

An interdisciplinary colloquium
Sexual violence as international crime: interdisciplinary approaches to evidence
17 June 2009, 14h30
Working Group – Group A

Start: 14h45
End: 16h15

Chair: John Hagan, Northwestern University
Resource persons: Renée Römken, The International Victimology Institute Tilburg (INTERVICT), Tilburg University
Maxine Marcus, ICTY

Remarks: Maxine Marcus

- By way of introduction, Ms Marcus noted that she has around 13 years of international criminal law experience. She has worked in numerous post-conflict situations with NGOs, the UN, and international criminal tribunals in roles including investigator and prosecutor. She noted that watching the beneficiaries of the justice as the process unfolded the most rewarding aspect of her work.

Darfur Atrocities Project

- The Darfur Atrocities Project was primarily a statistical project. It took an interdisciplinary approach involving a large cross section of professionals including lawyers, investigators and social scientists. This type of project could serve as useful information in traditional prosecutions of international crimes.
- Background to the Darfur Atrocities Project: investigators and prosecutors selected people randomly in internationally displaced persons (IDP) camps. The team was required to complete a standard form in 5 or 6 interviews a day, which was very demanding. There was a lot of evidence that need to be gathered from an interviewee in a relatively short interview.
- In a typical investigation, the investigator would meet someone, hear their story, learn of a person associated to the story and follow evidence where it leads. The Darfur Atrocities Project was not intended to fulfil this purpose. It achieved a sample of information but could not search for corroboration (in legal terms). The interviews gave a taste or picture of an incident but not the whole story.

Investigation of crimes of sexual violence

- Ms Marcus noted that crimes of sexual violence take a long time to investigate. People are reluctant to come forward to various reasons such as exile from their communities, within own families and the perpetrator group. For example, in the Civil Defence Forces (CDF) (pro-government militia) case before the Special Court for Sierra Leone (SCSL), crimes of sexual violence were perpetrated during the battle to reinstate the democratically elected government. A “grass roots” militia known as the “kamajors” were shrouded by customary practices that would render them “bullet proof” in battle. The kamajors were to

abide by many rules, the consequences of breaking the rules was destruction of the bullet proofing. One of the rules was not to touch a woman. It was asserted that the kamajors could not have committed sexual crimes for this reason, but it was found that they did commit such offences against women from their own group. During the conflict in Sierra Leone, women seen as 'war rations.' It was not until after the indictment in the CDF case had been issued against the three accused that evidence in relation to these crimes emerged. The Prosecutor sought to amend the indictment but failed. Consequently the treatment of women in this regard was left out of the trial process.

- The Darfur Atrocities Project was not confidence building project as there was not time or capacity to build rapport. As a result, it is expected that this may have resulted in low level reporting of sexual crimes.

→ Intervention by **Lynn Lawry, US Department of Defense and Harvard University** – noted that another factor that might have added to low level reporting was that foreigners conducted the interviews, compared to studies managed by Ms Lawry that uses local interviewers which have higher levels of reporting. **John Hagan** claims that while the results in studies using local interviewers report a higher level of sexual violence they are not significantly higher than those studies using foreign interviewers.

- **Ms Marcus** noted that the Darfur Atrocities Project revealed an overall pattern. Based on this, there are two ways that social science could be useful in a Prosecution case:
 1. to show patterns and trends; that the conduct had the characteristics of widespread, systematic, discriminatory. It also highlights the role of “overview witnesses” *e.g.*, doctors who treat so many victims with injuries bolsters part of the case that addresses elements of the crime; and,
 2. the creation of leads to follow up for evidence. Where permissions have been provided, a lot of information is uncovered leads for investigative purposes.
- Unlike prosecutions in international criminal law, Truth and Reconciliation Commissions (TRC) and/or conflict mapping have different goals, whereas prosecution is narrowly focused in terms of geography and types of incidences. A judgment from an international criminal tribunal will not provide a “big picture” of issues; rather it looks at isolated events. TRCs however will provide a more historical record and the two can work together side by side.

Remarks: Renee Römken

- Ms Römken outlined her experience which covers research on interpersonal violence, including how legislation impacts on protection on victim and studies in Afghanistan and South Africa. She identifies herself as a criminologist and social scientist.
- Ms Römken observes a tension between how sociological studies relate to individuals that need to be prosecuted; this relates to relationship between “correlation” and “causal” issues in proceedings.¹ She asks “whose word counts” in criminal proceedings?

¹ See presentation by Xabier Agirre, 17 June 2009 at 10h45.

- There are particular methodological problems in gathering data *e.g.*, language and the use of interpreters. It might be that in the context of Afghan women an interpreter from outside the community or a foreigner might be less threatening than from someone from inside the community. There are always factors that will influence the validity of the data. Furthermore, there will be various interpretations in the legal context.
- On the issue of racial epithets made by the jangaweed in Darfur (Arab group),² the women could not understand the language in which the racial epithets were made in. Yet, the men could understand what was being said. Furthermore, women disclosed far less about the incidences and the language whereas the men reported racial epithets. These differences are factors that cannot be overcome in research. The question then arises as to whose word counts? Should the women be asked because they are the victims, or are the men more credible because they can provide further information in the story?
- Creativity by prosecutors and researchers is necessary to approach people to encourage them to disclose. A combination of qualitative and quantitative processes is required – but there always remains a gap.
- Ms Römken agrees with Kelly Askin³ that changes in attitudes towards prosecution of sexual crimes are necessary as it affects the success or limited success in prosecuting in an international criminal law context. It is agreed that this is challenging because the attitudes are so deeply entrenched.
- There is also a deeply entrenched propensity to minimise the crime of rape. One reason is because the underlying act is performed normally but becomes criminal in a different context. The underlying commonality between the acts creates ambiguity. In the non-war context large scale research suggests that out of the rape cases, 7% end in conviction. The attrition is structural and can be evidenced in a survey of cases in the United Kingdom, Canada and Australia. If that happens in non-conflict then these attitudes will continue in international criminal law.
- Resolution 1820 is very welcome (19 June 2008). It requires that a report will be submitted to Secretary General by 30 June 2009 to show how have states that agreed with the Resolution has complied with treating victims, prosecutions, training prosecutors.
- Impunity needs to be addressed and social science research can play a role in identifying what need to happen to change attitudes.

Discussion was opened to the Working Group

Ron Levi (University of Toronto, Centre of Criminology) – questions if social science can be as exacting as courts demand. Social science and legal standards are based on different epistemologies. It seems that better social science techniques that will improve validity moves away from better law. It also moves further apart in respect of individual criminal responsibility. Mr Levi asks is social science and the law complementary and if they are what would that model like look like?

² See presentation by John Hagan, 17 June 2009 at 12h30.

³ See presentation by Kelly Askin, 17 June 2009 at 9h30.

Lynn Lawry notes that the terms “validity” and “reliability” are different in legal and social science terms. Most surveys are not validated (in social science terms). Rather, the goal is reliability.

John Hagan notes that even in social science there are different meanings to the terms, so usage needs to be clear.

Harman van der Wilt, University of Amsterdam – he sees that “validity” in legal terms is whether evidence has been lawfully obtained.

Christine Dahl, OTP, ICTY – notes that there are some failings of criminal justice such as DNA findings. She sees that it is necessary to look at the fact finding framework and whether it provides the validity that is necessary in inquisitorial or adversarial systems and whether that model fits well enough to keep up with social science advances to meet a particular objective. It seems that the small scale model (*i.e.* prosecution of sexual violence in domestic settings) does not work as well on a large scale setting. She is concerned of some decisions where Trial Chambers “prune off” parts of the case to prove the basis of the scale of a crime. This places a heavy burden on the prosecution to have to call that many people to show the scale of the crime. This introduces the frailties of eye witness.

Sara Sharratt, Gender and Peacebuilding Program, University of Peace, Costa Rica – does not accept the premise of the discussion. She sees that legal perspective is inherently non-objective and social science is objective. The context will always be critical in the legal setting, for example, some findings in respect of the former Yugoslavia are different in courts in Bosnia Herzegovina than the ICTY. Numbers are numbers and it is the interpretation that creates differences. Interpretation is based on intention / motives.

Ron Levi – notes that the definition of crime is also different *e.g.* the criminal as deviant *vs.* alternative definitions in criminology and international criminal law.

John Hagan – notes a study by David Shepherd that looked at atrocity law *vs.* atrocity crime. The study of atrocity crime looks at why the act happened whereas atrocity law provides the legal standards of crimes. They have different epistemologies and narrative framework.

Renee Römken – observes that at time there are different underlying epistemologies of social science and the law. However, she notes that objectivity and neutrality is central to law. The social science perspective is perhaps problematic. If you want to collect valid knowledge it is inevitably knowledge in context. Consequently there is a profound clash between epistemologies. Notes Hierarchical Linear Modelling (HLM) is argued to improve social science but this is subject to contestation. It is arguably reliable but may not be valid. From a social science perspective it is not a superior set of knowledge that a legal practitioner can choose from. However, the two disciplines need each other but need to accept the ‘gap’ that exists. The legal perspective could be argued that it has a more superior position than social science inferring institutional and epistemic power. She asks: what does good quality research look like?

Maxine Marcus – argues that lawyers have a lot to learn about social science to bridge that gap between social science and international criminal law. As a lawyer you might have statistics but you may have no idea what they are talking about. She makes the following the comments:

- It is important to bridge the gap between social science and the law – the focus must be on the beneficiaries of the justice process.
- There is the need to bridge the gap between the individual and the pattern of conduct. Interviews such as group interviews, delayed interviews. Studies could be used to show the pattern when individualised is problematic. Study

(Unknown, representative, ICC Victim Unit) – notes ICC investigators report that victims articulate what was said to them. She also directed a question to **Maxine Marcus** regarding the results of the Darfur Atrocities Project in results of female genital mutilation to Zahawa women. She noted that female genital mutilation is aggravating to the rape.

Lynn Lawry – noted that in the studies in which she was involved found prevalence of genital mutilation in 89% of women and 84 % of IDPs across 27 tribes.

Maxine Marcus – noted that crimes were committed in a limited time period *i.e.* while in Darfur or as they fled Darfur. She also noted the difficulties in the in-depth information out of victims.

Lynn Lawry – noted the spectrum of gender based violence that creates difficulties and recalled the presentation from Chen Reis⁴ who noted that there is a risk of creating a hierarchy of gender based violence *e.g.* rape might be considered worse than gender based mutilation.

Christine Dahl – said that it was important to consider who wrote the norms / laws, as the definition of what is a crime can be higher influenced by who wrote the law.

Renee Römken – commented on the issue of role of gender in relation to neutrality and objectivity – it is used in law and social science as if objectivity and neutrality are neutral concepts in and of themselves. But objectivity and neutrality are gendered. ICC is historically unique because it recognises the affects of sexual violence on women.

(Unknown person) question to **Maxine Marcus** – asks how do you link medical data to the crime as it does not refer to individual perpetrator?

Maxine Marcus responded that there are no issues related to the consent of victims where experts, such as doctors, as they are used as “overview witnesses” and give evidence of the pattern not linking the crime to the individual. The evidence is used to show the pattern and scale.

Harman van der Wilt – wanted to “speak up” for lawyers. The prosecution might be rebuked for “tunnel vision” but they need to approach cases narrowly as it is a question of legality.

Wenona Rymond-Richmond, University Massachusetts-Amherst – noted that victims were never explicitly asked about whether they were raped, rather “were you victimised.” It was important that there were no leading questions. It was also found that men could articulate and say what the women did not know.

⁴ See presentation of Chen Reis, 17 June at 11h45.

Maxine Marcus – noted that the interpreters on the Darfur Atrocities Project were all male, as more men are educated in being able to translate. This challenge will also face the ICC.

Renee Römken – questions whether there was any reluctance of women to reveal their stories to males in the Darfur Atrocities Project?

Maxine Marcus – answered that initially the women were universally reluctant. The group went to the community leader, the Sheik, and told him that unless the women had assurances their stories would not be told. Many women were afraid of exile from the community if they reported that they were victims of sexual violence. Following the issue of an edict by the Sheik that no woman was to be exiled, there was an increase in reporting.

Christopher Wing, ICC – questioned whether the use of such reports or statistical evidence such as this is challenged in court as hearsay.

Maxine Marcus – first, noted that the Darfur Atrocities Project had not been put before court. Second, hearsay is admissible but the court will give the evidence certain weight.

(Unknown) – asked whether the Darfur Atrocities Report found whether there was evidence of measures to reduce impact of rape cases, for example condoms to potential perpetrators or female condoms.

Maxine Marcus – responded that the people were desperate for basic needs and it appeared unlikely that people would have access to health measures such as condoms. Ms Marcus reiterated that international justice is just a tiny piece of the bigger picture – there are many other needs such as family reunification, reconciliation, democracy, food, water, shelter. The Darfur Atrocities Project was very specific.