficulties and one must be realistic as to what can be achieved.[375] Re-establishing the RoL and capacity-building are long-term goals.[376] Some of the problems with this approach are that it may not be expeditious enough to deal with sexual offences, and may have serious impacts on the right to a fair trial for the accused. Furthermore, it may divert resources from ongoing RoL and justice sector reform initiatives in certain host States. Martin-Ortega and Herman note that in the case of the War Crime Chambers ('WCC') in Bosnia-Herzegovina tension arose over resources and competing jurisdiction between the hybrid court and local courts charged with the prosecution of human rights violations not falling within the WCC's jurisdiction.[377] One can imagine that where some form of hybrid court is established to prosecute serious crimes by the UN peacekeepers, victims of serious human rights abuses (including mass rapes by local militias, armed forces and police) and local courts might feel that diverting resources away from the prosecution of the latter offenders is unjust. Such double standards might not be easily reconciled with or understood by local populations.

Capacity-building, both where a TCC is unable to prosecute, and with respect to the host State, would require some sort of capacity assessment. This could be limited to an assessment of capacity solely with respect to prosecuting the particular offence.[378] Probably one of the great-

[373] On the rule of law element, see further Martin-Ortega and Herman, 2010, p. 7, *supra* note 355.

[374] GLE Report, 2006, para. 38, *supra* note 328.

[375] Authors discuss problems faced by the WCC BiH Court and ECCC in Cambodia. See Martin-Ortega and Herman, 2010, pp. 15–21, *supra* note 355.

[376] *Ibid.*, p. 16.

[377] The potential for ECCC to impact on capacity-building of the local Courts in Cambodia, given the impossibility of setting up similar procedures, and case management mechanisms as a mere one per cent of the ECCC budget is equivalent to the budget allocated to run 25 local courts by the Ministry of Justice. Martin-Ortega and Herman, 2010, pp. 15–16, *supra* note 355.

[378] The Stimson centre suggests the Model Codes of Post-Conflict Criminal Justice might be prove useful in this regard in bringing the criminal justice system in line with ac-

est difficulties is that many UN mission host States have highly dysfunctional justice systems, and while capacity-building is a worthwhile endeavour, as the Stimson Centre puts it, "it would be like 'trying to build a ship while you are on it'".[379] If a hybrid court were set up, RoL and capacity-building efforts would require interaction between TCC and international personnel and their counterparts in the host State criminal justice sector. Such efforts would need to be accompanied by the willingness of State authorities to pursue this goal.

The establishment of a hybrid justice mechanism to deal with serious criminal offences by UN peacekeepers, in particular sexual, would create precedence and practice in dealing with such crimes. Trials could be made accessible electronically.[380]

One of the problems with hybrid courts is that any treaty negotiation may prove lengthy.[381] Furthermore, the establishment of a hybrid tribunal that could exercise jurisdiction over UN military personnel would require both host State[382] and TCC consent. This might be dealt with under the SOFA and MOU. Alternatively, Articles 25 and 29 UN Charter could arguably be used as a basis for the establishment of a hybrid justice mechanism, given that it permits the SC to establish such other bodies as necessary for the performance of its functions, and that States are obliged to accept and carry out SC decisions.[383]

14.2.2. Transnational Legal Networks

A number of authors argue that the use of transnational legal networks to bolster a hybrid system should not be excluded.[384] Dickinson posits that

ceptable international standards. See further, W.J. Durch, K.N. Andrews and M.L. England, with M.C. Weed, "Improving Criminal Accountability in United Nations Peace Operations", in *Stimson Centre Report*, No. 65, Rev. 1, June 2009.

379 GLE Report, 2006, *supra* note 328.

380 Jenia Iontcheva Turner, "Transnational Networks and International Criminal Justice", in *Michigan Law Review*, 2007, vol. 105, pp. 985, 1020.

381 Rosanna Lipscombe, "Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan", in *Columbia Law Review*, 2006, vol. 106, pp. 182, 208.

382 GLE Report, 2006, para. 35, *supra* note 328.

383 UN Charter, se *supra* note 113.

384 A number of authors suggest this in the context of interactions between the ICC and national courts. Burke-White, 2008, p. 98, *supra* note, 295; Turner, 2005, p. 32, *supra* note 358; Baylis, 2009, p. 24, *supra* note 176.

hybrid Courts can foster such networks, allowing for the transnationalisation of legal processes, which in turn may result in "internationalisation and interpenetration of norms".[385] Drawing on Baylis's analysis of transnational legal networks and their influence on national justice systems, I would like to turn to what she terms their "functional hybrid character", while locating "formal authority and effective control" in the domestic system.[386] This differs from hybrid courts as it locates authority and control solely with domestic actors, with the role of international personnel being to support and facilitate domestic criminal justice reform efforts and trials.[387] International personnel would not sit as judges, prosecutors, investigators, *et cetera*, but rather provide assistance, training, and technical support to national counter-parts, where required. Some scholars posit that States are more likely to comply with their international obligations through assistance and encouragement, and that transnational networks can assist in this role. Furthermore, they could bolster domestic systems in areas where they come up short.[388] Such networks already are developing amongst investigators, prosecutors, and judges.[389] One of the primary advantages of the use of transnational legal networks to support domestic prosecutions is flexibility, namely their ability to adapt to different legal and political environments.[390] Involvement of international legal networks may well reduce any political interference with criminal proceedings involving soldiers,[391] such as through trial monitoring. Such networks could work alongside any hybrid courts, or should TCCs prove unwilling to implement a hybrid system to hold peacekeepers to account, they might be a viable, albeit weaker, alternative, provided the UN puts appropriate support structures in place.

---

385 Dickinson, 2003, p. 304, *supra* note 345.

386 See Baylis, 2009, p. 7, *supra* note 176; On transnational legal networks, see also Turner, "Transnational Networks and International Criminal Justice", 2007, p. 985, *supra* note 380.

387 See Baylis, 2009, p. 80, *supra* note 176.

388 Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", in *Virginia Journal of International Law*, 2002, vol. 43, pp. 78–79.

389 For a detailed discussion of these networks and their influence in the realm of ICL, see Turner, "Transnational Networks and International Criminal Justice", 2007, p. 985, *supra* note 380.

390 *Ibid.*

391 *Ibid.*, p. 999.

A number of Congolese military court trials have drawn on the Rome Statute for the definition of crimes, procedure and due process standards,[392] irrespective of implementing legislation. The Rome Statute's definitions of sexual offences were considerably broader than under Congolese law.[393] Baylis puts this advancement down to the efforts not only of national military courts, but also given the influence of transnational networks through both advocacy for such prosecutions and through actual support and assistance.[394] Indeed if some sort of hybrid justice mechanism were established, it could also attract the interest and assistance of international legal networks and funding, should it play a dual role of host State capacity-building.

14.2.3. Tri-Hybrid

There seems to be considerable merit in proposals for the establishment of a hybrid court for dealing with incidents of SEA by UN peacekeepers, where TCCs fail to exercise jurisdiction. As mentioned, the GLE suggested locating such courts in the host State legal system.[395] While at first glance this might appear an ideal model, in this author's view it speaks more to rhetoric than to realism. Many host States may simply not be institutionally equipped to deal with crimes by peacekeepers, in particular in host States where such abuse is most prevalent. That is not to state that where it is feasible that the host State should not play a key role in a hybrid system.

I contend that at least partial jurisdiction over military contingents needs to remain with the TCC. I have two primary reasons for this. States will not be willing to expose their soldiers to host State criminal justice systems over which they have no control and where their rights might be violated. Should the TCC be required to do so this could well result in a massive fall in troop-contributions and prove seriously detrimental to UN peacekeeping. Secondly, given the particular nature of militaries, national

[392] Baylis, 2009, pp. 33–34, 37, 45, *supra* note 176.

[393] *Ibid.*, pp. 37, 43.

[394] Baylis notes that United Nations Organization Mission in the Democratic Republic of Congo – 'MONUC' (now United Nations Organization Stabilization Mission in the Democratic Republic of the Congo – 'MONUSCO') and the EU for instance provided briefings on legal issues or legal materials or other resource and legal materials to those involved in conducting at least some of the trials. *Ibid.*, pp. 43–44, 48.

[395] GLE Report, 2006, para. 33, *supra* note 328.

military law experts need to be present on anybody prosecuting such personnel.

As an alternative, I propose the TCC retaining primary jurisdiction. However, should a TCC prove unwilling or unable to investigate or prosecute, a secondary tri-hybrid mechanism, with input from the UN, sending and host State, could exercise jurisdiction. As the GLE noted:

> Jurisdiction is not an indivisible concept and the host State and other States may be involved in different but mutually supportive aspects of the overall exercise of criminal juris-diction.[396]

This is particularly relevant to extraterritorial criminal acts committed by UN military peacekeepers given that such acts may give rise to nationality and territorial based jurisdiction.[397] A tri-hybrid justice model would allow for the apportionment of jurisdiction between both the TCC and host states and the tribunal. It would also assist in countering perceptions at local level that UN peacekeepers are immune from the law, which have the possible dual purpose of enhancing RoL. However, the central feature would be that the international component is on permanent standby, so that it is rapidly deployable. This might help create some consistency in dealing with incidents of SEA or other serious crimes by UN peacekeepers. It could have permanent offices in larger mission states, such as the DRC, along with a headquarters in New York. Such a mechanism would require host State consent, and draw on State jurisdiction, whether territorial or nationality based, unless established under Chapter VII of the UN Charter or underpinned by a treaty.

The immunity of military personnel could be qualified, wherein the TCC could retain exclusive jurisdiction over on-duty offences, and offences that only affect the force itself.[398] The hybrid model court has subject-matter jurisdiction over a set of pre-agreed serious offences. The system could operate on the basis of complementarity, whereby it would be a court of last resort, exercising jurisdiction only where the TCC is unwilling or unable to prosecute, such as: (1) where prosecution is essentially conducted to shield the perpetrator; (2) proceedings are not being con-

[396] GLE Report, 2006, p. 2, *supra* note 328.

[397] Although in practice UN military contingents are immune from host State jurisdiction under UN SOFAs as they stand.

[398] This follows the framework set out in the NATO SOFA, which provides for concurrent jurisdiction. NATO SOFA, 4 UST 1972, TIAS 2846, 199 UNTS 67, signed in London, 19 June 1951, entered into force 23 August 1953.

ducted in an independent or impartial manner; or (3) the State lacks the ability to adequately investigate and/or prosecute abroad.

The tri-hybrid model would comprise of a mix of international and domestic personnel at all levels of the proceedings from investigation to prosecution and adjudication. International personnel could be drawn from a permanent component of this model, which includes a roster of appropriately qualified personnel. All TCCs and host States (where there are suitably trained personnel) could maintain a roster of appropriately trained personnel that could be deployed should serious allegations arise. TCC personnel should have military law expertise when dealing with crimes by military contingents.

A difficulty, however, is that under the present Model SOFA and Model MOU, TCC's are granted exclusive criminal jurisdiction over their troops, and host States are debarred from exercising any jurisdiction over UN military contingents. As I have argued elsewhere, these documents could be amended to allow for a broader approach to jurisdiction. It is my contention that TCC exclusive criminal jurisdiction is too broad, and perhaps not required for the independent functioning of UN operations. In my view, the SOFA, MOU, and any Convention that might eventually emerge on this issue, should provide for concurrent or complementary jurisdiction over military contingents by an international or hybrid court, should the TCC prove unwilling or unable to exercise jurisdiction.[399] SOFAs and MOUs could possibly provide for a system by which immunity could be waived, where a tri-hybrid court is to conduct proceedings.

The Statute of the SCSL contains a unique provision insofar as the Courts' jurisdiction covers in certain circumstances crimes committed by peacekeepers.[400] Article 1 specifically provides for the primacy of TCC jurisdiction over peacekeeping personnel, in accordance with the Status of Mission Agreement.[401] It further provides:

> 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the

[399] See further Burke, 2011, pp. 63–104, *supra* note 17.

[400] Art. 1 Statute SCSL, UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, available at http://www.unhcr.org/refworld/docid/3dda29f94.html, last accessed on 28 August 2011.

[401] On Status of Forces and Status of Mission Agreements and jurisdictional implications, see Burke, 2011, pp. 63–104, *supra* note 17.

> Government of Sierra Leone or agree-ments between Sierra Leone and other Governments or regional organizations, or, in the absence of such agree-ment, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.
>
> 3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.[402]

The provision contemplates the possibility of the SCSL exercising secondary jurisdiction, akin to the principle of complementarity, when the TCC proves "unwilling or unable genuinely" to investigate or prosecute peacekeepers. In such circumstances a State would have to propose that the SCSL exercise jurisdiction over such personnel and it could only do so if authorised by the SC, both of which are unlikely. Nevertheless, the insertion of such a provision, albeit more broadly worded, providing for possible partial relinquishment of jurisdiction over UN military personnel, through the exercise of secondary jurisdiction by a hybrid court, may make TCCs more open to it.[403]

Even if a more limited form of immunity from host State jurisdiction is not provided for, host State co-operation would still be required, in particular through assisting investigations, the gathering of evidence, *et cetera*. Involvement of host State personnel is important, not only given that it can contribute to capacity-building in the host State, but also given that they will have a better understanding of local customs, language, the security situation on the ground, and other issues that may be encountered in the host State. This may be particularly important when dealing with rape victims and children. Furthermore, the host State would be more likely to consent to various phases of the proceedings being conducted in

---

[402] UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002, available at http://www.unhcr.org/refworld/docid/3dda29f94.html, last accessed on 28 August 2011.

[403] It is also interesting that the provision seems to contemplate that the hybrid court could exercise jurisdiction over peacekeepers where a SOFA is not in place granting the TCC exclusive criminal jurisdiction and where such personnel are present in the absence of consent of the government of Sierra Leone. On the significance of host State consent to the legal status of UN forces deployed in that State, in the absence of a SOFA, see Burke, 2011, pp. 63–104, *supra* note 17.

its territory if it is involved. A number of authors have also pointed towards a supportive role that the ICC could play in its interactions with hybrid and national courts.[404]

Apart from the possible impediments already mentioned, a real difficulty I foresee with a hybrid or tri-hybrid justice mechanism is getting judges, whether international or from the TCC, to travel to a conflict or post-conflict state, in addition to other personnel necessary for the investigation and prosecution. Existing UN bodies, the Office of Internal Oversight Services ('OIOS') and Conduct and Discipline Unit ('CDU') and Teams ('CDT'), already involved in receiving complaints and the administration of serious offences by peacekeepers, including SEA, could help bolster the latter part of any given system, in conjunction with host States' authorities.[405] Furthermore, evidence gathered appropriately by the OIOS could be used for prosecution purposes,[406] and the assistance and expertise of these bodies in operating in a conflict or post-conflict environment could be drawn upon.

Some of the already established networks for dealing with SEA by peacekeepers could tie into the overall system of which the hybrid justice mechanism could form a part. This might include the UN's strategy for providing assistance and support to victims of SEA by UN staff and related personnel,[407] which provides certain medical, legal, social and psychological support through the use of existing programs and services.[408]

---

[404] Turner, 2005, p. 1, *supra* note 358; Baylis, 2009, p. 1, *supra* note 176; Burke-White, 2008, p. 53, *supra* note 295.

[405] The CDU/CDTs are now the first to receive allegations of SEA in the field. See further United Nations, "Comprehensive Report of Conduct and Discipline Including Full Justification of All Posts", Report of the Secretary-General, A/62/758, 20 March 2008.

[406] Note however that the difficulty with OIOS/UN investigation is that they are administrative in nature, and TCC may not accept such evidence as a basis for criminal prosecution. UNGA, "Report of the Ad Hoc Committee on Criminal Accountability of United Nations Officials and Experts on Mission", First Session, 9–13 April 2007, UN Doc A/62/54, para. 27.

[407] The General Assembly has now adopted the United Nations Comprehensive Strategy on Assistance and Support to Victim Exploitation and Abuse by United Nations Staff and Related Personnel GA Res. 62/214, UNGOAR 62nd Session, 7 March 2008.

[408] *Ibid.*, paras. 6–7; Report of Secretary-General, "Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel", UN Doc. A/64/176, 64th sess, 37 July 2009, para. 6.

It is my contention that, where possible, the prosecution of UN peacekeepers needs to occur and be seen to occur in host States. Local communities need to see justice being done.[409] A tri-hybrid Court might also draw on the mobility of the recent Congolese mobile military/gender justice courts.[410] In the DRC mobile court trials are often conducted outdoors, or in private homes, where other infrastructure in unavailable.[411] These are already operating in the DRC with UN support and assistance, in addition to that of transnational legal networks.[412] Mobility would add to the capacity to hold trials in remote communities, and thereby better promote RoL.[413]

14.2.4. Justifications for Prosecution of UN Military Personnel by an International or Internationalised Justice Mechanism

At this juncture, it is important to reflect briefly on whether the prosecution of UN peacekeepers is an appropriate role for the international community. One of the primary reasons for punishing crimes by peacekeepers at an internationalised level is the international dimension of such offences, and their effect on values of the international community and international peace and security as a whole. It must be borne in mind that the ICC has limited capacity to prosecute perpetrators of serious ICL offences even when they come within the jurisdiction of the court. While sexual offences committed by UN military peacekeepers are abhorrent, can we justify their prosecution at an international level? That is, where TCCs prove unwilling or unable to prosecute members of their military contingents, are the ICC or hybrid/tri-hybrid courts favourable alternatives?

In determining the appropriate forum for holding UN military peacekeepers complicit in SEA to account, the objectives of such prosecu-

[409] In Prince Zeid's report on a comprehensive strategy to deal with SEA by UN peacekeepers he recommending conducting onsite courts martial. A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in the United Nations Peacekeeping Operations G.A. Res. 57/710, UN Doc. A/Res/59/710, 24 March 2005.

[410] See further Eric A. Witte, "Putting Complementarity into Practice: Domestic Justice for International Crimes in the Democratic Republic of the Congo, Uganda and Kenya", Open Society Justice Initiative, 2011, pp. 53–58.

[411] *Ibid.*, pp. 52–53.

[412] For instance, Prosecution Support Cells are already deployed to MONUSCO in the DRC, to provide training to investigators, *et cetera*. *Ibid.*, p. 55.

[413] *Ibid.*, pp. 52–53.

tions ought to be considered. Is the primary goal to deter either specifically the perpetrator or more generally UN military personnel, or is the goal to deter sexual offences more broadly in the host State by demonstrating that nobody is outside the law? Alternatively, does the importance of ensuring the prosecution of UN peacekeepers for serious crimes, in particular sexual offences, rest in its expressive or pedagogical value, both within the host State, the TCC, military in general, and the broader international community? Indeed each of these objectives may play a part, but just how far these goals can be achieved would seem to depend on the forum. There may also be other justifications for punishment including rehabilitation, restoration, retribution, incapacitation and reconciliation. However, these are outside the scope of the current discussion.[414] Concentrating solely on deterrence and expressive theory, I will suggest that localised hybrid/tri-hybrid tribunals might better serve these ends than prosecution of peacekeepers by the ICC.

14.2.4.1. Deterrence

Deterrence is frequently cited as a primary objective of punishment for criminal offences both in the domestic and international sphere. The Preamble of the Rome Statute suggests that the drafters had deterrence in mind in punishing perpetrators of serious violations of ICL, wherein it provides that the ICC is "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[415] The essence of deterrence is that potential violators of the law fear the consequences of the law,[416] through threats of punishment.[417] Drumbl posits that there is a "utilitarian and consequentialist effect of that punishment: namely, reducing recidivism".[418] Deterrence in effect oper-

[414] There is considerable debate on the capacity of the ICC or any international court to serve any of these purposes and the utility of transposing domestic criminal law theory to the international context.

[415] Rome Statute, *supra* note 23; Keller, 2008, p. 41, *supra* note 112.

[416] See further Richard Posner, "An Economic Theory of the Criminal Law", in *Columbia Law Review*, 1985, vol. 85, p. 1193.

[417] Akhavan states, "sanctions are most important because the help instil voluntary of 'good faith' respect for just conduct by discrediting inhumane or unjust conduct, the cumulative effect of which encourages habitual or subliminal conformity with the law". Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia?", in *Human Rights Quarterly*, 1998, vol. 20, pp. 737, 741.

[418] Drumbl, 2005, p. 560, *supra* note 359; See also Keller, 2008, p. 41, *supra* note 112.

ates at two levels: (1) "specific", namely aimed at the author of the impugned conduct; and (2) "general", aimed at the broader community.[419] Punishment is not only to prevent repetition of the impugned conduct by the perpetrator but also at deterring would-be perpetrators of similar offences.[420]

Andenæs contends that general deterrence is also about the "moral or socio-pedagogical influence of punishment".[421] As noted by the ICTY in the *Rutanga* case, punishment has the power to deter by "showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights".[422] The ICC in *Lubanga* stated that deterrence is a key objective of the ICC and that "any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention".[423]

However, the deterrent value of punishment is problematic to assess even in the domestic context, given the difficulty in measuring its effect on the perceptions of potential perpetrators.[424] This difficulty is more acute when it comes to punishment by international courts.[425] This is primarily due to the lack of empirical data on the issue.[426] There is substantial cynicism on the actual ability of the ICC to deter crimes under its jurisdiction.[427] In order for deterrence to function fear of punishment must

[419] Keller, 2008, p. 41, *supra* note 112.

[420] Sloane, 2007, p. 43, *supra* note 283.

[421] Andenæs, *Punishment and Deterrence*, 1974, pp. 34–35, cited by Akhavan, "Justice in the Hague", 1998, p. 746, *supra* note 417.

[422] *Prosecutor v. Rutaganda*, ICTR-96-3-A, 26 May 2003.

[423] *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, para. 48.

[424] Margaret deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law* (forthcoming) p. 42 (on file with the author); see also chapter 2 in the present volume; Paul Robinson and John Darley, "The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing Its Best", in *Georgetown Law Journal*, 2003, vol. 91, p. 949.

[425] Eric Blumeson, "A Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court", in *Columbia Journal of Transnational Law*, 2006, pp. 798, 827–882.

[426] *Ibid.*, p. 828, fn. 84.

[427] See for example David Whippmann, "Atrocities, Deterrence and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, p. 473; Julian Ku, "How System Criminality Could Exacerbate the Weakness of International Criminal Law", in *Santa Clara Journal of International Law*, 2010, vol. 85, p. 36.

be realistic and properly communicated to potential perpetrators. Given the ICC's limited resources and capacity only to take a few situations and cases at any one time, when contrasted with the thousands of potential defendants that could be bought before the ICC, any deterrent value the Court is likely to be limited. Slaone notes that the rational-actor model of deterrence, based on a cost-benefit calculus, simply does not work effectively in the international context, given the context in which many ICL offences occur.[428] Deterrence theory assumes that potential perpetrators of ICL offences are rational actors, but other authors contend that such persons are unlikely to be rational actors who calculate the risk of their actions.[429] When it comes to crimes perpetrated by UN military peacekeepers deployed in conflict or post-conflict environments, the ability to act rationally is further thrown into flux. The total or partial collapse of RoL in many host States enables actors to commit crimes with little real fear of prosecution that they likely would never commit in the TCC.

Let us take for instance the situation in the DRC. The DRC has been in the midst of an armed conflict almost consistently since the mid-1990s.[430] Sexual violence and rape at the hands of the Congolese armed forces, police and militia groups is widespread. According to a recent study approximately 420,000 women and girls are raped in the DRC every year.[431] Accountability for such crimes is virtually non-existent, save some recent advances by mobile gender courts.[432] In such circumstances the deterrent value of a few international prosecutions is likely to be weak. It may have greater impact on level of senior leaders than on lower level perpetrators.[433] The DRC is spread across a geographic area of 2,345,408 square kilometres, with little infrastructure connecting regions, and there is considerable risk in travelling. SEA by UN military personnel

[428] Sloane, 2007, *supra* note 283.

[429] Drumbl comments on the ability of actor to act rationally in situations of mass violence and societal collapse. Drumbl, 2005, p. 590, *supra* note 359.

[430] The civil war in the DRC has been classed as Africa's war, the worst since WWII. "Making Africa Smile", Economist, 17 January 2004.

[431] Peterman, Palermo and Bredenkamp, 2011, p. 1064, *supra* note 161.

[432] See, *e.g.*, "DR Congo Court Convicts Nine Police of Rape", 8 November 2010, available at http://www.peacewomen.org/news_article.php?id=2341&type=news, last accessed on 17 May 2011.

[433] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Deter Future Atrocities?", in *American Journal of International Law* , 2001, vol. 95, p. 7; Sloane, 2007, pp. 42–43, *supra* note 283.

has been rampant in the DRC, yet thus far there has little accountability for such. This is partially due to the aforementioned difficulties, but also due to their immunity from criminal jurisdiction in the host State, and the lack of political will or perhaps the inability of TCCs to effectively exercise their jurisdiction. One can imagine the difficulties that would be faced by the ICC or a TCC in exercising jurisdiction over these troops for incongruous extraterritorial conduct, in particular conduct which is sexual in nature, given the difficulties of investigating and gathering evidence, in addition to the possible resistance of the armed forces to such investigations. This leaves us to question would these personnel perceive themselves as being genuinely at risk of prosecution by the ICC or any other body? Given the extent of violence perpetrated by other armed groups in the DRC, which quantitatively outweighs that by UN peacekeepers, can they realistically feel threatened? Ongoing SEA suggests that these personnel do not at present perceive themselves as being at risk of prosecution by the ICC, or even by their home State.

Conversely, Akhavan contends that prosecution of a large number of persons is not necessary in order to serve the goal of deterrence, but rather that a few exemplary prosecutions might suffice to deter other members of the community. He argues that punishment deters through internalisation of norms of conduct, wherein individual criminal accountability is expected for violating these norms.[434] Logically it does seem, however, that the deterrent value of any court or tribunal is linked to the perceived likelihood of punishment. There must be a realistic threat of punishment.[435] As stated by Smidt the likelihood of being brought before the ICC is about equal to winning the lottery.[436] Arguably, the establishment of a tri-hybrid court where TCCs prove unwilling or unable to prosecute, which has the ability and resources to prosecute substantial numbers of personnel, could increase the deterrent value of punishment, given the increased likelihood of been held to account. A number of authors argue that the ICC might better serve the goals of deterrence through positive complementarity, which is aimed at encouraging States to enforce ICL.[437]

[434] Akhavan, 1998, p. 751, *supra* note 417. In essence deterrence has a norm-reinforcing role. Blumenson, 2006, p. 819 *supra* note 425.

[435] Laplante, 2010, p. 641, *supra* note 293.

[436] Michael Smidt, "The International Criminal Court: An Effective Means of Deterrence?", in *Military Law Review*, 2001, vol. 167, pp. 156, 188.

[437] Laplante, 2010, p. 635, *supra* note 293.

It is this author's contention that both bodies could complement one another in serving such goals, where appropriate.

14.2.4.2. Expressive Value

Increasingly, theorists argue that a primary objective of the ICC in selecting cases for prosecution ought to be to express global norms.[438] As noted by the Office of the High Commissioner for Human Rights ('OHCHR'), in approaching the issue of prosecution of serious human rights violations, policy makers need to have an informed view on what they hope to achieve from prosecution at the international level. Deterrence is difficult to achieve and therefore may create unrealistic expectations. Retribution on the other hand may create conditions that can encourage vengeance. In the OHCHR's view a better approach is that the ultimate goal of prosecution is disapproval.[439] Expressive theory is the idea that prosecution and punishment can be used as a vehicle to express certain values when particular actors reject them.[440] Punishment by the ICC arguably serves to reaffirm faith in the RoL,[441] through communicating that certain acts violate social norms. Punishment may serve a moral educative value.[442]

DeGuzman argues that prosecution for the recruitment of child soldiers by the ICC has an expressive value in reinforcing a norm that has otherwise been under-prosecuted and under-recognised. A similar rationale might be applied to the prosecution of attacks on UN peacekeepers.[443] As discussed, Heller suggests a possible "category-based" approach in the prioritisation of cases.[444] This could arguably allow for the selection of cases on the basis that they fall within a particular category, which is

[438] deGuzman (forthcoming), p. 36, *supra* note 424.

[439] Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives, OHCHR, 2006, HR/PUB/06/4, p. 4.

[440] Dan Kahan, "Two Liberal Fallacies in the Hate Crimes Debate", in *Law and Philosophy*, 2001, vol. 20, p. 175.

[441] Mark Drumbl, "The Expressive Value of Prosecuting and Punishing Terrorists: *Hamdan,* the Geneva Conventions and International Criminal Law", in *George Washington Law Review*, 2007, vol. 75, pp. 1165, 1182.

[442] Drumbl posits that "[s]ince expressivism is concerned with the narrative and messaging function of law, it places considerable import on the methodology of how individuals are convicted and punished and, thereby, has come to value due process and legalism". *Ibid.*, p. 1184.

[443] deGuzman (forthcoming), p. 50, *supra* note 424.

[444] See section 14.1.4.

perhaps under-prosecuted, and the gravity of which needs to be emphasised. Indeed particular emphasis does appear to be placed gender-based crimes and crimes against children by the Rome Statute.[445] Punishment at the international level can be seen as condemnation of such abhorrent conduct.[446] It sends a moral message that this conduct is perceived as wrongful.[447] As Sloane aptly notes:

> International criminal tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions: publically condemning acts deplored by international law, acting as an engine of jurisprudential development at the local level, and encouraging the legal and normative internalization of international human rights law and humanitarian law.[448]

Serious sexual offences must be seen to be condemned by the international community, in particular when involving UN peacekeepers. It is difficult to see how the UN and international community can preach about the need to establish RoL and yet allow impunity for peacekeepers who violate the standards that they seek to promote.[449] Yet whether the ICC is the appropriate venue to express indignation is questionable. As addressed in section 14.1., even if crimes by UN peacekeepers meet the chapeau elements of war crimes or crimes against humanity under the Rome Statute, it seems unlikely that sexual crimes committed by UN military peacekeepers would be prosecuted by the ICC given gravity, prosecutorial discretion, the need to select and prioritise cases, *et cetera*. Yet if a pedagogical function is to be served, the prosecution of such cases at an internationalised or hybrid level appears warranted. Not only would it reinforce

---

[445] S. SáCouto and K. Cleary, "Symposium: Prosecuting Sexual and Gender-Based Crimes before Internationalized Criminal Courts: The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court", in *American University Journal of Gender Social Policy and Law,* 2009, vol. 17, p. 337.

[446] Matthew Alder, "Expressive Theories of Law: A Skeptical Overview", in *University of Pennsylvania Law Review*, 2001, vol. 148, p. 1363; Dan Kahan, "What Do Alternative Sanctions Mean?", in *University of Chicago Law Review*, vol. 63, 1996, p. 591.

[447] See further Stephen Garvey, "Restorative Justice, Punishment and Atonement", in *Utah Law Review*, 2003, pp. 303, 308; Jean Hampton, "The Moral Education Theory of Punishment", in *Philosophy and Public* Affairs, 1981, vol. 10, p. 209.

[448] Sloane, 2007, p. 43, *supra* note 283.

[449] OHCHR, "Rule-of-law Tools for Post-Conflict States: Mapping the Justice Sector", 2006, HR/PUB/2006/2, p. 41

norms on sexual violence against women and children, it would demonstrate that no person is above the law. As Hampton notes:

> [a] decision not to punish wrongdoers such as the rapist is also expressive: it communicates to the victim and to the wider society the idea that such treatment, and the status it attributes to the victim, are appropriate, and thus, in the case of the rape victim, reinforces the idea that women are objects to be possessed and are there for the taking.[450]

The ICC does appear to be having a subtle impact on armies all over the world in how they perceive and engage with international law. The establishment of the institution is leaving military commanders to question whether the actions of their troops could result in their being held criminally liable. As noted by ICC Chief Prosecutor: "Armies, all over the world, are adjusting their operational standards, training and rules of engagement to the Rome Statute".[451] The fact is that States do not generally desire their troops ever being brought before an international court for serious violations of ICL. Ocampo elaborated:

> This is what we call the 'shadow' of the Court […] the concept of the shadow explains how one court ruling in an individual case can affect a multiplicity of other cases, resulting in agreements being made and disputes being settled without further judicial intervention: they are solved under the 'shadow of the law'.[452]

However, as stated, the ICC is not necessarily the only or most appropriate avenue for pursing prosecutions of UN military peacekeepers for sexual violence. An internationalised hybrid/tri-hybrid court arguably could better achieve the expressive and pedagogical function of punishing peacekeepers complicit in serious SEA. Given greater proximity to military peacekeepers and victims and integration with domestic justice sectors it would be better suited to communicate condemnation at a local level and to reaffirm the RoL.

Past investigations into SEA by military personnel on the MONUC operation revealed a culture of solidarity and secrecy regarding such abuses. Military officials deliberately frustrated UN investigations, shield-

[450] Jean Hampton, "Correcting Harms versus Righting Wrongs: The Goal of Retribution", in *UCLA Law Review*, 1992, vol. 39, pp. 1659, 1684.

[451] Luis Moreno-Ocampo, keynote address, Council on Foreign Relations, Washington, 4 February 2010, para. 2.

[452] Luis Moreno-Ocampo, "The International Criminal Court: Some Reflections", in *Yearbook of International Humanitarian Law*, 2009, vol. 12, pp. 3, 9.

ing perpetrators.[453] Condemnation of sexual violence through prosecution and punishment by a tri-hybrid court may well help bring about behavioural change among would-be perpetrators. It could also have the dual value of expressing the seriousness of sexual offences and the international community's indignation at such conduct and the need to enforce universal values and the RoL not only amongst TCCs and their military contingents, but also at the level of the host State. Furthermore, it would demonstrate that nobody is immune from the law.

14.2.4.3. Conclusion

It is my contention that when it comes to SEA by UN military peacekeepers, a tri-hybrid model may well have greater deterrent and expressive value than purely international prosecutions. A possible advantage of adding the international element to prosecutions is that it may highlight the gravity of the crime, the international community's condemnation, and the fact that it affects more than one nation.[454] The presence of international personnel on a tri-hybrid Court would garner greater international attention, and therefore would likely have greater deterrent effect on would-be perpetrators of SEA, not only UN troops but possibly other potential perpetrators. Additionally a tri-hybrid justice mechanism might have the ability to exert influence over TCC's military and civilian laws dealing with sexual offences by the military, and to reinforce the UN's current UN zero-tolerance policy.

[453] Investigation by the Office of Internal Oversight into allegations of sexual exploitation and abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo, UN. Doc. A/59/661; Sarah Martin argues that a "hyper-masculine culture that encourages sexual exploitation and abuse and a tradition of silence have evolved within (peacekeeping missions)". Sarah Martin, "Must Boys Be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping", Refugees International, October 2005, p. ii, available at http://www.un.org/en/pseataskforce/docs/must_boys_be_boys_ending_sea_in_un_peacekeeping_missions.pdf, last accessed on 25 March 2012; The attitude that seems to prevail is one of "boys will be boys". Colum Lynch, "UN Faces more Accusations of Sexual Misconduct", Washington Post, 12 March 2005, A22, available at http://www.washingtonpost.com/wp-dyn/articles/A30286-2005Mar12.html, last accessed on 25 March 2012.

[454] Mégret, 2005, p. 737, *supra* note 367.

14.2.5. Overall Observations and Conclusion

SEA by UN military peacekeepers is not an ephemeral or passing concern and serious action needs to be taken to counter the current culture of impunity that still appears to lie within UN operations. While domestic jurisdiction ought to be the first port of call for holding UN military peacekeepers to account for SEA, the criminal prosecution of such persons by TCCs is rare. Serious incidents of SEA by UN military peacekeepers cannot be regarded as simply ordinary criminal offences. That stated, most of such offences, are unlikely to meet the high thresholds and other barriers set by the Rome Statute, to be prosecuted before the ICC. It is this author's contention that we need to be prudent in advocating the prosecution of UN military peacekeepers before the ICC, save in the most exceptional of circumstances. As Akhavan cautioned with respect to the ICTY, it is not "befitting to subscribe to the judicial romanticism of some circles that views the ICTY as a panacea for all the ills of the former Yugoslavia".[455] A similar argument may be made of the ICC and the ills of the world. It simply cannot adequately achieve all the goals that the international community might desire of it. Yet adding an international element appears warranted when the TCC proves unwilling or unable to prosecute soldiers who sexually abuse the civilians they have been mandated to protect. Mégret notes the difference between the utility of international and domestic criminal processes lies in their expressive value or message.[456] SEA when perpetrated by UN peacekeepers not only offends the victim, but the broader international community and "the dignity of mankind".[457]

The establishment of a tri-hybrid justice mechanism, when it comes to serious ICL offences, may provide a viable alternative. Such a solution would be in line with the principle of complementarity as it locates jurisdiction in national courts. Indeed the ICC could still play a residual role through positive complementarity, where appropriate. Transnational legal networks might also feed into a system through the support of TCC and tri-hybrid court proceedings. A system which increases the possibility of been held to account for SEA, would likely serve to deter would-be perpetrators.

[455] Akhavan, 1998, p. 740, *supra* note 417.
[456] *Ibid.*; Mégret, 2005, p. 743, *supra* note 367.
[457] *Ibid.*, p. 744.

Whichever approach is taken to addressing SEA by UN military peacekeepers, a word of caution seems warranted. While the rebuilding of national justice systems is really important for States in conflict and post-conflict States, we need to step carefully so as not to make UN military peacekeepers the "sacrificial lambs" for goals that are better achieved elsewhere. Adequate safeguards would need to be in place to protect the rights of the accused.

To conclude with a quote from Prince al Zeid, whose report was instrumental in bringing the problem of SEA by UN peacekeepers to the limelight:

> I was left feeling numb by the extent to which people can be made to suffer. The young women of Bunia, in the Democratic Republic of the Congo, had survived the most gruesome wartime experiences-massacres, multiple rapes, disease and hunger – only to then find themselves tormented by the very people who were sent in to save them. [… I]f the victims of UN abuse were properly treated today, the negotiators at the United Nations, representing all our countries, would by now have agreed to the mandatory holding of all court-martials in the territorial or host state, whenever the accused came from a military contingent. They would have allowed for joint United Nations-member state investigations of alleged criminal offenses […]. For lawyers from the world's respective defense establishments and various ministries to think only of securing and defending the rights of their own soldiers, of their own nationals, with little regard to the victims thereof begs the rather obvious question: if not them, then who?[458]

[458] Al-Hussein, 2009, pp. 654–655, *supra* note 1.

15

The Impact of Prosecutorial Strategy on the Investigation and Prosecution of Sexual Violence at International Criminal Tribunals

Niamh Hayes*

15.1. Introduction

Prosecuting violations of international criminal law is no easy task. In a national criminal jurisdiction, prosecuting authorities bear the responsibility of constructing a comprehensive case against an accused person for violations of the applicable domestic laws, but do so in co-operation with a police force with a mandate to gather the necessary physical evidence, identify relevant witnesses and arrest and interview potential suspects. Police and prosecutors know the locality, the language, and the law,[1] and have a career's worth of formative experience in investigating and prosecuting crimes. They are acutely aware of the vagaries of national criminal procedure and evidentiary rules, and they carry out their duties on behalf of the state, and, by implication, the society against whom the crime in question was committed. In an international criminal context, prosecuting authorities from a wide array of different legal systems are responsible for the identification, investigation and prosecution of individuals who are suspected of having committed violations of international criminal and international humanitarian law in another state. The state in question may be still experiencing open hostilities or may have entered an uneasy post-conflict atmosphere, but is likely to be politically and socially unstable

* **Niamh Hayes** is currently a Ph.D. candidate at the Irish Centre for Human Rights, National University of Ireland, Galway, researching the prosecution of sexual violence by international criminal tribunals. She has worked as a consultant for the Institute for International Criminal Investigations and as a legal consultant for Women's Initiatives for Gender Justice, an international women's rights organisation based in The Hague. The author would like to thank Joe Powderly and John Ralston for their comments on an earlier draft of this piece. All views expressed are the author's own.

1 As the (unattributed) saying goes, "a good lawyer knows the law, a great lawyer knows the judge".

and lacking a functioning police force or judiciary. Field investigations will have to be carried out under significant security constraints, most likely via interpreters (assuming appropriately trained personnel can be found), by staff of varying experiences, who come from a variety of jurisdictional backgrounds, and who are very unlikely to be able to operate unobtrusively. The crimes in question may have been committed months if not years previously, so physical evidence will have degraded, and witnesses may have suffered severe trauma, have had to leave their homes, or have been killed in the intervening period. International tribunals may not have the power to compel evidence, and the lack of an international police force means that such courts are dependent on states to enforce their arrest warrants, which may (and frequently does) take years. International criminal prosecutors operate in a legal system entirely alien to their own, applying a hybrid of common and civil law rules of procedure and evidence, and acting on an occasionally amorphous mandate from the international community which may not be supported or even recognised by the affected communities in the state in question.

Prosecuting any international crime under these circumstances is not an easy task, but prosecuting sexual violence – a category of crime which is perceived as notoriously difficult to prove even within domestic criminal systems – is a challenge of another magnitude altogether. If we take the jurisdictions of England and Wales, Sweden or Ireland as examples of states where national prosecuting authorities operate in relatively idyllic conditions by comparison to international criminal prosecutors, one may be shocked or simply disheartened to learn that domestic conviction rates in rape cases are derisory: according to a 2003 study of attrition rates in sexual violence cases, only eight per cent of reported rapes in England and Wales resulted in a conviction, seven per cent in Sweden and a truly pathetic one per cent in Ireland.[2] If this is the prognosis in states with a relatively high degree of social equality, political stability and a

[2] Linda Regan and Liz Kelly, "Rape: Still a Forgotten Issue", in *Rape Crisis Network Europe*, 2003, p. 13, available at http://www.rcne.com/downloads/RepsPubs/Attritn.pdf, last accessed on 1 August 2011. The figure for conviction rates in England and Wales dropped to 5.3 per cent in 2004/2005. See further Jennifer Temkin and Barabara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude*, Hart Publishing, Oxford, 2008, p. 20; and Office For Criminal Justice Reform, "Convicting Rapists and Protecting Victims – Justice for Victims of Rape", p. 8, available at http://www.men said.com/documents/cons-290306-justice-rape-victims.pdf, last accessed on 1 August 2011.

functioning criminal justice system, then the scale of the task facing international prosecutors – exacerbated by cultural stigmatisation of rape, precarious security conditions and the logistical difficulties inherent in all international criminal investigations – seems almost overwhelming. Experience from Rwanda and the former Yugoslavia has shown that it is beyond the capacity of most post-conflict state or transitional justice mechanisms to comprehensively address sexual and gender-based violence,[3] which places an even more onerous burden on international criminal tribunals to provide some (if not the only) semblance of a judicial response to sexual and gender-based violence committed during conflict.

Thankfully, some of the normal evidentiary requirements attached to prosecutions for rape and sexual violence in a national criminal system have been mitigated in international criminal proceedings, to reflect the unique challenges faced by international investigators and prosecutors. The Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), International Criminal Tribunal for Rwanda ('ICTR'), Special Court for Sierra Leone ('SCSL') and International Criminal Court ('ICC') all include specific provisions relating to evidence in cases of sexual violence.[4] These rules permit the exclusion of evidence relating to the prior sexual conduct of the victim,[5] the elimina-

[3] See for example African Rights and Redress, "Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes", 2008, available at http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf, last accessed on 1 August 2011; and Amnesty International, "'Whose Justice?' The Women of Bosnia and Herzegovina are Still Waiting", 2009, available at http://www.amnesty.org/en/news-and-updates/report/women-raped-during-bosnia-herzegovina-conflict-waiting-justice-20090930, last accessed on 1 August 2011.

[4] See Rule 96 of the ICTY Rules of Procedure and Evidence, UN Doc. IT/32/Rev.45, as amended on 8 December 2010; Rule 96 of the ICTR Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), as amended on 1 October 2009; Rule 96 of the SCSL Rules of Procedure and Evidence, as amended on 28 May 2010; and Rules 70 and 71 of the ICC Rules of Procedure and Evidence, ICC-ASP/1/3. Of course, the inclusion of these rules at the ICTY and ICTR was intended to facilitate a progressive approach to the adjudication of sexual violence, as well as merely to counter-act practical investigatory issues. See further Fionnuala Ní Aoláin, "Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War", in *Albany Law Review*, 1996–1997, vol. 60, p. 883.

[5] Rule 96(iv) of the ICTY Rules of Procedure and Evidence, *supra* note 4; Rule 96(iv) of the ICTR Rules of Procedure and Evidence, *supra* note 4; Rule 96(iv) of the SCSL Rules of Procedure and Evidence, *supra* note 4; Rule 70(d) and Rule 71 of the ICC Rules of Procedure and Evidence, *supra* note 4.

tion of consent as a defence in cases where the victim was subject to threats, coercion or violence,[6] and the explicit waiver of any requirement of corroboration of the victim's testimony.[7] Despite these concessions, the record of international criminal tribunals to date in prosecuting sexual violence remains patchy at best. This can be best comprehended (and indeed avoided) as a question of prosecutorial strategy, rather than as an inherently problematic combination of practical hurdles and definitional or evidentiary obstacles. An examination of both the successes and failures of international criminal tribunals in this regard shows that unless a specific effort is made to prioritise and strategise the investigation of sexual violence from the earliest possible stage in the international criminal process, it will not be adequately addressed in the prosecution's case or duly reflected in the judgment of the court. The avoidance of this outcome is not merely a preference – it is a responsibility incumbent on international criminal tribunals if they are to live up to their stated aims of ending impunity and prosecuting the most serious crimes of concern to the international community.[8] However, prior experience from international tribunals also shows that some strategies are more effective than others, and certain specific practical efforts can have a significant impact on the success rates of international prosecutions for sexual violence. These will be discussed throughout the chapter.

Prosecutorial strategy, in the sense that it is referred to throughout this chapter, encompasses both the investigation phase of a case and trial proceedings. It includes issues such as the selection of defendants, pursuance of thematic or geographical investigations, characterisation of facts

6 Rule 96(ii) of the ICTY Rules of Procedure and Evidence, *supra* note 4; Rule 96(ii) of the ICTR Rules of Procedure and Evidence, *supra* note 4; Rule 96(i)–(iii) of the SCSL Rules of Procedure and Evidence, *supra* note 4; Rule 70(a)–(c) of the ICC Rules of Procedure and Evidence, *supra* note 4.

7 Rule 96(i) of the ICTY Rules of Procedure and Evidence, *supra* note 4; Rule 96(i) of the ICTR Rules of Procedure and Evidence, *supra* note 4; Rule 96(i)–(iii) of the SCSL Rules of Procedure and Evidence, *supra* note 4; Rule 63(4) of the ICC Rules of Procedure and Evidence, *supra* note 4.

8 See for example the Preamble to the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured [...]. Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

and charges, treatment of victims and witnesses, assignment of personnel and existence of a coherent gender policy. This chapter will examine these issues by reference to the past experience of international criminal tribunals to assess the foundational importance of a coherent, systematic prosecutorial strategy for the successful investigation and prosecution of sexual crimes in international criminal law. Despite its reputation as a difficult crime to achieve a conviction for, or some of the received wisdom about victims being unwilling to come forward, and despite the hesitancy, even squeamishness, of some investigators and prosecutors to address it, sexual and gender-based violence is not impossible to uncover or prove when it is prioritised and normalised from the outset. If it is addressed consciously, thoroughly, deliberately and tactically, sexual and gender based violence – even if committed in conflict and prosecuted from afar – need not continue to be synonymous with impunity. International criminal law, despite its legal and practical challenges, provides an opportunity; prosecutorial strategy provides the means of realising it.

15.2. Prosecutorial Strategy at the Investigation Phase

In international criminal tribunals, investigations are a sub-division of the Office of the Prosecutor. The head of investigations occupies a senior management position and will co-ordinate strategy with the Chief Prosecutor, Deputy Prosecutor and other heads of divisions within the Office of the Prosecutor, such as prosecutions, appeals, complementarity or legal affairs. For the ICTY, ICTR and SCSL, the geographical scope of the tribunal's jurisdiction was set in its establishing Statute, and therefore, the initial priority for the Office of the Prosecutor was to identify potential defendants according to prosecutorial strategy. For example, the Office of the Prosecutor at the ICTY initially took what was referred to as a "pyramidal approach" in its earlier investigations, otherwise known as a "bottom-up" strategy, to address lower level perpetrators first, establish a crime base, and gradually follow the evidence higher up the chain to military and political leaders who ordered, planned or instigated the crimes.[9]

[9] See ICTY, "Investigations", available at http://www.icty.org/sid/97, last accessed on 3 August 2011:

> The OTP decided to follow what has been called a pyramidal investigation strategy, starting from the bottom, in other words, with crime base evidence and lower-ranking persons who actually committed or ordered the crimes. Investigations began in refugee

This approach quickly became more complex and multi-layered. Within a few months, the ICTY had developed an investigative strategy which concentrated on four inter-related elements: (1) senior political and military leaders; (2) sexual and gender-based violence; (3) notorious offenders; and (4) notorious events.[10] Prosecutors at the Special Court for Sierra Leone took a more holistic approach and pursued a limited number of cases against what were seen as the main actors in the conflict: the Armed Forces Revolutionary Council ('AFRC'), the Revolutionary United Front ('RUF'), the Civil Defence Forces ('CDF') and Charles Taylor, former President of neighbouring Liberia. At the ICC, by comparison, the Court's jurisdiction potentially encompasses more than 100 states, so even the selection of countries for investigation necessitates prosecutorial discretion. Once the Court's jurisdiction has been triggered in relation to a particular state or "situation", the Office of the Prosecutor must assess whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed, make an assessment of gravity and admissibility, and then decide whether to apply for authorisation from the Pre-Trial Chamber to officially open an investigation into that Situation.

Once an investigation is authorised at the ICC, the Office of the Prosecutor will begin conducting its investigations and the process of identifying potential cases and defendants, although it is somewhat constrained in its autonomous pursuit of this task by the statutory framework of the Court, which emphasises the principle of gravity.[11] This has been interpreted by the ICC Prosecutor to require a focus on senior perpetrators, within a political or military hierarchy, as "those who bear the greatest responsibility for the most serious crimes".[12] This means that the ICC

> centres throughout the world, where victims and witnesses were able to provide evidence implicating the persons who had physically committed the crimes, such as, for example, the persons in the camps where they were detained or the camp commanders. As the evidence grew, investigators began working up the pyramid to the persons who could be regarded as most responsible for the crimes.

[10] According to John Ralston, former Chief of Investigations at the ICTY, interview on file with author.

[11] Arts. 53 and 54 of the Rome Statute, *supra* note 8.

[12] ICC Office of the Prosecutor, "Prosecutorial Strategy 2009–2012", pp. 5–6, available at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf, last accessed on 3 August 2011:

is unlikely to prosecute the lower-level direct perpetrators of crimes, as occurred in the initial years of the ICTY and ICTR. The ICC Prosecutor has also chosen to pursue a policy of "focused investigations", wherein "incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimisation".[13] This is an acknowledgment of the finite resources available to the Court, and of the importance of selecting cases and crimes that are representative of broader patterns within the conflict. Article 54 of the Statute also requires the Prosecutor to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, explicitly including sexual and gender-based violence as categories of crimes necessitating particular consideration.[14] Likewise, Regulation 34 of the Regulations of the Office of the Prosecutor stipulates that, when developing a case hypothesis, the joint investigation team should aim to select incidents which reflect the most serious crimes and the main types of victimisation, in particular, sexual and gender violence and violence against children.[15] It is clear that for the ICC at least, the statutory and procedural framework of the Court explicitly requires the Prosecutor to prioritise sexual and gender-based violence in its investigative and prosecutorial strategy.

Dianne Luping, who has worked as both an investigator and trial lawyer at the ICC, has argued that a focused approach to sexual and gender-based violence must be implemented "from the outset, during the pre-analysis phase and before any decision is made to initiate an investigation in any country".[16] Patricia Sellers, former Legal Advisor for Gender in the

> In accordance with this statutory scheme, the Office consolidated a **policy of focused investigations and prosecutions**, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. Thus, the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.

13 ICC Office of the Prosecutor, "Prosecutorial Strategy 2009–2012", *supra* note 12, p. 6.

14 Art. 54(1)(b) of the Rome Statute, *supra* note 8.

15 Regulation 34(2) of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09.

16 Dianne Luping, "Investigation and Prosecution of Sexual- and Gender-Based Crimes Before the International Criminal Court", in *American University Journal of Gender, Social Policy and Law*, 2009, vol. 17, pp. 431, 434.

Office of the Prosecutor at the ICTY and ICTR, has similarly argued that "gender strategy is not a luxury. Its absence is an absurdity".[17] However, it is easy to talk about "focused investigations" or "gender strategy", but it is often much harder, particularly in academic literature, to pin down what this actually entails and how it is achieved. One primary and fundamental issue is personnel. Prosecution and investigation teams need to have both a healthy gender balance and a strong degree of awareness and competence in dealing with sexual and gender-based violence. Richard Goldstone, the first Chief Prosecutor of the ICTY and ICTR, has spoken openly about the "gender bias" among investigative staff in the initial years at the Tribunal, and has shown a remarkable degree of tact simply to say that "[t]heir culture was not such as to make them concerned about gender-related crime".[18] As he describes, when the majority of the staff were ex-army or police, very few senior investigators were women, and a "locker-room mentality" prevailed. The importance of staff attitudes was obvious even in the infancy of the Tribunals:

> I became convinced that if we did not have an appropriate gender policy in the Office of the Prosecutor, we would have little chance of getting it right outside of the office.[19]

This was not just an issue of team dynamics but one of "smouldering sexism";[20] not only were female staff members uncomfortable in their work environment, but some (although certainly not all) male staff members were actively resentful of attempts to emphasise the importance of gender balance within the investigations division. Patricia Sellers recalls one occasion where, as Legal Advisor for Gender, she organised a meeting between a psychologist and a particularly testosterone-heavy investigations team to discuss the importance of including both male and female team members in investigative activities. Immediately following the meeting, she was subject to a spurious and petty disciplinary complaint from the Chief of Investigations, Deputy Chief of Investigations and the leader of the team in question, ostensibly for having revealed the internal work-

---

17 Patricia Viseur Sellers, "Gender Strategy is Not a Luxury for International Courts", in *American University Journal of Gender, Social Policy and Law*, 2009, vol. 17, pp. 301, 325.

18 Richard Goldstone, "Prosecuting Rape as a War Crime", in *Case Western Reserve Journal of International Law*, 2002, vol. 34, pp. 277, 280.

19 *Ibid.*

20 Sellers, 2009, p. 312, *supra* note 17.

ings of an investigation team to an outside expert.[21] The "gender atmosphere" problem within the Office of the Prosecutor was more insidious than merely creating a boorish work environment. The attitude of some male staff members towards sexual crimes was dismissive at best, antediluvian at worst: Peggy Kuo recalls encountering resistance from (admittedly overworked) male colleagues, who frequently minimised the gravity of sexual violence by making comments such as "So a bunch of guys got riled up after a day of war, what's the big deal?".[22] Another former ICTY staff member recalled the Senior Trial Attorney in a case refusing to contemplate including sexual violence in the indictment by saying "I have enough on my plate, I don't need a bunch of hysterical women in my courtroom".[23]

Thankfully, gender parity and gender attitudes have improved since then across all international criminal tribunals, although Women's Initiatives for Gender Justice has consistently highlighted the gender disparity in senior management positions at the ICC.[24] As recently as 2007, of 13 individuals appointed to the List of Professional Investigators at the ICC, only one was a woman.[25] That is not to say that men should be barred from involvement in sexual violence investigations or that exclusively female investigation teams would automatically produce miraculous results; the ideal investigation team would include a mixture of genders and ages but a consistent standard of expertise and competence at investigating sexual and gender-based violence. True, some female victims may not be comfortable discussing their rape or sexual assault with a male investigator, but by the same token a male victim may feel humiliated discussing his experience of sexual violence with an investigator who reminds him of one of his daughters. The most important component is choice. Based on her experience as part of an ICC investigation team in Uganda, Dianne Luping concluded:

---

21 *Ibid.*

22 Peggy Kuo, "Prosecuting Crimes of Sexual Violence in an International Tribunal", in *Case Western Reserve Journal of International Law*, 2002, vol. 34, pp. 305, 311.

23 Interview on file with author.

24 See, *e.g.*, Women's Initiatives for Gender Justice, "Gender Report Card 2010", pp. 12–23, available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf, last accessed on 1 August 2011.

25 Women's Initiatives for Gender Justice, "Gender Report Card 2010", *supra* note 24, p. 24.

> The lesson learned in that situation is that a victim should be provided the choice of a male or female interviewer, wherever possible, to ensure that they feel most comfortable sharing their experiences of sexual violence. Accordingly, it was important that all investigators, male and female, were trained to conduct sexual violence interviews with both male and female victims.[26]

According to Patricia Sellers,

> [i]n other words, investigations could field all male team members, or all female team members or mixed-gendered teams depending on what configuration would be more like-ly to obtain a witness's evidence.[27]

Another crucial personnel component for an effective prosecutorial strategy on sexual violence is the appointment of a Gender Advisor within the Office of the Prosecutor, something that the majority of international tribunals have failed to do. Patricia Sellers occupied the position of Legal Advisor for Gender in the ICTY from 1994 until 2007, and unsurprisingly that tribunal has the strongest record by far of any international criminal tribunal in prosecuting sexual violence. She also held the same position within the Office of the Prosecutor at the ICTR from 1995 until 1999, but with the exception of two abortive short-term appointments in the immediate aftermath, the position has not been filled since then, and the ICTR has been harshly criticised for its abysmal record of prosecutions for sexual violence. The position of Legal Advisor for Gender at the ICTY has (officially at least) remained vacant since 2007, while the Special Court for Sierra Leone has never had a Legal Advisor for Gender. Despite years of sustained advocacy and an explicit statutory requirement,[28] the ICC Prosecutor did not appoint a Special Advisor on Gender Crimes until

[26] Luping, 2009, p. 493, *supra* note 16.

[27] Sellers, 2009, p. 311, *supra* note 17.

[28] Art. 42(9) of the Rome Statute states: "The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children". In 2008, Women's Initiatives for Gender Justice recommended the Prosecutor to urgently appoint a gender legal advisor, noting that the wrongful dismissal fine imposed by the International Labour Organisation on the ICC that same year would amount to over two years salary for a gender advisor. Women's Initiatives for Gender Justice, "Gender Report Card 2008", p. 29, available at http://www.iccwomen.org/news/docs/GRC08_web4-09_v3.pdf, last accessed on 1 August 2011.

2008.[29] Unfortunately, Catharine MacKinnon's other commitments have meant that the appointment is relatively symbolic:

> [A]s it is a part-time position based outside The Hague, the ability of the post to influence and advise on the day-to-day decisions regarding investigation priorities, the selection of incidents and the construction of an overarching gender strategy will be extremely limited.[30]

In the absence of a dedicated in-house gender legal advisor,[31] Deputy Prosecutor Fatou Bensouda acts as the focal point for sexual and gender-based violence within the ICC.[32] Patricia Sellers has stressed the importance not only of the appointment of a competent gender advisor but also the level of appointment, noting that within the UN system only P-5 or higher staff positions are considered senior management and therefore are able to set policy.[33] Anyone who has ever been an employee in a large organisation can appreciate that the seniority of a person's position has an exponential impact on their capacity to be effective in that position, and also exerts a significant influence on receptiveness and co-operation from other staff members, both superiors and subordinates. Although, as Beth van Schaack has pointed out, no gender advisor at the *ad hoc* tribunals has ever been appointed above a P-4 position,[34] specific efforts on the part of Richard Goldstone and Louise Arbour ensured that Patricia Sellers was included in senior management meetings.[35] Obviously, for a gender advisor to be effective – which entails both monitoring and influencing prosecutorial policy on sexual and gender-based violence – they must be inte-

---

29 ICC Press Release, "ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes", ICC-OTP-20081126-PR377, 26 November 2008, available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20appoints%20prof_%20catharine%20a.%20mackinnon%20as%20special%20adviser%20on%20gender%20crimes?lan=en-GB, last accessed on 2 August 2011.

30 Women's Initiatives for Gender Justice, "Gender Report Card 2008", p. 21, *supra* note 28.

31 The Office of the Prosecutor does include a "Gender and Children Unit", but it is not structured or staffed to provide an equivalent function to a Legal Advisor on Gender.

32 Luping, 2009, pp. 435, 489, *supra* note 16.

33 Sellers, 2009, p. 308, fn. 17, *supra* note 17.

34 Beth van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson", in *American University Journal of Gender, Social Policy and Law*, 2009, vol. 17, p. 361, 366, fn. 16.

35 Patricia Sellers, 2009, p. 308, fn. 17, *supra* note 17.

grally involved in senior levels of decision making, rather than simply being responsible for pointing out the gender failings of policies which have already been set by higher management, and they must have a very close involvement with investigation and prosecution teams (both at the trial and appeals stage), in order to identify, react to or avoid procedural or substantive errors. This will be discussed further in the discussion of prosecutorial strategy at the trial phase.

Another major component of gender strategy at the investigation phase involves the development of a case hypothesis. In order to ensure that potential patterns of sexual violence are not overlooked, it is essential for investigation teams to conduct a detailed overview of the conflict or region in order to identify the best possible investigative strategy. International criminal prosecutions ordinarily fall into one of two categories: geographic or thematic investigations. Geographic investigations will pursue evidence of all potential crimes committed within a specific region, such as the siege of Sarajevo or the campaign of genocide in Butare Province, and the results of the investigation may be used in a number of subsequent prosecutions. If conducted thoroughly, there is no reason why geographic investigations should not be able to produce compelling evidence of patterns of sexual violence, albeit only those committed in the region in question. Thematic investigations, on the other hand, focus on a specific aspect of the conflict. This may relate to the category of crimes involved (sexual violence being one common example), a particular group of defendants (the Military and Government cases at the ICTR, for example), or a specific military campaign (such as Operation Storm in Croatia). Although both categories of investigation can be and have been employed in sexual violence prosecutions, it is futile to insist that a tribunal should exclusively follow one in preference to the other. According to John Ralston, former Chief of Investigations at the ICTY and Executive Director of the Institute for International Criminal Investigations, it is not possible to choose either strategy in the abstract without conducting comprehensive background research into the conflict.[36] Also, there is nothing to say that the two categories are mutually exclusive. Although the *Kunarac* case at the ICTY is frequently trumpeted as the classic or original example of thematic investigations of sexual violence, as it was the first indictment from the ICTY to deal exclusively with sexual crimes, it actually originat-

[36] Interview on file with author.

ed out of a geographic investigation of crimes committed in the Foča municipality in 1992 and 1993.[37] Although Foča is a small town, its strategic location and significant Muslim population made it the site of significant atrocities during the Bosnian conflict. The 1991 census recorded approximately 20,000 Muslim inhabitants in Foča, roughly half of the town's population; at the end of the war, 10 remained.[38] The *Kunarac* case represents the female experience of mass rape and sexual enslavement,[39] while the *Krnojelac* case addressed the killings and beatings of male residents of Foča at the KP Dom detention camp.[40]

Conducting a comprehensive overview of a conflict not only allows investigators to select the most appropriate investigative strategy, it will also help to identify potential patterns of sexual violence at an early stage. Not every conflict will feature systematic sexual violence – despite its entrenched and intractable nature, the Israel/Palestine conflict is a good example of this[41] – but, even in those that do, it can take many different forms: it may be ethnically motivated, a deliberate military tactic, part of a genocidal campaign, a means of torturing or punishing political opponents, or simply opportunistic, all of which will have implications for charging and modes of liability, which are discussed later in the chapter. Moreover, sexual violence should not only be seen as a standalone crime; it may also be a feature or expression of the gendered nature of the conflict. The scale of sexual and gender-based violence committed in a conflict will vary and will have significant implications for prosecutorial and investigative policy; when rape is committed on a mass scale, as occurred during the Rwandan genocide, its token inclusion in a handful of international criminal indictments constitutes an abject failure to adequately address the reality of the crimes committed and victimisation perpetrated

37 Peggy Kuo, 2002, p. 310, *supra* note 22.

38 International Criminal Tribunal for the former Yugoslavia, "Facts About Foča", p. 1, available at http://www.icty.org/x/file/Outreach/view_from_hague/jit_foca_en.pdf, last accessed on 6 August 2011.

39 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et al.*, Trial Judgement, IT-96-23/1, 22 February 2001.

40 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Krnojelac et al.*, Trial Judgement, IT-97-25, 15 March 2002.

41 See Elisabeth Wood, "Variation in Sexual Violence During War", in *Politics and Society*, 2006, vol. 34, no. 3, pp. 307, 314.

during that conflict.[42] Although sexual violence is predominantly committed against women and girls, it is also frequently committed against men and boys,[43] a fact which has historically been neglected or overlooked in international criminal prosecutions, with the notable exception of the ICTY.[44] John Ralston notes that certain factual scenarios will raise red flags for experienced investigators as indicia of an increased likelihood of sexual and gender-based violence, such as detention camps (for both male and female victims), the use of child soldiers, or concentration of populations in refugee or internally-displaced persons' camps.[45] Identifying the presence or absence of these factors at a very early point in the investigation permits the development of a clear strategy, to target investigations and prepare investigators prior to their deployment to the field.

Before investigators are deployed, they need to understand the cultural context of a country, if they are to have the best possible chance of creating a rapport with a victim or witness and obtaining valuable, credible information. A pre-deployment gender analysis can assist in this task; for example, understanding the cultural and ethnic context in Rwanda, where Tutsi women were both prized and resented for their beauty and where a heavy stigma attaches to victims of rape, would help investigators to be aware of whether the person they were interviewing was likely to have been a target of sexual violence, and whether they were likely to be unwilling or uncomfortable in volunteering such information. In order to conduct a successful interview, specific cultural information may also be vital. For example, an investigator from Europe or North America may

[42] For example, one study of all available information and statistics for rape victimisation in the Rwandan genocide concluded that, at a conservative estimate, more than 350,000 women were raped during the conflict – half the number of victims who were killed. See Catrien Bijleveld, Aafke Morssinkhof and Alette Smeulers, "Counting the Countless: Rape Victimization During the Rwandan Genocide", in *International Criminal Justice Review*, 2009, vol. 19, p. 208.

[43] For example, in one empirical public health survey conducted in the eastern DRC, 75 per cent of women and 65 per cent of men reported experience conflict-related sexual violence. See Kirsten Johnson, Jennifer Scott, Bigy Rughita *et al.*, "Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo", in *Journal of the American Medical Association*, 2010, vol. 304, no. 5, p. 553.

[44] See Dustin A.Lewis, "Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law", in *Wisconsin International Law Journal*, 2009, vol. 27, no. 1, p. 1.

[45] Interview on file with author.

suspect that an interviewee is being evasive if they avert their gaze or refuse to maintain eye contact, not realising that this is a mark of respect or deference to a person of authority. Shaking hands with a person of the opposite gender when introduced may seem like basic courtesy, but it has the potential to be highly inappropriate in certain cultures, while seemingly innocuous actions such as sitting cross-legged can also be considered offensive. Cultural awareness also extends to the use of language. For example, while working in one situation country, John Ralston discussed the use of safe houses in the context of witness protection measures, not realising that the phrase 'safe house' was used to refer to the buildings in which people are detained and tortured by the intelligence services.[46] Words and actions which may be intended to be respectful or comforting have the potential to be construed as offensive or frightening, so extensive preparation and cultural awareness are vital. Likewise, recognising the oblique meaning behind an interviewee's use of language is also critical, particularly in relation to sexual violence. A person may refer to an incident which happened to a 'friend' or 'neighbour' to avoid revealing that they were themselves the victims, or may use euphemistic language to refer to rape or sexual violence, such as "he lay with me", "he disrespected me" or "he made me his wife", rather than providing explicit anatomical details of the assault. Investigators must be very careful in situations such as this to ensure that they do not overlook evidence of sexual violence which is raised indirectly or in the third person, or to wrongly assume that a witness whose prior statements make no reference to sexual violence has no relevant information in relation to it.

As mentioned earlier, most international criminal investigators will not speak the local language fluently, and will therefore be reliant on interpreters to communicate with victims and witnesses. Conducting interviews through interpreters presents a barrage of challenges, most of which can be overcome with concerted preparation prior to the interview and sufficient patience during the interview. An investigator needs to understand that not everything they or the interviewee say will have a direct word-for-word translation and that certain styles of question (particularly rhetorical questions or long, barrister-style conditional questions) are particularly difficult to convey to an interviewee. The interpreter, however, needs to understand that it is the investigator, not them, who is conducting

[46] Interview on file with author.

the interview. The relationship between an investigator and interpreter is crucial, and lots of planning and preparation before the interview will be necessary, to ensure that the interview is conducted in a manner that meets the required evidence-gathering standards and produces accurate and credible information. For example, the interpreter should present both the question and the response in the first person (that is, "How old were you?" and not "He wants to know how old you are"), and should ask clarifying questions when necessary, so as to ensure that they do not paraphrase or substitute their own interpretation of a person's meaning where a direct translation is not possible.[47] Despite the presence of the interpreter, the investigator should make sure they do not lose their rapport with the interviewee, and should understand that the interviewee will need to trust both the interpreter and the investigator if they are to reveal particularly sensitive information. The investigator and interpreter should also be particularly careful in identifying and correcting any mistakes or inaccuracies in the witness statement before the interview ends, as errors which are discovered at a later point in proceedings may be taken as evidence of unreliability in the interviewee's version of events.

Planning and preparation also extends to the selection of the location for the interview with a victim or witness. Obviously, in ideal circumstances, the interview would take place in a quiet, private, comfortable room with a table and chairs. However, in practice, such a location may not be available. Investigators have a responsibility to ensure the security, privacy and confidentiality of interviewees,[48] which applies just as much to an assessment of the potential risks an individual may be exposed to for cooperating with the investigation as it does to an investigator's efforts to identify a suitable interview setting; as John Ralston puts it, there must be a "do no harm" approach on the part of investigators to ensure that the victim or witness is not going to be put in a worse position by their interaction with the investigation team.[49] If the potential risks to the interviewee are too great, the investigators should not proceed with the interview. Although an ideal interview location would allow for complete

[47] Dermot Groome has also noted that an interpreter should be careful to resist the impulse to "improve" the responses of the interviewee to make them sound more coherent or credible. See Dermot Groome, *The Handbook of Human Rights Investigation*, Human Rights Press, 2001, p. 296.

[48] Luping, 2009, pp. 486, 491, *supra* note 16.

[49] Interview on file with author.

privacy (auditory and visual), security and anonymity on the part of the interviewee, investigators may find themselves in a position where they cannot guarantee all of these factors and must choose the "least worst" option. For example, international criminal investigator Jan Pfundheller, who has conducted interviews with victims of sexual violence for the ICTY in the former Yugoslavia and for the U.S. State Department in Darfur, recalls arranging a group interview with female Darfuri victims near a river bed some distance away from the refugee camp to allow for some degree of privacy.[50] The criminal process for which the interview is being conducted should also be clearly explained to the interviewee. This is to ensure the interviewee can give informed consent to being interviewed, including the fact that they could be called to testify, that their name could be made public, and that a trial, if one materialises, may not take place for years. Although international tribunals allow for extensive protective measures for victims, witnesses and those put at risk on account of their interaction with the activities of the court,[51] John Ralston stresses that an interviewer should never make promises to an interviewee, either of financial inducements or of any specific protective measures such as relocation.[52]

As part of a systematic investigative approach to sexual violence, investigators should make sure to avoid making prejudgments or assumptions regarding witnesses. All interviewees – male, female, young and old – should be questioned sensitively about any information they may have regarding sexual and gender-based violence.[53] Even witnesses who have not been victims of sexual violence may have relevant information regarding its commission, and the profile of those who are capable of being victimised may be a lot broader than less-experienced investigators may initially assume. There is also a common perception that victims will be reluctant to discuss their experiences of sexual violence with a stranger[54], especially in conservative cultures. Although this is true of some victims,

[50] See John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide*, 2009, Cambridge University Press, p. 9.

[51] See Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, 2005, Intersentia, pp. 231–283.

[52] Interview on file with author.

[53] Dianne Luping, 2009, p. 493, *supra* note 16.

[54] Beth van Schaack, 2009, p. 369, *supra* note 34.

it may also be caused by a flawed interview technique, a failure to establish rapport, or simply the lack of an opportunity to do so in response to suitably open questioning. Making any such sweeping generalisations about victims is counter-productive, as it fails to take into account the simple fact that victims are not a homogenous group and will have very different attitudes, wishes and degrees of vulnerability. Some witnesses may be re-traumatised at the prospect of testifying in front of the person responsible for their victimisation; others will feel empowered by it.[55] For an investigator, the most important thing is to sensitively and patiently facilitate the interviewee's ability to tell his or her own story. For example, the investigator could explain his or her own background to reassure the interviewee that they have dealt with very serious cases in the past. Investigators will also need to be trained and be capable of dealing with traumatised witnesses.[56] Trauma may cause an interviewee to present a disjointed narrative of events, become distressed at re-living certain incidents or become triggered by aspects of their environment, such as a closed or locked door for victims of forcible detention or the presence of people in uniform for victims of sexual violence at the hands of police or military authorities. Investigators must be sure to provide plenty of breaks for a vulnerable witness, be empathetic and non-judgmental, and even allow for the presence of a support person (whether a friend, relative or psychologist) if the witness requests it.

The identification of potential interviewees, victims or witnesses will sometimes take place through the use of an intermediary; thankfully, we have come a long way from the crass victim identification techniques recounted by war correspondent Edward Behr, where refugees from Stanleyville in the Congo in the mid-1960s were greeted by a TV journalist shouting "Anyone here been raped and speaks English?".[57] Intermediaries can come in many different forms – fixers, psychologists or members of support organisations, police contacts – but should be carefully vetted, just as one would with police informants in national criminal jurisdic-

[55] Peggy Kuo, 2002, p. 317, *supra* note 22.

[56] See Anthony Forde, "Identifying Victims of Sexual Violence in the Absence of Forensic Evidence Using Investigative Interview Strategies", in *Forensic Science and International Law: Cases, Problems and Perspectives*, forthcoming 2012.

[57] Edward Behr, *Anyone Here Been Raped and Speaks English?*, 1985, New English Library Ltd.

tions.[58] The ICC has produced both positive and negative examples of the use of intermediaries in international criminal investigations. For example, in the ICC's investigation of sexual and gender-based violence committed in the Central African Republic, they secured the co-operation of a local victims' organisation known as the Organization for Compassion and the Developments of Families in Distress ('OCODEFAD'), set up by a former schoolteacher who had herself been raped and widowed in the conflict, which helped the investigators to identify individuals (male and female) who had been subject to sexual crimes and would be willing to speak about them.[59] In the *Lubanga* case in the DRC Situation, however, the first prosecution witness to take the stand dramatically recanted his testimony, claiming he had been coached by an intermediary to provide false testimony of having been forcibly conscripted as a child soldier,[60] while subsequent similar allegations and the Prosecutor's refusal to reveal the identity of one specific intermediary who had come under suspicion ultimately led to the Trial Chamber temporarily imposing a stay of proceedings against Lubanga, on the grounds that he could not receive a fair trial under the circumstances.[61] Although intermediaries can be a valuable and at times irreplaceable asset to an investigation team, their activities should be carefully supervised to ensure that they do not conduct themselves in a way which has the potential to damage the investigation or the evidence obtained in the course of the process.

---

58 John Ralston, interview on file with author.

59 See Marlies Glasius, "Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic", in *Alternatives: Global, Local, Political*, 2008, vol. 33, p. 413.

60 See Lubanga Trial, "Witness Says He Lied, Was Coached", available at http://www.lubangatrial.org/2009/01/28/witness-says-he-lied-was-coached/, last accessed on 7 August 2011, although the witness later retracted the retraction and testified under oath; see further Lubanga Trial, "Witness Admits to False Statement", available at http://www.lubangatrial.org/2009/06/16/witness-admits-to-false-statement/, last accessed on 7 August 2011, and Lubanga Trial, "Lubanga Witness Says He Was Paid US$200 to Tell Lies", available at http://www.lubangatrial.org/2010/02/08/lubanga-witness-says-he-was-paid-us200-to-tell-lies/, last accessed on 7 August 2011.

61 International Criminal Court, *Prosecutor v. Lubanga*, Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU, ICC-01/04-01/06-2517-Red, 8 July 2010. See also Women's Initiatives for Gender Justice, "Gender Report Card 2010", pp. 147–156, *supra* note 24.

Of course, many of the recommendations above relate to interviews with victims and witnesses who have direct experience of sexual violence, often referred to as "crime base witnesses". However, international criminal investigators have a complex task to fulfil to obtain evidence not only of the commission of crimes such as sexual violence, torture or murder, but also the background context to the conflict, military and political chains of command, existence of specific *chapeau* elements for crimes against humanity, war crimes or genocide charges, and evidence in relation to persons who ordered, instigated, or directed the commission of the crimes in question. This will necessarily require a broader spectrum of potential witnesses, including expert witnesses,[62] overview witnesses – who can testify to patterns of fact (such as a doctor or psychologist testifying about the number of conflict-related sexual violence victims they have treated), and 'linkage' or insider witnesses – who can provide evidence of the involvement or criminal responsibility of state authorities, military groups or specific defendants in relation to the crimes charged.[63]

Investigators and prosecutors also work with teams of analysts, whose job is to assess and categorise the evidence produced by investigators, to tailor the evidence to specific aspects of the prosecution case. Analysts can fall into many different categories – military experts, historians, demographers – but their contribution to the investigation will be vital to correctly identify patterns of criminal conduct and responsibility so as to compile a coherent prosecution case from the evidence collected by investigators. Their involvement is another crucial component of investigative strategy on sexual violence in order to piece together a strong

[62] For example, the Special Representative to the UN Secretary General for Children and Armed Conflict, Radhika Coomaraswamy, submitted an *amicus curiae* brief to the Trial Chamber in the *Lubanga* trial arguing that the sexual victimisation of male and female child soldiers constituted an inherent element of the crime of using them to "actively participate in hostilities". See International Criminal Court *Prosecutor v. Lubanga*, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, Submitted in Application of Rule 103 of the Rules of Procedure and Evidence, available at http://www.un.org/children/conflict/_documents/AmicuscuriaeICCLubanga.pdf, last accessed on 7 August 2011.

[63] See further Morten Bergsmo and William H. Wiley, "Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes", in *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, 2008, Norwegian Centre for Human Rights, Oslo, available at http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/manual/, last accessed on 7 August 2011.

enough case to proceed with a prosecution for specific crimes. For example, the work of prosecution analysts is vital in identifying responsible military commanders on the basis of troop movements and established chains of command during periods of intense sexual violence, or providing analysis of the ethnic breakdown of victims, to establish whether the sexual violence was carried out as a form of persecution on ethnic grounds or as part of a genocidal ideology.[64] Xabier Agirre, who has worked as an analyst at the ICTY and ICC, has also noted the potential of using pattern evidence to prove charges of sexual violence.[65]

Ensuring that a focused strategy, to identify patterns of sexual and gender-based violence and implement best practice for obtaining evidence is put in place at the investigation stage, will pre-empt and avoid many of the mistakes which have plagued previous international criminal prosecutions for sexual crimes. It is significantly easier to follow the procedures outlined above from the outset than it is to retroactively address investigative flaws that become obvious only at a later stage in the proceedings. Likewise, prosecutors should work cooperatively with investigators and be willing to follow the patterns of evidence they unearth, rather than follow the example of the first trial at the ICC, where investigators in the DRC initially discovered preliminary evidence of a range of crimes – including rape, torture, pillage and enslavement – but were told by the Office of the Prosecutor to focus only on evidence relating to the conscription and use of child soldiers.[66] Thorough and competent investigations are the foundation of any successful international criminal prosecution; however, as will be seen in the following discussion, errors made at the investigation stage will give rise to serious and recurring ramifications for prosecutors throughout the trial phase.

15.3. Prosecutorial Strategy at the Trial Phase

If one needs a microcosm for the functioning of prosecutorial strategy on sexual and gender-based violence in the early years of the *ad hoc* interna-

[64] John Ralston, interview on file with author.

[65] Xabier Agirre, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases", in *Leiden Journal of International* Law, 2010, vol. 23, p. 609.

[66] See Katy Glassborow, Institute for War and Peace Reporting, "ICC Investigative Strategy Under Fire", available at http://iwpr.net/report-news/icc-investigative-strategy-under-fire, last accessed on 7 August 2011.

tional criminal tribunals (both positive and negative), one need look no further than the *Akayesu* case at the ICTR. The judgment in the *Akayesu* case[67] is held up as a watershed in international criminal jurisprudence and one of the central achievements of the Rwanda tribunal,[68] which is hardly an exaggeration given that it was the first conviction at that tribunal,[69] the first conviction for genocide by an international criminal tribunal since the adoption of the Genocide Convention in 1948, the first international criminal conviction for rape as a crime against humanity, and the first time an international tribunal had acknowledged that sexual violence could be considered a constituent element of the crime of genocide. However, it is a little less inspiring to recall that, at the beginning of what would turn out to be one of the flagship international criminal prosecutions of this crime, there were no sexual violence charges included in the indictment. It was only after the spontaneous testimony regarding acts of rape from a number of witnesses – including the gang rape of the six year old daughter of one witness – and sustained questioning from the judges, one of whom was subsequent UN High Commissioner for Human Rights, Navi Pillay, that the trial was adjourned to permit the prosecution to conduct further investigations and amend the indictment to include charges of rape, other inhumane acts and outrages on personal dignity.[70] One of the most important precedents in all of international criminal jurisprudence on sexual violence almost never was. However, the *Akayesu* case is also a sterling example of the immense importance and precedence that an inter-

67 International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998.

68 See for example Diane Amann, "Prosecutor v. Akayesu – Casenote", in *American Journal of International Law*, 1999, vol. 93, p. 195; Catherine MacKinnon, "The ICTR's Legacy on Sexual Violence", in *New England Journal of International and Comparative Law*, 2008, vol. 14, no. 2, p. 101; Niamh Hayes, "Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals", in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010, p. 129.

69 Although Jean Kambanda had already pleaded guilty, his conviction and sentence were not handed down until 4 September 1998, two days after the issuance of the judgment in *Akayesu*. See International Criminal Tribunal for Rwanda, *Prosecutor v. Kambanda*, Judgment and Sentence, ICTR-97-23-S, 4 September 1998.

70 See Beth van Schaack, "Engendering Genocide: The *Akayesu* Case Before the International Criminal Tribunal for Rwanda", 2008, Santa Clara University School of Law, Legal Studies Research Paper Series, Working Paper no. 08–55, available at http://ssrn.com/abstract=1154259, last accessed on 9 August 2011.

national criminal conviction for sexual violence can generate, however precarious its origins.

Kelly Askin once described the prosecution of gender-based crimes as "fraught with inherent difficulties and gratuitous obstacles".[71] As discussed above, international criminal investigations have all but cornered the market in inherent difficulties; it is at the prosecution stage that the truly gratuitous obstacles have to be navigated, particularly when so many of them are self-imposed. No less than at the investigation stage, it is possible to pursue a pre-determined and comprehensive sexual violence strategy throughout the prosecution phase of a case, to avoid the more obvious pitfalls, and contribute to a significantly higher standard of prosecution for such crimes than has often been the case. However, it is all but impossible to achieve a successful prosecution for sexual and gender-based crimes by happy accident and without deliberate care, attention, and effort. Again, an examination of the past practice of international criminal tribunals produces some signal examples of what to do and, equally, what not to do.

When developing a case hypothesis, and again when assessing the evidence produced from the investigation stage of proceedings, prosecutors need to consider two crucial issues before drafting the indictment or application for a warrant of arrest: the most appropriate mode of individual criminal liability, and the most effective characterisation of facts as specific charges. Choosing the most suitable mode of liability is not just a matter of correctly identifying and categorising a potential defendant's contribution to the commission of crimes; it may also be the difference between an acquittal and a conviction.[72] As mentioned above, in the initial years of the *ad hoc* tribunals, the majority of accused (in custody at least) were on a relatively low rung in the political or military hierarchy, which made the determination of the mode of liability less problematic as they could be charged either with principal responsibility as a direct perpetrator, or some form of accessorial liability for ordering, planning, instigating, or aiding and abetting the commission of the crimes. Obtaining suffi-

[71] Kelly Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", in *Berkeley Journal of International Law*, 2003, vol. 21, pp. 288, 318.

[72] "Modes of participation have also gained increasing importance in the areas of sentencing and cumulative convictions". See Gerhard Werle, *Principles of International Criminal Law*, 2009, TMC Asser Press, p. 168.

cient evidence to prove these forms of individual criminal responsibility is significantly less problematic than the two other main forms of liability: command responsibility and joint criminal enterprise or "common purpose" liability. Proving the requisite elements of command responsibility in relation to sexual violence – the existence of a superior-subordinate relationship, that the superior knew or had reason to know of his subordinates' crimes, and a failure by the superior to prevent or punish their commission – can be extremely problematic, predominantly in relation to establishing adequate notice (actual, constructive or imputed) on the part of the superior that such crimes were being committed,[73] although some noteworthy convictions have been achieved through this form of liability.[74]

To a certain extent, the difficulty in achieving a conviction for command responsibility in relation to sexual violence may be attributable to the bench rather than to the prosecution; Judge Arlette Ramaroson drafted a palpably frustrated dissent in the *Kajelijeli* case at the ICTR bemoaning the unwillingness of the other judges to convict for sexual violence on the basis of command responsibility when they had no qualms doing so in analogous factual circumstances in relation to the crime of murder.[75] Prosecuting sexual violence under the rubric of joint criminal enterprise or common purpose liability, on the other hand, allows prosecutors to focus on the forseeability of the commission of sexual and gender-based violence as part of a common plan rather than an individual defend-

[73] See for example International Criminal Tribunal for Rwanda, *Prosecutor v. Musema*, Trial Judgment and Sentence, ICTR-96-13-T, 27 January 2000; *Prosecutor v. Muvunyi*, Trial Judgment, ICTR-00-55A-T, 12 September 2006; and *Prosecutor v. Niyitegeka*, Trial Judgment, ICTR-96-14-T, 16 May 2003. See further Patricia Sellers and Kaoru Okuizumi, "Intentional Prosecutions of Sexual Assaults", in *Transnational Law and Contemporary Problems*, 1997, vol. 7, pp. 45, 66–67; Nicola LaViolette, "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda", in *Canadian Yearbook of International Law*, 1998, vol. 36, p. 93.

[74] See, *e.g.*, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Delalić et al.*, Trial Judgment, IT-96-21-T, 16 November 1998.

[75] International Criminal Tribunal for Rwanda, *Prosecutor v. Kajelijeli*, Dissenting Opinion of Judge Arlette Ramaroson, ICTR-98-44A-T, 1 December 2003. See further Catherine MacKinnon, "The ICTR's Legacy on Sexual Violence", in *New England Journal of International and Comparative Law*, 2008, vol. 14, no. 2, pp. 101, 104–105.

ant's notice of the commission of specific incidents of sexual violence.[76] As Patricia Sellers has argued,

> [i]t is almost impossible for an accused to participate in criminal activity that concomitantly generates sexual violen-ce, and not be cogent that the sexual violence was reasonably foreseeable.[77]

However, a note of caution should be sounded in relation to the ICC. Although the majority of charges for sexual violence at the ICC do not involve direct physical perpetration,[78] and only one case to date is based on command responsibility for sexual violence,[79] the Prosecutor's difficulties in achieving the inclusion of genocide charges for rape and sexual violence in the arrest warrant against Omar al-Bashir is a worrying development.[80] Although the Appeals Chamber found that the Pre-Trial Chamber had erred by applying a higher standard of proof than is required for the issuance of an arrest warrant,[81] it does not bode well for the Office of the Prosecutor's ability to obtain sufficient linkage evidence, to prove beyond a reasonable doubt the responsibility of senior political leaders for sexual violence crimes which require specific intent.

The second major preparatory issue in a prosecution case, and one of the most crucial steps in relation to sexual and gender-based violence, is the selection of charges. Obviously, the standard and breadth of evi-

---

[76] See further Rebecca L. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory", in *Harvard Journal of Law and Gender*, 2006, vol. 29, p. 201; and Alison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", in *California Law Review*, 2005, vol. 93, no. 1, p. 75.

[77] Sellers, 2009, p. 314, *supra* note 17.

[78] In the Darfur situation, Ali Kushayb was charged as a co-perpetrator under Art. 25(3)(a) in relation to one count of outrages on personal dignity. See International Criminal Court, *Prosecutor v. Harun and Kushayb*, Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3, 27 April 2007.

[79] See International Criminal Court, *Prosecutor v. Bemba*, Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009.

[80] See Women's Initiatives for Gender Justice, "Gender Report Card 2009", pp. 59–61, available at http://www.iccwomen.org/news/docs/GRC09_web-2-10.pdf, last accessed on 1 August 2011; and Women's Initiatives for Gender Justice, "Gender Report Card 2010", pp. 106–109, *supra* note 24.

[81] International Criminal Court, *Prosecutor v. al-Bashir*, Judgment on the Appeal of the Prosecutor Against the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, 3 February 2010.

dence obtained at the investigation stage will be crucial in this regard, particularly if (as in the *Akayesu* case) such evidence is initially overlooked, as this can have a ruinous impact on the prosecution's ability to amend the indictment in sufficient time to have the charges included at trial. Unfortunately, the experience in the *Akayesu* case is exceptional in this regard; the normal consequence of a failure to identify or include sexual violence evidence at a sufficiently early point in proceedings is the exclusion of charges for sexual crimes. One of the most striking failures in this regard comes from the *Lukić* case at the ICTY. As with many other cases at the ICTY, the initial indictment against the Lukić brothers was drafted in 1998, several years before their arrest and transfer to the tribunal.[82] Although the involvement of both defendants in rapes and sexual violence committed in Visegrad was well-known, then-Prosecutor Carla del Ponte took the mystifying decision not to amend the indictment to add sexual violence charges on the basis that it would unduly lengthen the trial and thereby fall foul of the Security Council completion strategy for the tribunal.[83] When her successor Serge Brammertz applied to have the indictment amended to include charges of rape and sexual slavery, the Trial Chamber refused, as the deadline for amending the indictment had already passed. The Trial Chamber also held that adding new charges so close to the commencement of trial would be in violation of the fair trial rights of the accused.[84] The outrageous result of this abject failure of prosecutorial strategy was that evidence of sexual violence was admitted only to undermine the accused's defence of alibi; one witness testified that, at the time Milan Lukić claimed to have been in another location, he was in fact raping her in Visegrad.[85] Likewise, judges at the Special Court for Sierra

[82] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Lukić et al.*, Indictment, IT-98-32-I, 26 October 1998.

[83] See *Prosecutor v. Lukić and Lukić*, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008, IT-98-32/1-PT, 8 July 2008; and Simon Jennings, Institute for War and Peace Reporting, "Lukic Trial Ruling Provokes Outcry", available at http://iwpr.net/report-news/lukic-trial-ruling-provokes-outcry, last accessed on 9 August 2011.

[84] *Ibid.*

[85] Dermot Groome, quoted in Simon Jennings, Institute for War and Peace Reporting, "Lukic Trial Ruling Provokes Outcry", *supra* note 83.

Leone refused prosecutors permission to amend the indictment in the *CDF* case to add charges of sexual violence as it was too close to the start of trial, although the unfortunate impact in that case was the exclusion of all witness testimony regarding sexual violence, a source of great distress to the witnesses in question.[86]

Assuming that sexual violence evidence has been identified early and included from the beginning of the preparations of the prosecution case, it is still vital for prosecutors to choose the correct characterisation of facts to ensure that all elements of the crime in question can be met on the evidence. This is particularly important at the ICC, where judges in the Pre-Trial Chambers have not one but two opportunities – at the issuance of an arrest warrant phase and again at the confirmation of charges phase – to exclude charges for insufficient evidence or incorrect characterisation of facts. The experience of the Court to date has shown that charges of sexual or gender-based crimes have been particularly vulnerable to attrition at the earlier stages in the proceedings.[87] Prosecutorial strategy at this stage should also include a conscious effort to make full

[86] See Institute for War and Peace Reporting, "International Justice Failing Rape Victims", available at http://iwpr.net/report-news/international-justice-failing-rape-victims, last accessed on 11 August 2011; Sara Kendall and Michelle Staggs, UC Berkeley War Crimes Studies Centre, "Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court for Sierra Leone", available at http://www.ocf.berkeley.edu/~changmin/Papers/Silencing_Sexual_Violence.pdf, last accessed on 11 August 2011; Michelle Staggs Kelsall and Shanee Stepakoff, "'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone", in *International Journal of Transitional Justice*, 2007, vol. 1, no. 3, p. 355.

[87] Although this has sometimes been a matter of insufficient prosecution evidence (such as the shrinking of the geographic scope of the rape charges in the *Muthaura* case), it has also frequently been caused by an incorrect interpretation of the law by the judges – for example, the exclusion of other forms of sexual violence in the arrest warrant in the *Bemba* case on the grounds that forcible public nudity did not meet the threshold for 'other forms of sexual violence of comparable gravity', despite the fact that when the crime of other forms of sexual violence was first identified in the *Akayesu* case, the archetypal example given was forcing women to undress and parade in public. See International Criminal Court, *Prosecutor v. Muthaura et al.*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-01, 8 March 2011; International Criminal Court, *Prosecutor v. Bemba*, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, ICC-01/05-01/08-15-tENG, 10 June 2008; *Prosecutor v. Akayesu*, Trial Judgement, para. 688, *supra* note 67.

use of the expansive range of sexual violence offences included in the Rome Statute,[88] as well as the incorporation of evidence of sexual violence, to illustrate the gendered nature of other crimes within the jurisdiction of the Court. International judges to date have shown willingness to consider evidence of sexual violence as a constituent factor in the commission of a wide range of offences beyond explicitly sexual or gender-based crimes, including genocide, extermination, enslavement, torture, persecution, other inhumane acts, grave breaches, outrages on personal dignity and cruel treatment. Prosecutors may be inclined to err on the side of caution in their characterisation of charges, but in doing so may miss a valuable opportunity to create an important precedent in international criminal law. For example, in the *Delalić* case at the ICTY, prosecutors sought charges only of inhuman treatment and cruel treatment in relation to an incident where two male detainees were forced to perform fellatio on each other. However, in the trial judgment, the judges noted that they would have been willing to convict the detainees for rape on the facts if they had been charged as such.[89] It is vital to adopt an open-minded and progressive approach to gender in the selection of charges; international criminal trials have already inverted some preconceptions by hearing testimonies of sexual violence from male victims, and convicting a woman for the perpetuation of sexual violence.[90]

---

[88] This includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence. Rome Statute, Art. 7(g), Art. 8(b)(xxii) and Art. 8(c)(vi), *supra* note 8.

[89] *Prosecutor v. Delalić et al.*, Trial Judgement, paras. 1056–1066, *supra* note 74.

[90] As mentioned above, the ICTY has by far the best record in relation to the prosecution of sexual violence committed against men, but more recently, a male rape victim testified in the *Bemba* case at the ICC, which is an encouraging development. See Women's Initiatives for Gender Justice, "Legal Eye on the ICC", March 2011, available at http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html, last accessed on 11 August 2011. In June 2011, Pauline Nyiramasuhuko became the first woman to be convicted of rape by an international criminal tribunal for her role in the Rwandan genocide. See International Criminal Tribunal for Rwanda, *Prosecutor v. Nyiramasuhuko et al.*, Trial Judgment and Sentence, ICTR-98-42-T, 24 June 2011; Stephanie Nieuwoudt, Institute for War and Peace Reporting, "Arusha Trial Challenges Gender Stereotypes", available at http://iwpr.net/report-news/arusha-trial-challenges-gender-stereotypes, last accessed on 11 August 2011; Stephanie K. Wood, "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems With Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda", in *Columbia Journal of Gender and Law*, 2004, vol. 13, p. 274.

Although international criminal trials are a costly and time-consuming business, there are certain concessions prosecutors should not make in exchange for a guilty plea, if they conflict with prosecutorial strategy. It is interesting to compare the practice of the ICTY and ICTR in relation to sexual violence charges and guilty pleas. At the Rwanda tribunal, sexual violence charges were dropped entirely in exchange for a guilty plea in no fewer than four cases.[91] Although the defendants pleaded guilty to a lesser charge relating to killings perpetrated in pursuit of the genocidal policy, charges of rape and sexual violence which were initially included in the indictments were removed without any corresponding manifestation in the ultimate conviction, weakening the already paltry prosecution record of that tribunal in relation to sexual crimes. At the Yugoslavia tribunal, by comparison, prosecutors succeeded in obtaining a guilty plea on sexual violence charges in six separate cases,[92] thereby proving that sexual and gender-based crimes need not be jettisoned in subservience to quick, efficient convictions. International criminal tribunals will not be judged on conviction rates alone; excessive eagerness on the part of prosecutors to sacrifice any reflection of a defendant's criminal responsibility for a serious and widespread crime, such as sexual violence in the final judgment of a case, shows a failure to appreciate the didactic importance of international criminal prosecutions.

When dealing with sexual and gender-based crimes at trial, prosecutors need to include a consideration of the needs of victims and witnesses in their prosecutorial strategy. The practice of witness proofing is a valuable means of preparing a vulnerable witness for the experience of testifying, and can have the added advantage of removing the potential for an appearance of unreliability in a witness who may have given their ini-

[91] International Criminal Tribunal for Rwanda, *Prosecutor v. Bisengimana*, Judgement and Sentence, ICTR-00-60, 13 April 2006; *Prosecutor v. Nzabirinda*, Sentencing Judgement, ICTR-2001-77, 23 February 2007; *Prosecutor v. Rugambarara*, Sentencing Judgement, ICTR-00-59, 16 November 2007; and *Prosecutor v. Serushago*, Sentence, ICTR-98-39-S, 5 February 1999.

[92] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Cesić*, Sentencing Judgement, IT-95-10/1, 11 March 2004; *Prosecutor v. Nikolić*, Sentencing Judgement, IT-94-2, 18 December 2003; *Prosecutor v. Rajić*, Sentencing Judgement, IT-95-12-S, 8 May 2006; *Prosecutor v. Simić*, Sentencing Judgement, IT-95-9/2-S, 17 October 2002; *Prosecutor v. Todorović*, Sentencing Judgement, IT-95/1, 31 July 2001; and *Prosecutor v. Zelenović*, Sentencing Judgement, IT-96-23/2, 4 April 2007.

tial statement to investigators years earlier.[93] Obviously, the trauma of reliving the experience of sexual violence in a courtroom will not be an easy experience for any witness, and can be particularly distressing for victims suffering from post-traumatic stress disorder. Thankfully, the ICTY has held in the *Furundžija* case that "there is no reason why a person with PTSD cannot be a perfectly reliable witness", although the other decisions taken in that case in relation to the disclosure of a traumatised witness's psychological and medical records were significantly less encouraging.[94] Where necessary, prosecutors should also co-operate with the Victims and Witnesses Unit to take full advantage of the in-court and out of court protective measures available to vulnerable witnesses, including face and voice distortion, testifying under a pseudonym, redaction of identifying information, the presence of a resource person or psychologist from the Victims and Witnesses Unit in the courtroom, and even (if strictly necessary) testimony in closed session.[95] Ultimately, however, the highest form of consideration that prosecutors can show to victims of sexual violence is to ensure that every layer of their investigative and prosecutorial strategy is designed to ensure the most effective and comprehensive prosecutions of sexual and gender-based violence possible.

15.4. Conclusion

Although there have undoubtedly been errors over the last seventeen years of modern international criminal prosecutions, it would be churlish not to acknowledge the incredible significance of the body of law on sexual and gender-based crimes which has been developed, and the hard work and dedication of the many talented and committed people who have made such concerted efforts to pursue these prosecutions. However, the very

[93] Witness proofing is not technically permitted at the ICC; however, the practice of 'witness familiarisation' is broadly analogous for this purpose. See further Sergey Vasiliev, "Proofing the Ban on 'Witness Proofing': Did the ICC Get it Right?", in *Criminal Law Forum*, 2009, vol. 20, no. 2–3, p. 193 and Christine Schön, "Telling Their Stories in Their Own Words: Witness Familiarisation at the International Criminal Court", in *Revue Internationale de Droit Pénal*, 2010, vol. 81, no. 1–2, p. 189.

[94] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundžija*, Trial Judgement, IT-95-17/1-T, 10 December 1998, para. 105. See further Kelly Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", in *American Journal of International Law*, 1999, vol. 93, no. 1, pp. 97, 110–113.

[95] See further Anne-Marie de Brouwer, 2005, pp. 231–283, *supra* note 51.

scale of the normative and interpretative precedents set by the limited roster of international criminal convictions for sexual violence imposes an even more onerous requirement on prosecutors, to ensure that they prosecute these crimes to the fullest possible extent. Nothing raises expectations like success. It would be a mistake to allow the perception of sexual and gender-based violence as a problematic or difficult crime to prosecute, to be used as an excuse to relegate such crimes to an afterthought or a handful of token allegations scattered across the case files. Prosecuting sexual violence effectively at the international criminal level is not easy, but nor is it impossible. As has been seen throughout this chapter, if sexual crimes are to be dealt with in a sufficiently thorough manner, they must be prioritised at all levels in the work of the investigation and prosecution teams. The result will not only better reflect the reality of the underlying conflicts and the experience of victims (both male and female), but will enable international tribunals to live up to their mandates and to continue to contribute vital precedents to the growing body of international criminal jurisprudence.

INDEX

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

R

S

T

TORKEL OPSAHL ACADEMIC EPUBLISHER

Judge Advocate General Arne Willy Dahl, Norway
Professor Emeritus Yoram Dinstein, Tel Aviv University
Professor Jon Elster, Columbia University and Collège de France
Mr. James A. Goldston, Open Society Institute Justice Initiative
Mr. Richard Goldstone, former Chief Prosecutor,
International Criminal Tribunal for the former Yugoslavia
Judge Hanne Sophie Greve, Gulating Court of Appeal, formerly
European Court of Human Rights
Dr. Fabricio Guariglia, Senior Appeals Counsel, Office of the Prosecutor,
International Criminal Court
Dr. Franz Guenthner, Ludwig-Maximilians-Universität
Mr. Christopher Keith Hall, Amnesty International
Professor Emeritus Frits Kalshoven, Leiden University
Judge Hans-Peter Kaul, International Criminal Court
Judge Erkki Kourula, International Criminal Court
Dr. Claus Kress, Director of the Institute for Criminal Law and Criminal Procedure,
Cologne University
Professor David Luban, Georgetown University
Mr. Juan E. Méndez, Special Adviser to the ICC Prosecutor on Crime Prevention, former President, ICTJ
Dr. Alexander Muller, Director, The Hague Institute for the Internationalisation of Law
Judge Erik Møse, Norwegian Supreme Court, former President,
International Criminal Tribunal for Rwanda
Dr. Gro Nystuen, University of Oslo and Norwegian Defence Command and Staff College
Mr. William Pace, Convener, Coalition for the International Criminal Court
Ms. Jelena Pejić, International Committee of the Red Cross
Mr. Robert Petit, former International Co-Prosecutor,
Extraordinary Chambers in the Courts of Cambodia
Maj-Gen (ret'd) Anthony P.V. Rogers, Cambridge University
Professor William A. Schabas, National University of Ireland, Galway
Professor James Silk, Yale Law School
Professor Emeritus Otto Triffterer, Salzburg University
Professor Marcos Zilli, University of Sao Paulo

ALSO IN THE FICHL PUBLICATION SERIES

Morten Bergsmo, Mads Harlem and Nobuo Hayashi (editors):
Importing Core International Crimes into National Law
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 1 (Second Edition, 2010)
ISBN 978-82-93081-00-5

Nobuo Hayashi (editor):
National Military Manuals on the Law of Armed Conflict
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 2 (Second Edition, 2010)
ISBN 978-82-93081-02-9

Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec:
The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 3 (Second Edition, 2010)
ISBN 978-82-93081-04-3

Morten Bergsmo (editor):
Criteria for Prioritizing and Selecting Core International Crimes Cases
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 4 (Second Edition, 2010)
ISBN 978-82-93081-06-7

Morten Bergsmo and Pablo Kalmanovitz (editors):
Law in Peace Negotiations
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 5 (Second Edition, 2010)
ISBN 978-82-93081-08-1

Morten Bergsmo, César Rodríguez Garavito, Pablo Kalmanovitz
and Maria Paula Saffon (editors):
Distributive Justice in Transitions
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 6 (2010)
ISBN 978-82-93081-12-8

Also available in Spanish:
Justicia distributiva en sociedades en transición
ISBN 978-82-93081-10-4

Morten Bergsmo (editor):
Complementarity and the Exercise of Universal Jurisdiction
for Core International Crimes
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 7 (2010)
ISBN 978-82-93081-14-2

Morten Bergsmo (editor):
Active Complementarity: Legal Information Transfer
Torkel Opsahl Academic EPublisher
Oslo, 2011
FICHL Publication Series No. 8 (2011)
ISBN 978-82-93081-55-5

Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker (editors):
The Law of the Future and the Future of Law
Torkel Opsahl Academic EPublisher
Oslo, 2010
FICHL Publication Series No. 11 (2011)
ISBN 978-82-93081-27-2

All volumes are freely available as e-books on the FICHL homepage www.fichl.org.
Printed copies may be ordered online from distributors such as www.amazon.co.uk.

FICHL Publication Series No. 13 (2012)

Thematic Prosecution of International Sex Crimes

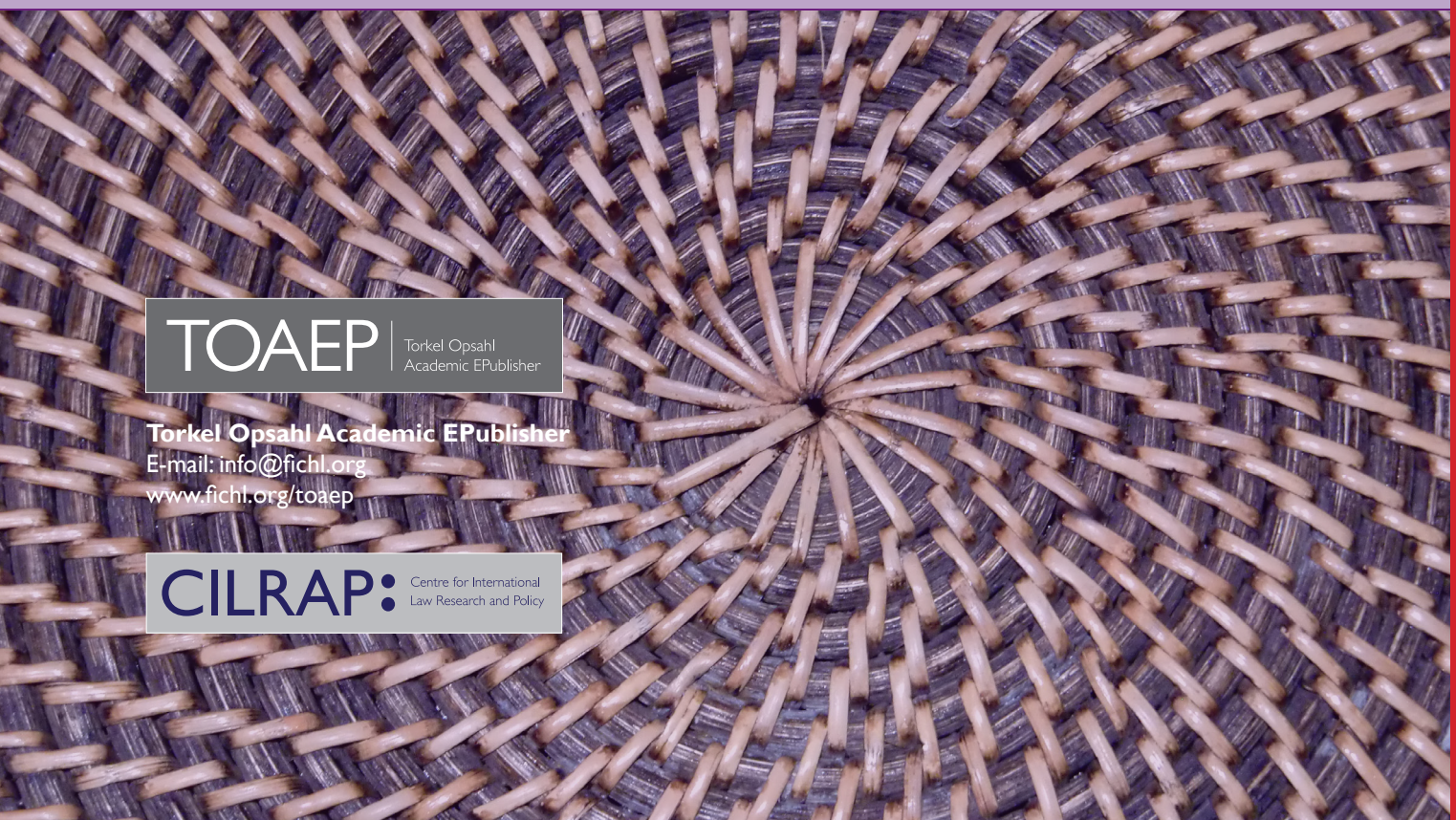
Morten Bergsmo (editor)

By singling out the theme of recruitment and use of child soldiers in its first case, the Lubanga Trial Judgment of the International Criminal Court has legitimized the very idea of thematic prosecution at the international and national levels. Mr. Lubanga Dyilo was convicted by the Chamber of a narrow range of criminality to the exclusion of killings and physical integrity violations such as rape, that characterized the conflict in which he was an actor. Should war crimes cases reflect the overall victimization that took place in the relevant conflict? Or 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, whether in internationalized or national criminal jurisdictions. 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 timely publication will hopefully raise awareness and generate discussion about the possibilities and challenges of the use of thematic prosecution among those working in criminal justice agencies, academia, civil society, and the media. It contains a foreword by Richard J. Goldstone and 15 chapters by eminent legal scholars and practitioners.

ISBN 978-82-93081-31-9



TOAEP | Torkel Opsahl Academic EPublisher

Torkel Opsahl Academic EPublisher
E-mail: info@fichl.org
www.fichl.org/toaep

CILRAP: Centre for International Law Research and Policy