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Thematic Prosecution of International Sex Crimes

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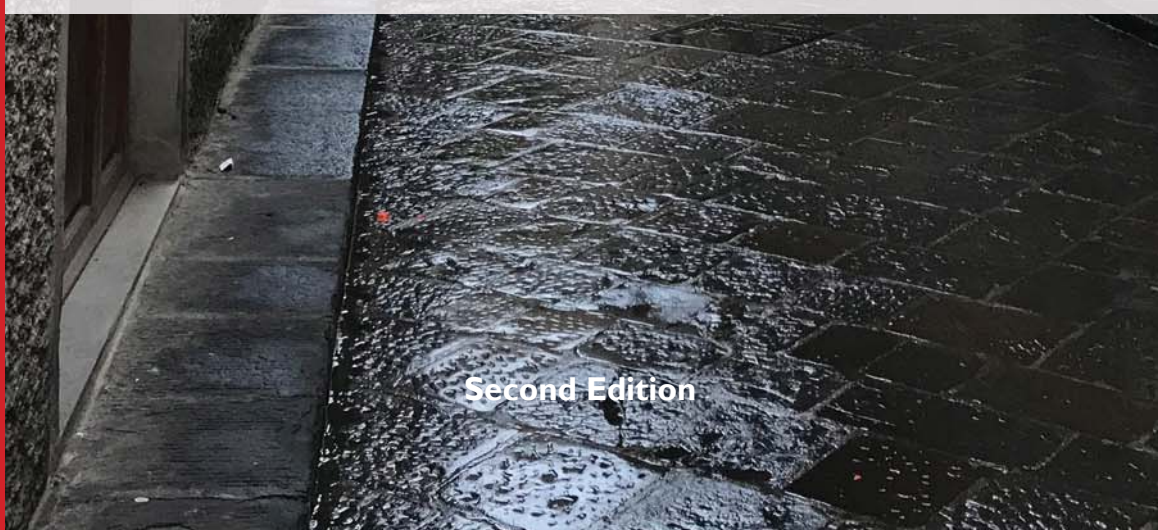

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An Expressive Rationale for the Thematic Prosecution of Sex Crimes

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 the Second World War.[1] More recently, thematic prosecutions have been employed to focus attention on sex crimes.[2] At the International Criminal Tribunal for the former Yugoslavia ('ICTY') teams of investigators have been assigned to uncover evidence

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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. 1167–73, 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, Chicago, 2003, pp. 181–82; Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, 2nd ed., Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 109, fn. 46.

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 former prosecutor of the International Criminal Court ('ICC'), Luis Moreno-Ocampo, pledged that in selecting cases he would "pay particular attention to […] sexual and gender-based crimes".[4] The ICTY's first prosecutor, Richard Goldstone, 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 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

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3 International Criminal Tribunal for the Former Yugoslavia ('ICTY'), *Prosecutor v. Kunarać, Zoran Vuković and Radomir Kovač*, Trial Chamber, Judgment, IT-96-23 & 23/1, 22 February 2001 (*Foča* case) (http://www.legal-tools.org/doc/fd881d/); see also ICTY, *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, IT-95-17/1, 10 December 1998 (http://www.legal-tools.org/doc/e6081b/) (charging exclusively sex crimes).

4 International Criminal Court ('ICC'), Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, p. 7 (https://www.legal-tools.org/doc/6e3bf4/pdf/); see also ICC, Office of the Prosecutor, "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"; ICC, Office of the Prosecutor, "Factsheet: Situation in the Central African Republic", p. 3: "The OTP is paying particular attention to the many allegations of sexual crimes".

5 Richard J. Goldstone, "Prosecuting Rape as a War Crime", in *Case Western Reserve Journal of International Law*, 2002, vol. 34, no. 3, 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.

7 "The Fourth Chautauqua Declaration: 31 August 2010", in Leila Nadya Sadat (ed.), *Forging a Convention for Crimes against Humanity*, Cambridge University Press, Cambridge, 2011, pp. 545–48.

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 chapter, 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 criminal 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 underenforcement 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

[8] 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. 781–82 (explaining the ICTY's focus on the development of the law surrounding sex crimes).

[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 cate-

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 legitimate 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]

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gory 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", in *New York Times*, 28 June 2011, citing a US 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".

11 Cf. Bergsmo *et al.*, 2010, p. 122, fn. 80, see *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: an ICTR prosecutor explaining the need to

Moreover, the decision whether to engage in thematic prosecutions or otherwise prioritise 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.

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 in-

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, The Hague, 7–8 April 2011, p. 7.

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

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

ternational 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 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.

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*, Oxford University Press, Oxford, 2011, pp. 17–21.

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, p. 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, 2005, vol. 41, p. 17. See also Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *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. 136–87.

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.

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 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

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19 See, generally, Joshua Dressler, *Cases and Materials on Criminal Law*, 4th ed., West, St Paul, 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 *Cambridge Law Journal*, 2008, vol. 67, no. 1, p. 145.

20 Dressler, 2007, p. 39, see *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 ('ICTR'), *Prosecutor v. Omar Serushago*, Trial Chamber, Sentence, ICTR-98-39, 5 February 1999, para. 20, noting that retribution and deterrence are the primary objectives of international criminal punishment (http://www.legal-tools.org/doc/e2dddb/); 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.

23 See, for example, Tallgren, 2002, p. 583, *supra* note 14; Koller, 2008, pp. 1025–26, *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, Oxford, 2010, p. 426, espousing retribution as partial justification for international criminal law.

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.

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]

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24 See, for example, Drumbl, 2007, pp. 152–56, *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.

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, see *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 603 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

Evidence of such an hierarchy is also found in national sentencing laws, which generally permit greater punishment for murderers than for rapists.[31] For example, the US Supreme Court has ruled that murderers, but

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 42 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 200 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, Robert F. Meier and Maynard L. Erickson, "Norms, Theories of Punishment, and Publicly Preferred Penalties for Crimes", in *Sociological Quarterly*, 1983, vol. 24, no. 1, p. 82: In a study of 800 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, no. 6, 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 Congo] confirmed that killing was the highest priority for the local population (92% demanded accountability), followed by rape (69%) and looting (41%).

Citing International Center for Transitional Justice, "Living in Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo", August 2008, pp. 40–41.

[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, Articles 232, 236, providing minimum imprisonment of three to five years for rape, ten years to life for murder (http://www.legal-tools.org/doc/80fc95/); Уголовный Кодекс РФ [Criminal Code of the Russian Federation], 13 June 1996, Articles 105(1), 131(1), providing for imprisonment of three to six years for rape and six to 15 years for murder (http://www.legal-tools.org/doc/8eed35/); Code Pénal [French Penal Code of 1994], Articles 221(1), 222(23), providing 15 years' imprisonment for rape and 30 years' imprisonment for murder (http://www.legal-tools.org/doc/01ab1f/); Kodeks Karny z Dnia 6 Czerwca 1997 r. [Polish Penal Code of 6 June 1997], Articles 148(1), 197(1), providing one to 10 years' imprisonment for rape and eight years to life imprisonment for murder (http://www.legal-tools.org/doc/f6cda6/); Das Deutsche Strafgesetzbuch [German Penal Code], 13 November 1998, Sections 177(1)–(4), 212(1)–(2), providing for a one to five year minimum sentence for rape and five years to life imprisonment for murder (http://www.legal-tools.org/doc/ecd810/); Canada Federal Statutes, Criminal Code, R.S.C. 1985, c. C-46, ss. 235(1), 271(1), providing a maximum of ten years' imprisonment for sexual assault and life imprisonment for first and second degree murder (http://www.legal-tools.org/doc/35111a/);

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 sometimes, 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. 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

Hong Kong Offences Against the Person Ordinance, 30 June 1997, Cap. 200 s. 118, Cap. 212 s. 2, 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 Report of the Special Rapporteur, Philip Alston, United Nations Economic and Social Council, Commission on Human Rights, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2005/7, 22 December 2004, para. 3.

34 The judgment in the ICTR's *Semanza* case notes that the jurisprudence of the ICTY and ICTR reflects sentences between 12 and 15 years for rape as a crime against humanity and between 12 and 20 years for murder as a crime against humanity: ICTR, *Prosecutor v. Laurent Semanza*, Trial Chamber, Judgment and Sentence, ICTR-97-20, 15 May 2003, para. 564 (http://www.legal-tools.org/doc/7e668a/). But see Special Court for Sierra Leone, *Prosecutor v. Augustine Gbao et al.*, Trial Chamber, Sentencing Judgment, SCSL-04-15, 8 April 2009, p. 93 ('*RUF* Case Judgment') (http://www.legal-tools.org/doc/f7fbfc/), 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.

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 application 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 legitimises killing. Killing one's enemy is the very purpose of war. The laws of war legitimise 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.

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

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 recognised 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.

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 undertheorised,[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 marginalised, 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 psychological harms of the crimes. A rape victim in the Democratic Republic of 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 stigmatising and ostracising 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, ostracised 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 ostracised or abandoned by

[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. 230–31.

[42] "UN: rape being used as weapon of war in DRC", in *Jurist*, 6 July 2011.

[43] ICTY, *Prosecutor v. Milomir Stakić*, Trial Chamber, Judgment, IT-97-24, 31 July 2003, para. 803 (http://www.legal-tools.org/doc/32ecfb/); see also ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Chamber, Judgment, IT-99-36, 1 September 2004, para. 1009 (http://www.legal-tools.org/doc/4c3228/), 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.

> 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 ostracised, often find support in their communities.

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.

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45 *RUF* Case Judgment, paras. 132–34, see *supra* note 34.

46 *Ibid.*, para. 135.

47 Doherty, 2011, see *supra* note 12.

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 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

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.

49 See, for example, ICC, Office of the Prosecutor, 2006, p. 9, *supra* note 4, stating that the Prosecutor's Office will take steps to reinforce its deterrent impact; Michael P. Scharf, "*The Prosecutor v. Dusko Tadic*: 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 J. 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", in *Monsters & Critics*, 30 March 2007, 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: "Effective deterrence is a primary objective of those working to establish the international criminal court".

the sentences they impose.[50] Nonetheless, most scholars have expressed scepticism 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 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]

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50 See, for example, ICTR, *Prosecutor v. Jean Kambanda*, Trial Chamber, Judgment and Sentence, ICTR-97-23, 4 September 1998, para. 28 ('*Kambanda* Judgment') (http://www.legal-tools.org/doc/49a299/), 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); ICTY, *Prosecutor v. Popović et al.*, Trial Chamber, Judgment, 10 June 2010, IT-05-88, para. 228 (http://www.legal-tools.org/doc/481867/), affirming the ICTY's longstanding commitment to deterrence.

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

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. 477–78, see *supra* note 17, arguing that the conflict mobilised 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" (citations omitted).

53 See, for example, Ku and Nzelibe, 2007, pp. 827–31, *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. 426–27, see *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 *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.

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.

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 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 deter-

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

[56] Institute for War and Peace Reporting ('IWPR') Staff, "International Justice Failing Rape Victims", IWPR, 15 February 2010; 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, no. 2, pp. 644–45: "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, see *supra* note 25. See also Robinson and Darley, 2007, pp. 964–65, *supra* note 35, discussing examples where deterrence-based recidivist statutes may impose heavy punishment without consideration of specific crime's relative harm to society.

mine 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.

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, the 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.

59 Sloane, 2006, pp. 73–74, see *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, see *supra* note 12.

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 offender.[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

63 John Braithwaite, "Narrative and 'Compulsory Compassion'", in *Law and Social Inquiry*, 2006, vol. 31, no. 2, pp. 425–26, noting that restorative justice's "values framework is not settled and clear".

64 Erik Luna, "Punishment Theory, Holism, and the Procedural Conception of Restorative Justice", in *Utah Law Review*, 2003, vol. 1, pp. 228–29.

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.

UN Economic and Social Council, Resolution 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, see *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. See 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, see *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.

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]

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] Nonethe-

68 Luna, 2003, pp. 228–29, see *supra* note 64.

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

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", in *Smart Library on Globalization*, Center on Law and Globalization, 2007.

72 Some authors have expressed scepticism 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, Cambridge, 2006, p. 68.

74 See Danner, 2001, p. 430, *supra* note 22, citing Madeleine Albright's 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. 586–89, discussing truth-telling function.

75 Damaška, 2008, see *supra* note 18.

76 ICC, Office of the Prosecutor, Report on Prosecutorial Strategy: 2009–2012, 1 February 2010, p. 6 (http://www.legal-tools.org/doc/6e3bf4/).

less, many writers, including one important judge, cite historical record building as an important purpose of international prosecutions.[77]

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 centre around law's ability to express states of mind – beliefs, attitudes and so on – of the governments or other collectives that promul-

[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.

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

gate 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 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, Kahan maintains that punishment is not merely justified but necessary when the relevant community would interpret other forms of expression as inadequate.[85]

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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.

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

81 Amann, 2002, p. 118, see *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, see *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. 2022–24.

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, Princeton, 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, see *supra* note 79; Dan M. Kahan, "What's Really Wrong with Shaming Sanctions", in *Texas Law Review*, 2006, vol. 84, pp. 2075–76, acknowledging that shaming sanctions are an inferior alternative to punishment.

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 symbolic 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 implicitly 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 adjudica-

86 Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, pp. 265–320.

87 Rome Statute of the International Criminal Court, Preamble, 17 July 1998, in force 1 July 2002 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

88 *Ibid.*, Article 17.

89 ICC, "Review Conference: ICC President and Prosecutor Participate in Panels on complementarity and co-operation", Press Release, 3 June 2010.

tion.[90] Some international prosecutors have also adopted expressive rationales 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 *Kambanda* judgment that the sentence would express that "the international community was not ready

[90] Amann, 2002, p. 117, see *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, see *supra* note 14: "Over time, punishment by international criminal tribunals can shape as well as express social norms"; Damaška, 2008, p. 339, see *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, see *supra* note 14, noting that "international trials reach a global audience"; Luban, 2010, p. 576, see *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, Princeton, 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, 2012, see *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.

[92] Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, Statement at the OTP Monthly Media Briefing, 28 August 2006, p. 3.

[93] ICTY, *Prosecutor v. Drazen Erdemović*, Trial Chamber, Sentencing Judgment, IT-96-22, 29 November 1996, para. 65 (http://www.legal-tools.org/doc/eb5c9d/).

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 – 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 pro-

94 *Kambanda* Judgment, para. 28, see *supra* note 50.

95 I am indebted to Valerie Oosterveld for this observation.

96 Sunstein, 1996, pp. 2026–27, see *supra* note 82.

97 *Ibid.*, p. 2026.

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

2.3.1. Sex Crimes as Underenforced 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,

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98 Goldstone, 2002, p. 280, see *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", in *BBC News*, 29 June 2007.

100 See, for example, Armen Keteyia, "Rape in America: Justice Denied", in *CBS News*, 9 November 2009: "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: "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"; RTE News, "Conference hears of low rape conviction rate", 16 January 2010: 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:

> [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 responsibilities

special gender adviser 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 unprovable 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. 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

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.

102 Goldstone, 2002, p. 279, see *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, Antwerp, 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. 188–89, asserting that the prosecution in international cases has "historically neglected the special needs of victimized women and failed to give their cases adequate attention".

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

The ICC Statute 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

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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. 310–11; IWPR Staff, 2010, see *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. 310–11, see *supra* note 104.

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. 173–74. The ICTY's first prosecutor, Richard Goldstone, has confirmed that non-governmental organisations were instrumental in ensuring the prosecution of sex crimes at that tribunal in the face of resistant investigators. Goldstone, 2002, p. 280, see *supra* note 5.

110 For discussion of feminist advocacy in the *Akayesu* case, see Halley, 2008, pp. 15–17, *supra* note 107; 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 ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgment, ICTR-96-4, 2 September 1998 ('*Akayesu* Judgment') (http://www.legal-tools.org/doc/b8d7bd/).

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 ICC 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 underenforced at the international level.[116] For example, the

[112] Halley, 2008, pp. 101–15, see *supra* note 107.

[113] *Ibid.*, pp. 105–07.

[114] ICC Statute, Article 54(1)(b), see *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. 845–46.

[115] ICC Statute, Article 36(8)(b), see *supra* note 87, providing that in selecting judges, "States Parties shall consider the need for legal expertise on violence against women"; Article 42(9), requiring prosecutor to "appoint advisers with legal expertise on [...] sexual and gender violence"; Article 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: "Squandered opportunities, periods of 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: "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"; Uganda Radio Network, "Women Accuse the ICC of Failing Them", 1 June 2010: "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, see *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.

Women's Initiative for Gender Justice, the premier advocacy organisation for women in international criminal law, has criticised 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 B. Jallow, chief prosecutor of the ICTR, has admitted that the prosecution of sex crimes at international tribunals could be improved.[118]

International judges have recognised 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 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 instil 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 de-

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[117] Women's Initiative for Gender Justice, "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.

[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.

[119] *Akayesu* Judgment, para. 417, see *supra* note 111.

[120] *RUF* Case Judgment, para. 156, see *supra* note 34 (citations omitted).

termining 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 than frequently believed and are also underprosecuted,[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 the 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-determination […].[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 in-

[121] ICTR, "Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY's First Indictment Dealing Specifically with Sexual Offences", Press Release, 27 June 1996. See also Special Court for Sierra Leone, *Prosecutor v. Alex Tamba Brima et al.*, Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-2004-16, 6 May 2004, para. 34, identifying a need to "highlight the high profile nature of the emerging domain of gender offences".

[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] ICTY, "Judgment of Trial Chamber II in the *Kunarać, Kovač and Vuković* Case", Press Release, 22 February 2001, p. 5.

creased penalties for hate crimes, the US 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 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

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[124] Supreme Court of the United States, *Wisconsin v. Mitchell*, Judgment, 13 June 1993, 508 U.S. 476, pp. 487–88.

[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, 26–28 November 2008, paras. 1–2. 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.

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 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 prioritise sex crimes over killing crimes. This chapter 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.

[126] Kahan, 1996, p. 598, see *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, see *supra* note 38.

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

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Thematic Prosecution of International Sex Crimes

Morten Bergsmo (editor)

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

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

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

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