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Thematic Prosecution of International Sex Crimes

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***Thematic Prosecution of International Sex Crimes* edited by Morten Bergsmo. Torkel Opsahl Academic E-Publishers, 2012.**

Reviewed by Nyasha Karimakwenda*

In 2012 the International Criminal Court (ICC) handed down its long awaited first judgement in *The Prosecutor v. Thomas Lubanga Dyilo*. In this landmark verdict, the ICC found the former Congolese militia leader, Thomas Lubanga, guilty of the crime of recruiting and using child soldiers in the regional conflict in Ituri. Another significant decision in international criminal law was issued in 2011 by the International Criminal Tribunal for Rwanda (ICTR). Pauline Nyiramasuhuko, the former Minister for Family Welfare and the Advancement of Women, was convicted of genocide and rape as a crime against humanity. While acting as a leader during the genocide, she had ordered her men to rape women before killing them. Nyiramasuhuko is the first woman to be found guilty of these international crimes.

Given these milestone developments in the international legal and political arena, the publication of *Thematic Prosecution of International Sex Crimes*, edited by Morten Bergsmo, is a timely work which examines the current status of international criminal law and policy, particularly as they relate to violence against women. It is the first book committed solely to confronting this issue. Thematic prosecution refers to the prioritizing of sex crimes to the exclusion of other crimes, or in conjunction with other crimes.^[1] In the 1990s the efforts of feminist groups resulted in the 'Foca cases' issued by the International Criminal Tribunal for Yugoslavia (ICTY) and the ICTR's ground-breaking *Akayesu* judgement. These cases were the first to thematically incorporate the crimes of rape and sexual slavery into international criminal law.^[2]

The book is an anthology of papers; the majority of which were presented at a seminar on the International Prosecution of International Sex Crimes in March 2012 in Cape Town; and sponsored by the Forum for International Criminal and Humanitarian Law, the University of Cape Town, and Yale University. The aim of the anthology is to analyse 'thematic prosecutions, possibilities, challenges and consequences' in order to 'equip and empower criminal justice actors.'^[3] It is divided into three parts and contains fifteen chapters written by actors from a range

of backgrounds – political scientists, consultants, and both international and national legal practitioners and scholars.

Refreshingly, the book does not articulate a wholesale endorsement of thematic prosecutions of sex crimes. The authors' views vary considerably and are by no means narrow or uniform. They interrogate a range of assumptions about thematic prosecutions in order to ascertain their utility and effectiveness. Several of the papers, such as the one by Margaret deGuzman, emphasize the philosophical and feminist underpinnings which justify a thematic prosecution of sex crimes. Some authors, for example Christopher Mahony, reveal political agendas at play as well as the risks of thematic prosecution. A wide range of topics are covered, including: the history of how international crimes relating to gender violence have been addressed; the practicalities of investigating and prosecuting sex crimes; debates about the gravity of murder versus rape; and even the perpetration of sex crimes by UN peacekeepers. The chapters' content spans the globe, with discussions on topics from throughout South America and Africa as well as Yugoslavia and Cambodia. Here I will highlight just a few of the thought-provoking chapters in this anthology.

In a chapter that provides an excellent foundation for understanding the prosecution of sex crimes in the international arena, deGuzman details the various theoretical justifications for thematic prosecution of sexual crimes. She argues that an expressive rationale is the most compelling. Because international law is an important vehicle for promoting norms, it should, she asserts, be utilized to express norms against sex crimes given 'their history of under-enforcement and in the discrimination that the crimes themselves express.'^[4] DeGuzman discusses how, historically, sex crimes have not been taken seriously by prosecutors and investigators. Feminists pushed for sex crimes to be incorporated at the ICTY and the ICTR, and without their interventions, the cases which have been lauded as victories in terms of prosecuting and recognizing the seriousness of gender based violence would never have come to pass.

In theory it is difficult to argue against the prioritization of targeting those responsible for such unspeakable crimes, crimes that overwhelmingly affect women and girls and which had not been viewed with sufficient severity prior to the intervention of women's groups in the 1990s. Yet, it is crucial to also look at how such strategic prosecution may in reality not assist victims; or how it may be utilized to further the political agendas of certain actors and countries. Certain chapters in the book take on this important role by presenting unexpected or unconventional arguments in order to undo the assumption that prosecuting sex crimes is an inherently positive and effective strategy. Of note is the paper by Mahony who writes a scathing opinion of the Special Court for Sierra Leone. He details the history of the conflict and involvement by Western powers such as the United States and Britain to illustrate how the Court was designed to serve Western foreign policy interests and facilitate regime change. Moreover, the cases chosen for prosecution were based on an externally imposed, simplified, and biased narrative of the conflict. It is in this context that Mahony analyses how effective the prioritization of sex crimes would be in light of this problematic foundation of the court.

Mahony also states that, in essence, the process was 'more about prosecuting 'Victor's Justice' and administering Liberian regime change than conducting an impartial investigation of all parties to the conflict.'^[5] Consequently, thematic

prosecution of sex crimes in such a context would only serve as an additional tool of manipulation for those seeking to achieve certain particular goals, as opposed to acting in the interest of victims. Further, the author staunchly believes that retributive goals and deterrent goals would not be achieved through prioritising sex crimes. Contrary to deGuzman's argument, he is sceptical about whether expressivist ideals can, in actuality, create a stigma around sexual crimes. Since he regards the Court as a manipulative tool, he is weary of selective prosecution being used as a means to gain international credibility in an expedient, visible and sensationalist manner. He cites the creation of the crime of 'forced marriage' as an example of this.

Mahony's viewpoints are certainly valuable and invite questioning about how the international criminal justice system is structured, what influences are at play, and what motivations may be behind certain prosecutions. Although he raises intriguing points with regards to sex crimes, his gender analysis is not fully developed and the topic of sex crimes almost appears to be an afterthought. The issue of sex crimes is only directly discussed in the introduction and conclusion. He does not include sufficient detail about how sex crimes were prosecuted in order to support his contention that thematic prosecution in this case was manipulatively employed and that expressivist aims were not met. Mahony simply mentions that it made sense to not prosecute the Civil Defense Forces (CDF) for sex crimes because it committed a very low percentage of the total. He does not look at the prosecution of other parties, such as the Revolutionary United Front (RUF), who were the most notorious perpetrators of heinous gender based violence. In fact, if relying upon his article, it is unclear whether sex crimes *were* actually thematically prosecuted before the Court as this is not explained in the chapter. Valerie Oosterveld has detailed how the Special Court issued critical judgements relating to gender-based violence, particularly in the RUF trial.^[6] Mahony's article would have been enriched by integrating more discussion of this jurisprudence and the rationale behind it.

Benson Olugbuo also presents a polemical thesis in this volume. He examines the fundamental question of whether prioritizing prosecution of sex crimes will in fact reduce or eliminate sexual violence. Doing a historical survey from World War I onwards, he examines various tribunals, international and domestic. Using the Democratic Republic of Congo (DRC) as a unique case study, he explores the function of mobile courts which were utilized to deal with cases of mass rape committed by combatants. In a similar vein to Mahony's article, Olugbuo is also sceptical of the effectiveness of prosecution of sex crimes. He concludes that this strategy does not tackle the root causes of the epidemic. This is because, within the communities where these atrocities took place, there is a lack of understanding about sexual assault and the way women's bodies are used in conflict. Women continue to experience stigma and shame, and are unable to meaningfully rebuild their lives. Olugbuo advocates that education and economic empowerment are critical tools for victims.

As Olugbuo is a legal scholar, it is refreshing to see that he does not consider the law as a panacea for societal ills. He is able to look at its capacity quite objectively outside of the legal framework. His opinions are in sync with recommendations made by gender development practitioners who understand that combatting gender violence takes a multi-pronged concerted effort. For example, a 2007 report by Oxfam cautions:

[o]ur experience suggests that the prevalence of violence against women can only be reduced through a combination of sustained, strategic, and comprehensive measures to address both the short-term requirements of individual survivors, such as health care and bringing the perpetrators to justice, and the longer-term cultural and attitudinal changes required to challenge the acceptance of violence against women.^[7]

Olugbuo's chapter reminds us that overcoming gender violence is a complex and enormous task. The law can only play a limited, albeit important, role. Given his progressive conclusions, it would have been useful for the author to include more on the ground information about victim's experiences which illustrate his points. For example, what frustrations did victims of sexual violence express with the legal process? How did victims in Congo, and elsewhere, experience stigma? What efforts have been helpful in helping to reintegrate them in communities and assist them in attaining economic independence and education?

Overall, *Thematic Prosecution of International Sex Crimes* is a comprehensive and stimulating anthology which is useful for practitioners, scholars and advocates in various fields, and in both domestic and international settings. As most ICC investigations and cases are Africa based, this anthology is certainly a critical source for those concerned with the future of international criminal justice and political affairs on the continent. Further, it is a significant text for those concerned with the rights of women and other vulnerable groups such as children. The essays help us to identify the challenges and complexities of prosecuting international sex crimes without taking any positive developments for granted. So far, it appears that the challenges are far greater than the successes.

-- Scott Ross served as lead editor for this book review.

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[1] Benson Olugbuo, "Thematic Prosecutions of International Sex Crimes and Stigmatisation of Victims and Survivors: Two Sides of the Same Coin?," in *Thematic Prosecution of International Sex Crimes*, ed. Morten Bergsmo (Beijing: Torkel Opsahl Academic Epubliser, 2012), 110.

[2] Alejandra Azuero Quijano, "Science and international Thematic Prosecution of Sex Crimes: A Tale of Re-Essentialisation," in *Thematic Prosecution of International Sex Crimes*, ed. Morten Bergsmo (Beijing: Torkel Opsahl Academic Epubliser, 2012), 251-252.

[3] Morte Bergsmo and CHEAH Wui Ling, "Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes," in *Thematic Prosecution of*

International Sex Crimes, ed. Morten Bergsmo (Beijing: Torkel Opsahl Academic Epublisher, 2012), 5.

[4] Margaret deGuzman, “An Epxressive Rationale for the Thematic Prosecution of Sex Crimes,” in *Thematic Prosecution of International Sex Crimes*, ed. Morten Bergsmo (Beijing: Torkel Opsahl Academic Epublisher, 2012), 14.

[5] Christopher Mahony, “Prioritising International Sex Crimes before the Special Court for Sierra Leone: One More Instrument of Political Manipulation?” in *Thematic Prosecution of International Sex Crimes*, ed. Morten Bergsmo (Beijing: Torkel Opsahl Academic Epublisher, 2012), 81.

[6] Valerie Oosterveld, “The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments,” *Cornell International Law Journal* 44.1 (2011): 49.

[7] Geraldine Terry *Gender-Based Violence* (Oxford: Oxfam Publishing, 2007) 11.

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