



Thematic Investigation and Prosecution of International Sex Crimes

A seminar organized by the
 Forum for International Criminal and Humanitarian Law,
 Yale University and the University of Cape Town,
 with support by the Royal Norwegian Ministry of Foreign Affairs,
on 7 and 8 March 2011, Cape Town, Republic of South Africa.

International sex crimes were first investigated and prosecuted in a systematic manner by the ICTY through the so-called ‘Foča cases’ (referring to Foča Municipality in Bosnia and Herzegovina). This represents a very significant achievement of international criminal justice as a whole. The Tribunal’s approach can be described as use by default of a mild variant of ‘thematic prosecution’, understood for the purposes of this seminar as prosecutorial prioritization, at least initially, of for example international sex crimes over other crimes, including arguably more serious crimes such as killings. ‘Thematic prosecution’ may sometimes be considered necessary in order to focus adequate resources to build complex and time-consuming cases when there is a large backlog of cases.

Pure ‘thematic prosecution’ differs from standard approaches in that those crimes that are generally considered most serious are not given the same priority, at least initially. Such pure ‘thematic prosecution’ entails that a theme of crimes is 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 not involving that theme.

It may be argued that the ICTY has pursued a ‘Srebrenica prosecution theme’, but not the themes of destruction of religious buildings and monuments, or the use of incitement through mass-media. It has been suggested that the ICC has used thematic prosecution for the recruitment and use of child soldiers. But the seminar is not concerned with past institutional practices as much as with the future.

Several national criminal justice systems face many more core international crimes cases than they have resources to investigate and prosecute. They need to prioritize cases. Should they use one or more variants of ‘thematic prosecution’ to highlight certain types of crimes, depending on the circumstances of each situation?

A careful justification for ‘thematic prosecution’ of core international crimes – including international sex crimes – has not yet been developed. This is a lacuna insofar as the practice of pure ‘thematic prosecution’ is potentially controversial. Most criteria for the prioritization of cases place decisive emphasis on the gravity of the crimes. Regrettably, contemporary armed conflicts are still characterized by many killings, normally many more than the criminal justice systems concerned can process. Murder is

widely considered more grave than sex crimes and torture. Thus it is easy for criminal justice officials to insist that the most serious core international crimes must be prioritized for investigation and prosecution, whether in international or other criminal jurisdictions.

This seminar seeks to address the justification for why criminal justice officials might prioritize the investigation and prosecution of certain themes of core international crimes, in particular international sex crimes. The seminar will also consider the related questions of whether there should be thematic jurisdictions for international sex crimes (special courts or chambers), whether there should be special investigative and case preparatory institutional capacity for such crimes, or other forms of special measures to facilitate such investigations and prosecutions. Moreover, the role of activist non-governmental organizations in the decision-making processes that lead to thematic investigation and prosecution will also be considered.

Registration:

Seminar participation is free, but there is only a limited number of seats available. To register, please send an e-mail message to info@fichl.org by 25 February 2011, indicating your wish to register as a seminar participant. Confirmation e-mail responses will be sent. The Vineyard Hotel (<http://www.vineyard.co.za/>) offers a reduced rate for seminar participants.

Programme:¹

Monday, 7 March 2011:

Session 1:

Chaired by Elisabeth Wood² (Yale University)

09:00 Salím A. Nakhjavání³ (University of Cape Town):
Introduction and welcome.

09:05 Morten Bergsmo⁴ (Georgetown University, Stanford University, EUI):

¹ The programme is subject to change. The latest version will be available at www.fichl.org/activities.

² **Elisabeth Wood** is professor of political science at Yale University. Her current research focuses on sexual violence during war. She is the author of *Insurgent Collective Action and Civil War in El Salvador* (Cambridge, 2003) and *Forging Democracy from Below: Insurgent Transitions in South Africa and El Salvador* (Cambridge, 2000), as well as many scholarly articles. She has been a visiting scholar at the University of Cape Town and the Universidad Centroamericana José Simeón Cañas (San Salvador), and a scholar at the Harvard Academy for International and Area Studies (1995-1997). She is also a Research Professor at the Santa Fe Institute.

³ **Salím A. Nakhjavání** is Senior Lecturer in the Department of Public Law at the University of Cape Town. He teaches undergraduate and postgraduate students in general public international law and international criminal law. His current PhD research focuses on complexity theory and international law; other research interests include international criminal law and procedure and international sustainable development law. Prior to his appointment at UCT in 2006, he served as Associate Human Rights Officer at the UN Office of the High Commissioner for Human Rights (2005), working on a review of judicial processes in Indonesia and Timor-Leste, and as Assistant Legal Adviser in the Office of the Prosecutor of the International Criminal Court (2003-2004), where he was involved in the preparatory and initial investigative activities of that Office, including the development of the Case Matrix and other components of the ICC Legal Tools. He was elected to the Whewell Scholarship in International Law in the University of Cambridge in 2002. He has lectured on international human rights law and specialist topics in international criminal law in Germany, Italy, Norway, the Netherlands, Australia and South Africa. In 1999, he was commended by the Government of Quebec for his work with young musicians. A citizen of Canada and the United Kingdom, A citizen of Canada and the United Kingdom, Salim is fluent in French and English, with notions of isiXhosa and Afrikaans.

⁴ **Morten Bergsmo** is Visiting Professor of Law, Georgetown University; Visiting Fellow, Stanford University; Fernand Braudel Senior Fellow, EUI (Spring 2011); and ICC Consultant and Co-ordinator of the ICC Legal Tools Project. He was formerly Visiting Scholar, UC Berkeley (2010 Spring); Senior Researcher, PRIO (2006-09);

Why Thematic Prosecution of International Sex Crimes, Special Institutional Capacity for Such Crimes, and the Role of Gender NGOs Matters.

- 09:30 Margaret M. deGuzman⁵ (Temple University, Beasley School of Law):
Selecting Sex Crimes for Prosecution at International Courts: the Philosophical Foundations of a Feminist Agenda.
- 10:20 Fabricio Guariglia⁶ (ICC Office of the Prosecutor, Appeals Section):
'Those Most Responsible' v. International Sex Crimes: Competing Prosecution Themes?
- 11:10 Tea
- 11:25 Christopher Mahony⁷ (Oxford University):
Prioritising International Sex Crimes before the Special Court for Sierra Leone: Another Potential Instrument of Political Manipulation?
- 12:15 Lunch

Special Adviser to the Office of the Director of Public Prosecution of Norway (2007-08); Senior Legal Adviser and Chief of the Legal Advisory Section, ICC Office of the Prosecutor (2002-05); Co-ordinator of the establishment of the ICC Office of the Prosecutor (2002-03); Legal Adviser, ICTY (1994-2002); and Legal Adviser, UN Commission of Experts for the Former Yugoslavia established pursuant to Security Council resolution 780(1992) (1993-94). He represented the ICTY to the UN negotiation process to establish the ICC (1996-2002). Since 2005, he has worked extensively with national capacity building, knowledge-transfer and legal empowerment in the area of core international crimes. He founded and directs the capacity building platform *Case Matrix Network* (www.casematrixnetwork.org) and the *Forum for International Criminal and Humanitarian Law* (www.fichl.org).

⁵ **Margaret M. deGuzman** teaches criminal law, international criminal law, and transitional justice at Temple University's Beasley School of Law. Her scholarly interests lie at the intersections of criminal law, international law, and international human rights law. She has authored a number of publications, including articles examining the definition of crimes against humanity and the role of case and situational gravity in the legitimacy of the International Criminal Court. She is a graduate of Yale Law School, the Fletcher School of Law & Diplomacy, and Georgetown University's School of Foreign Service. She was a Fulbright Scholar in Senegal and is currently a PhD candidate at the Irish Center for Human Rights. Before joining the Temple faculty, Professor deGuzman clerked on the Ninth Circuit Court of Appeals and practiced law in San Francisco for six years, specializing in criminal defense. Professor deGuzman also clerked for the ICTY Office of the Prosecutor and served as a legal advisor to the Senegal delegation at the Rome Conference on the International Criminal Court.

⁶ **Fabricio Guariglia** is Senior Appeals Counsel, Office of the Prosecutor, International Criminal Court (ICC). Dr. Guariglia has previously served as Appeals Counsel, Office of the Prosecutor, ICTY and a member of the Argentine ICC delegation to the Rome Conference. His academic appointments include the positions of visiting fellow at the London School of Economics, where he taught international law and international criminal law, Permanent Adjunct Professor of Criminal Law and Procedure at the Faculty of Law of the University of Buenos Aires, and Visiting Professor at the University of Münster. He has taught numerous courses and spoken at conferences on the problems of international criminal law, comparative criminal law and human rights. Dr. Guariglia has published extensively in the field.

⁷ **Christopher Mahony** is a justice sector consultant based at the University of Oxford where he is a candidate for a DPhil in Politics and treasurer of Oxford Transitional Justice Research. He holds Bachelor of Commerce (BCom) and Bachelor of Laws (LLB) degrees from the University of Otago and a master's degree in African Studies (MSc) from the University of Oxford. He was admitted to the bar of the High Court of New Zealand in 2006 where he appeared for the crown in criminal and refugee matters. He drafted the recommendations on governance for the Sierra Leone Truth and Reconciliation Commission, and co-authored the 'Historical antecedents to the conflict' chapter. In 2008, he directed the Witness Evaluation Legacy Project at the Special Court for Sierra Leone. He designed a proposed witness protection programme for Sierra Leone's domestic justice system. He has advised the British and US governments and the Institute for Security Studies on justice sector reform and transitional justice issues. His research interests include transitional justice, international criminal law, international human rights and humanitarian law, and African history and politics.

Session 2:

Chaired by Elisabeth Wood (Yale University)

- 13:15 Flor de Maria Valdez⁸ (Inter-American Commission of Women, Organization of American States):
Prospects for Thematic Prosecution of International Sex Crimes in Latin America.
- 14:05 Benson Chinedu Olugbuo⁹ (University of Cape Town):
A Victims' Perspective on Thematic Prosecution of International Sex Crimes: The Role of National Judicial Institutions in Africa.
- 14: 55 Tea
- 15:15 Susanna Greijer¹⁰ (European University Institute):
Thematic Prosecutions for Crimes Against Children: A Deliberate or Accidental Strategy in International Criminal Justice?
- 16:05 Paloma Soria Montañez¹¹ (Women's Link Worldwide):
Looking Forward: the Prosecution of Sex Crimes in National Courts.
- 19:00 Seminar dinner.

⁸ **Flor de Maria Valdez** is a consultant of the Inter-American Commission of Women (CIM) at the Organization of American States (OAS). She collaborates with the Mechanism to Follow Up on the Implementation of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women - Convention of Belem do Pará (MESECVI). Her previous work and publications focus on sexual violence within armed conflict, gender justice, transitional justice and gender-sensitive reparations. She holds a BA in Law from Pontificia Universidad Catolica del Peru and a M.Sc. in Forced Migration from the University of Oxford.

⁹ **Benson Chinedu Olugbuo** is a Teaching and Research Assistant and PhD candidate in the Public Law Department of the University of Cape Town. He is the UCT Team Advisor for the 2011 Phillip Jessup International Law Moot Court Competition. Before joining UCT, he was the Anglophone Africa Regional Coordinator for the Coalition for the International Criminal Court (2004 -2009) where he led the campaign for the ratification and domestic implementation of the Rome Statute of the International Criminal Court (ICC) and the Agreement on Privileges and Immunities of the ICC (APIC) in Sub-Saharan Africa. He has participated in the meetings of the Assembly of States Parties of the ICC since 2004 and was a delegate to the Review Conference of the ICC in Kampala in 2010. He holds an LL.M. from the University of Pretoria, an LL.B from the University of Nigeria and is a Solicitor and Advocate of the Supreme Court of Nigeria.

¹⁰ **Susanna Greijer** is a PhD candidate at the Department of Law at the European University Institute. She holds a master's degree in International Affairs from Sciences Po Paris. Her previous experiences include research for UNICEF Innocenti research centre as well as for the International Institute for Humanitarian Law (IIHL). She has lectured in international humanitarian law, human rights and on the topic of children and armed conflict at the IIHL, the NATO School in Oberammergau, Germany, the Italian Red Cross and at the University of Pisa. She has worked with children involved in armed hostilities in Colombia.

¹¹ **Paloma Soria Montañez** is a senior staff attorney at Women's Link Worldwide Madrid office, where she is in charge of the following lines of work: human trafficking, migrant women's rights, intersectional discrimination and international gender crimes. Before joining Women's Link as a staff attorney, she was an intern with the organization. She holds a law degree from the University of Málaga, in Spain, and was the recipient of various scholarships that allowed her to continue her studies in Barcelona and Rome. She holds a Masters 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 different 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. She currently resides in Madrid.

Tuesday, 8 March 2011:

Session 3:

Chaired by Nobuo Hayashi¹² (PRIO)

- 09:00 Valerie Oosterveld¹³ (University of Western Ontario):
Gender-Sensitive Thematic Prosecution using Gender-Neutral Crimes.
- 09:50 Neha Jain¹⁴ (Georgetown University):
Going Beyond Prosecutorial Discretion: Institutional Factors Influencing Thematic Prosecution.
- 10:40 Tea
- 11:00 Olympia Bekou¹⁵ (University of Nottingham):
Special Mechanisms to Investigate and Prosecute International Sex Crimes: Pro and Contra Arguments.
- 11:50 Lunch

¹² **Nobuo Hayashi** is a Researcher at the Peace Research Institute Oslo (2008-present), where he is preparing a monograph on military necessity. Also, as a Visiting Professor at the International University of Japan (2005-present), he teaches semester-length courses on general public international law, the international law on recourse to force and the law of armed conflict. Previously, he was a Legal Advisor at the Norwegian Centre for Human Rights, University of Oslo Law Faculty (2006-2008); a Legal Officer in the Prosecutions Division, Office of the Prosecutor (OTP), International Criminal Tribunal for the Former Yugoslavia (ICTY)(2004-2006); and an Associate Legal Officer in the ICTY OTP Legal Advisory Section (2000-2003). He holds a B.Sc. in Foreign Service in international relations, law and organisation from Georgetown University (1995); a *Diplome d'etudes superieures*, an M.Phil. equivalent, in international law from the *Institut universitaire de hautes etudes internationales* (HEI) in Geneva (1998); and an LL.M. from the University of Cambridge (1999). He was also enrolled in the post-graduate School of International and Public Affairs at Columbia University (1995-1996), the Hague Academy of International Law (1999) and the doctoral programme at HEI (1998-2004).

¹³ **Valerie Oosterveld** is an Assistant Professor at the Faculty of Law of the University of Western Ontario in Canada, having joined the faculty in 2005. She teaches International Criminal Law, Public International Law and International Organizations. She has published extensively on gender issues in international criminal law. Prior to joining the faculty, she served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade, where she provided legal advice on international criminal accountability for genocide, crimes against humanity and war crimes, especially with respect to the International Criminal Court (ICC), the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Special Court for Sierra Leone. Prof. Oosterveld was a member of the Canadian delegation to the 1998 ICC negotiations in Rome, Italy, at which she was involved in the negotiation of the gender-related provisions. She also represented Canada at the subsequent ICC Assembly of States Parties meetings and the 2010 Review Conference of the Rome Statute of the ICC in Kampala, Uganda. She earned her J.S.D. and LL.M. at Columbia Law School, her LL.B. from the University of Toronto Faculty of Law and her B.Soc.Sc. from the University of Ottawa.

¹⁴ **Neha Jain** is a research fellow and Adjunct Professor of Law at Georgetown University Law Center. Her scholarship focuses on criminal law, public international law, legal theory and comparative law. Prior to coming to Georgetown, Neha worked as a research fellow at the Max Planck Institute for Foreign and International Criminal Law and continues to act as a consultant for the Institute. She received a B.C.L. and M.Phil. in Law from Oxford University where she was a Rhodes scholar and Editor-in-Chief of the Oxford University Commonwealth Law Journal. Neha has also served as a law clerk to Justice V.N. Khare, former Chief Justice of the Supreme Court of India and interned with the Office of the Prosecutor at the Extraordinary Chambers in the Courts of Cambodia. She has taught courses in constitutional law, legal methods, and jurisprudence at Oxford University and the National Law School of India University.

¹⁵ **Dr. Olympia Bekou** is Lecturer in Law and Head of the International Criminal Justice Unit of the Nottingham Human Rights Law Centre. A qualified lawyer, she specializes in international criminal law with particular expertise in national implementing legislation for the ICC. Olympia has provided research and capacity building support for 63 States, through intensive training to more than 75 international government officials and drafting assistance to Samoa (with legislation enacted in November 2007), Fiji and Jamaica. She is responsible for the National Implementing Legislation Database (NILD) of the ICC Legal Tools Project and has researched and taught extensively worldwide.

Session 4:

Chaired by Elisabeth Wood (Yale University)

- 12:50 Alejandra Azuero Quijano¹⁶ (Harvard Law School):
Investigating Sex Crimes in a Post Genomic Age.
- 13:40 Kai Ambos¹⁷ (University of Göttingen):
Thematic Investigations and Prosecution of International Sex Crimes: Some Critical Comments from a Theoretical and Comparative Perspective.
- 14:30 Nobuo Hayashi (PRIO):
Concluding remarks.

The seminar ends by 15:00.

¹⁶ **Alejandra Azuero Quijano** is a lawyer and first year doctoral student at Harvard Law School. Before starting her doctoral degree, Alejandra worked in Colombia as a researcher on the gendered dimensions of armed conflict for CODHES, a local NGO, and served as a consultant on wartime sexual violence and human trafficking for UNIFEM and IOM respectively. She recently published a case study on the uses of sexual violence during paramilitary attacks against civilian population in Colombia titled “Survivors Matter: The Experience of Women in the Massacres of Chengue and Tigre”. Her current research focuses both on the role of legal discourses in shaping how activists, judges, journalists and legislators imagine, narrate and represent sexual violence within and without war; and how other epistemologies participate in the production of legal discourses at the intersection of sex, violence and war.

¹⁷ **Kai Ambos** has been Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen since May 2003 and Judge at the Provincial Court (Landgericht) of Göttingen since 2006. He has been Dean of Student Affairs between summer 2008 and 2010. He is freelance consultant on the issues of international criminal law, transitional justice and judicial reform in Latin America to the Deutsche Gesellschaft für technische Zusammenarbeit (GTZ-German agency for technical cooperation), the Konrad Adenauer Foundation and other organisations. From 1991 to 2003, he was senior research fellow at the Max-Planck-Institute for Foreign and International Criminal Law (Freiburg im Breisgau, Germany) in charge of the International Criminal Law and Spanish-speaking Latin America Sections. On behalf of Germany, he has participated in the negotiations on the creation of the International Criminal Court and later became a member of the expert working group of the German Federal Ministry of Justice on implementing the Rome Statute. He has also worked extensively in Latin America on human rights, drug-related issues and criminal law reforms. He has written widely on international criminal law and procedure in German, English, Spanish, Portuguese and French. He is a member of editorial boards of several international criminal law journals in Europe and Latin America. He holds guest professorships in Israel, Italy, Spain and various Latin American countries. He is also member of scholarship selections committees of the German Academic Exchange Service (DAAD) and the Alexander von Humboldt Foundation. He is freelance consultant on the issues of international criminal law, transitional justice and judicial reform in Latin America to the Deutsche Gesellschaft für technische Zusammenarbeit (GTZ-German agency for technical cooperation), the Konrad Adenauer Foundation and other organisations. His educational background includes: study of law and political science at the Universities of Freiburg (Germany), Oxford (United Kingdom) and Munich (Germany); 1st and 2nd state exams; doctoral studies and "Habilitation" (post-doctoral qualification for a professorship) in criminal law, criminal procedure, criminology, comparative law and public international law at the Ludwig Maximilian University Munich (Germany).