**Interdisciplinary Colloquium**

Sexual violence as International Crime: Interdisciplinary Approaches to Evidence
17 June 2009

# Working group B

Discussion between investigators or prosecutors of cases where sexual violence was prosecuted on what evidence was used and how it was collected with a social scientist's commentary on how social science methodology might support such investigation and prosecution.

- Chair: Thomas Ginsberg, University of Chicago Law School and Centre on Law and Globalization
- Resource Person: Binaifer Nowrojee, Open Society Institute

Participants:

| **Name** | **Organisation** |
|---|---|
| Anne-Marie de Brouwe | INTERVICT, Tilburg University |
| Bertrand Yamaha | ICC |
| Carolyn Buff | Trial Chamber II at the SCSL |
| Daniela Kravetz | ICTY – OTP |
| Doreen Kiggundu | Trial Chamber II at the SCSL |
| Flavio M Noto | Grotius Centre for International Legal Studies, Leiden University |
| Isabelle Solon Helal | Rights and Democracy |
| Herlambang Perdana Wiratraman | Leiden University – PHD Candidate |
| Jessica Giede Herbert | Leiden University – Public International Law |
| Jordana Adams | Grotius Centre for International Legal Studies, Leiden University |
| Judge Julia Sebutinde | Judge at the SCSL |
| Kabita Nirola | ICTY |
| Kayoko Sano | ICTY |
| Michelle Jarvis | ICTY |
| Mikel Delagrange | ICC – OTP |
| Nancy Grosselfinger | International League for Human Rights, New York |
| Sheerine Alernzadeh | ICTY – OTP |
| Terence Halliday | Centre on Law and Globalization, Northwestern University |
| Usta Kaitesi | National University Rwanda |
| Xabier Agirre | ICC - OTP |

The working group opened with a short talk by the Resource Person Binaifer Nowrojee.

*Binaifer Nowrojee is the Director of the Open Society Initiative for East Africa (OSIEA). Prior to joining the OSIEA, she worked for 11 years as legal counsel with the Women's Rights and Africa Divisions of Human Rights Watch. Before that, she served as staff attorney with the Lawyers Committee for Human Rights. In opening the discussion Binaifer Nowrojee spoke about her time working for Human Rights Watch and particularly her experiences as an expert witness at the ICTR, focusing on what could be taken from these experiences with respect to how social science methodology might support investigation and prosecution of international crimes of sexual violence.*

When Richard Goldstone was appointed as the first Chief Prosecutor at the ICTR there was a lot of rhetoric with respect to prosecutions of crimes of sexual violence but no charges where made. The second prosecutor Louise Arbour actually started to take action with respect to charges. This saw the beginning of the amendment of indictments in cases. However these amendments were added more as an after thought and the crime charged was always rape and never other forms of sexual violence. This was done almost within a vacuum and was not integrated into the mapping of other evidence. There was no practical idea as to how this information could be used by the OTP.

It was easy to get factual witnesses for trials at the ICTR from those who had already been raped or the rapists themselves. The ICTR trials however were only concerned with 16 command responsibility officials. These are the type of accused that are increasingly being seen in international justice. In the case of the ICTR trials amendments to the charges had been made in part due to Rwandan women pressure groups. Binaifer Nowrojee was asked to serve as an expert in four of these trials. The difficulty she found during this time was linking knowledge and awareness of acts of sexual violence with the steps necessary to punish the accused officials. She observed that all the witnesses were considered in a type of vacuum, rather than in the context of the events that had taken place. In 2003 when Binaifer Nowrojee was asked to act as an expert witness the Office of the Prosecutor gave her a CD of 405 testimonies that they had from put together from rape victims (OTP Rape Database). The OTP Rape Database included evidence from eye witnesses to rape and other corroborative witnesses. She noted that the number of testimonies was quite small, compared to the thousand plus rapes generally believed to have taken place during this period.

Due to the database only representing a sample cross section of the total number of women in Rwanda who were raped from April-July 1994, it was not possible for her to estimate the total number of women raped during that period. This was due to the fact that many victims had died during or after the genocide and further that the stigma of being a rape victim would have prevented many from testifying to ICTR investigators.

In analysing the database Binaifer Nowrojee looked at six categories:

1. The date and location of rapes
2. The profile of the victims
3. The perpetrators

4. The forms of sexual violence (rape, gang-rape, sexual slavery, rape with aggravated violence)
5. Statements of intent to target women on the basis of ethnicity
6. Consequences or rape

Binaifer found that that rape had occurred in every prefecture in Rwanda. A total of 225 occurred outside the home in places such as government buildings, schools, churches, market places, university premises, hospitals and healthcare clinics, stadiums and inside vehicles. From this evidence it was clear that the rapes were not something that was unknown within Rwanda. Mainly rapes were perpetrated by the Interahamwe, but also by local authorities, soldiers, gendarmes, prisoners, and in one case a priest. There was a wide range of patterns with respect to the forms of sexual violence. These included very vicious gang rapes where the number of attackers varied from between 2 and 20 men. Tutsi women being held in sexual slavery both individually and collectively, with a third being held for less than a month and two thirds for more than a month. These women were often kept and repeatedly raped by militia. Seven out of every ten women raped reported that ethnic statements were used during the rape. Prior to the violence starting Tutsi women had been portrayed as beautiful devious seductresses. The data demonstrated a clear link between ethnicity and rapes.

ICTR data showed that the sexual violence was foreseeable. Further it demonstrated that sexual violence occurred routinely in conflicts, with no efforts to punish perpetrators. Attacks were systematic and as an expert witness Binaifer Nowrojee was able to demonstrate the patterns which would assist other victims with their own testimony.

The Defence response to this expert evidence given by Binaifer Nowrojee was to discredit her as an expert witness. The Defence stated that there was no such thing as this type of expert. This was not accepted by any of the benches. In one case Binaifer Nowrojee was accepted as an expert immediately. The Defence in response called for an immediate recess. However they returned with a new and rather more effective tactic. The defence stated that they recognised her expertise and acknowledged that a vast number of rapes had taken place and that this was very sad but that it had nothing to do with their defendant. This line of defence was effective as the prosecution were unable to link the rapes that had taken place to the defendant.

These experiences expose a gap between social science and the linkage of sexual violence that takes place during a conflict with a crime perpetrated by an individual. In particular an individual that is at a high level in the conflict and therefore is not directly involved in committing the act of sexual violence. However the amount of information gathered from this rather limited and not particularly well prepared OTP Rape Database demonstrates how social science can be used effectively to assist with sexual violence prosecutions under international law.

The floor was then opened by the Chair for general discussion:

The Chair in response to the talk given by Binaifer Nowrojee observed that there was perhaps a failure in the application of social science in such circumstances with respect to linking sexual violence to the individual and specifically defendants.

Xabier Agirre asked whether Binaifer Nowrojee's expert report had been published. Binaifer Nowrojee responded that her expert report had been published by Human Rights Watch and that the evidence that she gave as an expert witnesses was a matter of court record.

Usta Kaitesi spoke about the importance of recognising that sexual violence can be a crime of genocide and prosecuting it as such, rather than under other classifications, where appropriate. She stated that by linking statistical research to the elements of the crime of genocide social science can assist in proving the required elements of the crime at trial. She gave an example of her own personal experience working for the OTP to support this. In this example she stated that a defendant had raped 27 women in Rwanda. He had later realised that one of the women he had raped was a Hutu and went back to apologise to her. In this case the defendant was charged with having committed crimes against humanity (CAH). However Usta Kaitesi submitted that for the 26 women who were Tutsi's the appropriate charge would have been genocide and that it was only the one Hutu woman who could have accurately been considered the victim of a CAH. Usta Kaitesi voiced her concern at the context of genocide being lost as a result of using social science and statistical data within the international judicial system.

Binaifer Nowrojee in response stated that she was not convinced of the hierarchy of such crimes. In support of this statement she highlighted the ICC and Special Courts use of fewer charges compared to the ICTR. Stating that looking at the different types of sexual violence was the beginning of a more nuanced and multi layered approach in comparison to that applied during the Nuremburg Tribunal.

The Chair remarked that there was a clash between the historical record of what was taking place in these situations and the judicial record. Pointing to the high requirements of the standard of proof which are necessary to prove the elements of a crime in courts but are not required of social scientists.

Nancy Grosselfinger questioned whether social science is the best approach to finding out why a particular person has committed a crime of sexual violence

Terence Halliday observed that generally throughout the colloquium speakers seemed to be failing to acknowledge the lack of facilities available with respect to these types of prosecutions under international law. He observed that John Hagan had used a similar type of approach to analysing data as that taken by Binaifer Nowrojee, using the existing data that was available. Indicating that some of the changes that had been called for within the international legal system in this area were unrealistic given the resources available.

Caroline Buff observed that the defence that the victim consented to rape is in her own experience never used in international law. General discussion took place on the need to move away from the traditional idea of victims giving evidence of their rape, which is the evidence which is focussed on within domestic courts. It was generally felt that there was a need for different types of evidence which drew attention to the context in which the crimes took place

and proved all the required elements of the crimes charged in the international courts. Caroline Buff observed that it was important not to isolate victims of sexual violence in such a way that they are unable to be heard within the courts. She stated that in her experience victims of sexual violence wanted to have the opportunity to speak about their personal experiences. She stated that it was excellent to be able to link systematic attacks through social science but viewed this as complementary evidence.

Isabelle Solon Helal stated that it would be interesting to look at where woman would place themselves. By this she meant what crime they would consider themselves to have been the victim of, asking whether the international legal system should take this into consideration.

Usta Kaitesi in response stated that evidence of intention is apparent with respect to the understanding of the sexual violence which took place in Rwanda. She stated that if you used the legal terminologies with respect to the crimes which took place there, you would find that many Rwandans would understand and identify genocide with the actions that took place in Rwanda. In response to discussion regarding the appropriate charges for crimes of sexual violence, she observed that it is important to create not just the record of what took place but the right record. Justice is convicting someone for the right crime. It is not acceptable in the domestic system to charge someone with an offence that they have not committed in place of one that they have and it should not be permitted on an international level. Therefore as we use the statistical data and creativity this allows, we must not lose understanding of the context that this must be put into and its correct legal application.

Terence Haliday requesting clarification asked if Usta Kaitesi considered that it was not just important to record the act but what was said, the context in which the act took place etc.

Usta Kaitesi agreed, confirming the need to look at the whole situation which created the crime. Reasoning that academically something might be very clear but legally it can be difficult to identify and understand, requiring a broader consideration of the situation.

Caroline Buff agreed that it was also critically important to have this type of detail because there may be intentions to expand the law in the future which would require this degree of information.

Anna-marie de Brouwe stated that although defendants might not run the defence of consent that the issue can still be raised by Judges and that this is something that takes place. She gave an example of a case where the Judges had asked the prosecutor if the survivor had consented to rape. This was after the victim had spent two days talking about the rape in detail.

Michelle Jarvis stated that it is surprising the type of defences that are run. She confirmed that in her experience defendants had run the defence of consent. However she stated that this happens less often with high level defendants. She stated that the ICTY and ICTR chamber has confirmed that consent is an element of the crime, but that the Appeals Chamber has found that you do not necessarily have to confirm this element expressly.

The Chair asked Binaifer Nowrojee if with respect to the linkage issue, apart from the expert evidence she gave what other types of evidence would be useful.

Binaifer Nowrojee responded that a unified methodology or questionnaire that is given at the outset of the investigation by the OTP would be helpful. She stated that there were only two

investigators in the sexual violence team for the ICTR OTP. Further she highlighted that there was no real selection process and that the investigators were often chosen merely because they were female. Binaifer Nowrojee stated that the investigators needed to illicit the information that the prosecutor is trying to prove, which could be achieved through questionnaires. Such information would be more statistically sound and would push the linkage and nexus and increase accuracy.

The taboo of sexual violence was cited by Binaifer Nowrojee as another problem that needed to be tackled. In her experience victims are not as forthcoming and perceptions from the bench and investigators themselves can be detrimental. It is common for people to get embarrassed by sexual violence and specific standardised training would be a solution to this problem. She voiced the need for the stripping away of taboos and the need to understand rape as a crime which is about power, domination and terror.

With respect to court testimony Binaifer Nowrojee felt that it should not be only rape victims that gave evidence. That the international legal system must move away from the national level perceptions of rape victims. For example that they are lying and that the consent is the main issue in the trial. By bringing the testimony of others it assists in preventing this perception from being brought into international law.

Binaifer Nowrojee gave examples of common misconceptions from her own experience. In Sierra Leone she knew of women who had been with the men who had committed acts of sexual violence against them for years, had children with them and even remained with these men after the conflict had ended. People find this difficult to identify as rape. Because of the stigma people do not refer to themselves as rape victims. In Sierra Leone women refer to themselves as wives. The perception of people is important as one judge compared this situation to an arranged marriage where a militant selects his wife and used this to justify the reasoning that only the first act of sexual violence could be considered as rape. Further examples were given with respect to the issue of body parts with respect to rape and the many biases that come from this.

Nancy Grosselfinger said that focus should be on the bench and the political backing, education etc that have brought these people to this position. Because in her experience it is naïve not to look deeply at whom this case is being presented to. Taking into consideration how prepared they are, what pre-training, ongoing training, exposure to other areas, such as basic statistics the bench has. How the evidence should be presented needs to be carefully examined and this information would be very helpful to take into consideration.
Binaifer Nowrojee observed that Judges seem to be very resistant to training. Kayoko Sano agreed that there seemed to be resistance to training amongst the bench in her experience. Nancy Grosselfinger felt Judges might be more receptive to training from people that they consider to be their peers and this might serve as a solution. But to achieve an appropriate environment need to be made available.

Terence Halliday cited John Hagans paper to be a brilliant paper which deals with a lot of the issues being discussed today. From a social scientist point of view it demonstrates there was systematic violence taking place, but from a legal point of there are difficulties in its application.

The Chair stated that John Hagan's paper showed you can not infer government responsibility from social science and much less use it to tie a specific commander to a crime of sexual violence. Legal paradigm is of individual, as opposed to collective, responsibility and intent. He considered whether international law needed to go down this route and look at some sort of collective responsibility/intent as being good enough to permit a conviction for sexual violence under international law.

Binaifer Nowrojee stated that the problem with going down the route of collective responsibility and intent was that the complexity of collective responsibility made it difficult to draw a line as to responsibility. Is the Minister of transport being charged with genocide really relevant? Should the nuns in Belgium, who had to take all the Tutsi people they were sheltering out from their protection or be killed, be considered responsible for genocide? At what point does individual responsibility turn into collective responsibility?

The Chair referred to the use of collective responsibility in domestic law. Caroline considered this as too radical, and failing to meet the requirements of the principle of legality. The Chair disagreed considering that judges were already making up laws which were not based on the principle of legality and felt that there was a little more room for creativity in international law.

Nancy Grosselfinger pointed out that UN diplomats had intended for these matters to be left to the lawyers and judges specifically.

Xabier Agirre recommended three texts which he considered were of particular relevance to the discussion:
(1) The ICTY Milutinovic Case

(2) The ICC Bemba case, which is primarily about rape by a series of militia. Here the issue was liability under article 25 or article 28 (common responsibility). The Prosecutor argued article 25 but judges rebuked this and said they were not convinced as the evidence was not sufficient. Instead they believed it was responsibility under article 28.

Terence Halliday asked if the judgement indicated the type of evidence that would be required to successfully prove responsibility in accordance with article 25. Xabier Agirre responded that the judgment stated that evidence of specific orders to troops to commit the crimes was needed. In this case, in contrast to the trial of Omar al-Bahir, there were no explicit statements from the accused targeting certain groups.

(3)Two articles by Professor Elisabeth Jean Wood, Yale University, the first on Sexual Violence during war: toward an understanding of variation and the second on Armed Groups and Sexual Violence: When is wartime rape rare? The second article is a case study on Sri Lanka and looks at what are the factors affecting more or less prevalence of rape. She provides a micro-study looking at positive and negative findings. The article goes beyond negative reporting looking at the contexts where there appears to be less rape, for example considering the Tamil Tigers who seem to be committing less rape. Professor Wood attributes this to the strict level of enforcement within the organisation not to commit rape. There is an elite utilitarianism, that rape is not positive to the objectives of establishing a new regime to replace the existing one.

Binaifer Nowrojee spoke of the need to capture a variety of crimes, but that for convenience the ICC OTP and other international court prosecutors seemed to be narrowing the number of crimes they prosecuted. Caroline Buff remarked that the practice of limiting charges to allow the conviction of high level perpetrators as opposed to going after mid level perpetrators was a resources issue more than anything. Xabier Agirre said that prosecutors have decided to take a minimalist approach to cases, focusing on the top level perpetrators. This is demonstrated by the ICC has making only six indictments with respect to the incidents which took place in Darfur, compared to ICTY which have made over a hundred indictments. He stated that this was due to the role of ICC which is to prompt the national system to act and not to replace it, therefore focusing on the highest level crimes.

Break

Chair re-opens the floor asking specifically how investigations are organised in this type of crime. Is it good to have a special unit, should investigation of crimes be specialised or generalised?

Kabita Nirola responds stating that it would be great to be specialised but not realistic. She stated that there is also the added difficulty of time constraints which must be taken into consideration. From her personal experience the case that she dealt with did not have many sexual violence cases and so these cases were dealt with as inhuman treatment. Discussion took place as to the cost benefits of bracketing off rape as a separate crime. It was considered that there would be a lower burden of evidence if the scope was broad

Binaifer Nowrojee commented that in one case the prosecution had tried to integrate sexual violence within the crime of genocide without claiming it specifically. This was not permitted by the court. There was concern as to whether the Bema judgement has been too restrictive in its characterisation of rape.

Usta Kaitesi said that initially sexual violence was brought in as a category 3 offence. In the end this caused the charge to be changed to rape and sexual torture. Rape was then a category 2 offence and sexual torture a category 1 offence. The Rwandan parliament had felt it could not appropriately have context of crime as just rape.

Binaifer Nowrojee spoke of her own experience with respect to category 1 crimes of sexual violence, which could not be evaded by confession from prosecution unlike category 2 and 3 crimes. In Gacaca, rape being classed as a category 1 crime actually deterred victims from coming forward as they had to declare the rape publicly. Another deterrent was that women did not always want men to be subjected to the death penalty. The unintended consequence was that women did not wish to come forward within the national context.

The Chair stated that political enterprise is very fragile, coalition of Darfur is fighting hard to have events named as genocide, but for the man on the street the intent demonstrated in John Hagan's article is good enough. This type of report is generally helpful for public opinion and for recording events in history. It also gives public support to legal proceedings. Nancy Grosselfinger noted that the problem then is when this happens and the court throws out the case. In these cases ordinary people do not understand why this has taken place.

Daniela Kravetz said that in the ICTY the issue had been to what extent judges were willing to rely on social studies with respect to making findings on the crimes charged. In her

experience judges being able to feel they could rely on such findings was dependent upon the source material and how it was used by the expert. How this material compared with other material available was also taken into consideration. She observed that source material that had been prepared by the expert witness was particularly persuasive. Daniela Kravetz did not agree that the problem was a lack of understanding of the material. She considered that judges are able to understand findings if the data is collected in a sufficiently reliable manner. Further she noted that neither the prosecution nor judges have specific training in either social sciences or statistics. She also observed that judges feel more comfortable when the expert has been involved in designing the research or surveys compared to third party findings that they have not personally been involved in and can not explain.

Binaifer Nowrojee observed that with respect to statistics Judges are often looking for a number and in particular a high number. Binaifer Nowrojee explained the wider role of the social scientist to communicate ideas such as that of how people can be shepherded in their behaviour without written rules. An environment of lawlessness and impunity can be created without specific written commands to do so. Language must be looked at in context “go taste Tutsi women” was a phrase to refer to going to rape. A phrase that looks innocuous can translate into something that is quite dangerous. A social scientist can ensure that the true meaning of such language is properly understood and applied in the appropriate legal context.