Colloquium on Sexual Violence as International Crime:
Interdisciplinary Approaches to Evidence

Report on the session of working group C (Chair: Dr. Charlotte Ku) - 17 June 2009

After the welcome by the Chair, Dr. Charlotte Ku, all the participants of the working group introduced themselves and the first of the two resource persons of the group, Wanda Akin, took the floor.

She admitted that there is a lot to be improved and by giving an example of the testimony of a Darfurian victim-applicant she pointed out that the narrative statements that the victims usually deliver need to improve and that the legal aspect of the victims' experiences needs to be taken into consideration. As she stated, the ultimate goal is to have victims recognized in order to participate in the case. However, there are many practical difficulties even in seemingly simple matters, such as the transliteration of the Arabic names. As she claimed, Darfurians want justice, but they are not necessarily interested in appearing before the ICC.

Moreover, the idea that anyone can make an application as long as they are assisted and are credible, is illusive; in practice, the victims are often people from very different legal traditions and backgrounds, so those assisting them need to explain them very basic things, such as what a court is, what an international court is, what a public counsel for the defence is, what a public counsel for the victims is, why they have to keep secret their personal data. As Wakin said it all goes back to the basics, namely the second clause of the preamble of the ICC Statute: "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity".

The other resource person of the group, Brenda Hollis, at this point took the floor to talk about the procedure that should be followed when interviewing victims of sexual violence. For that purpose, she separated the procedure in three phases: prior to the testimony, the actual testimony and the post-testimony phase.

In the first phase, it is necessary to gather as much evidence as possible from media reports, reports of special panels (primarily UN panels), NGOs reports, as well as scholars from historical, psychological and political perspective; everything can be useful and the goal is to put all that information together. With witnesses, Hollis stated, it is "99% perspiration and 1% inspiration". Therefore, preparation and organization are the keys, especially since the information when dealing with international crimes is excessive in quantity and needs to be organized within a legal framework before someone goes out to collect the information from the victims.

She also stressed the difference between collecting information for purposes of criminal investigation and for human rights purposes. It is thus important for the interviewers to have the objective in their mind before going on the interview. Sometimes, for example, collective narrations of what happened are used, which however are inappropriate for criminal proceedings. Other preparations that the interviewers should do is to be aware of the special needs of the person who will be interviewed in order to set up the best possible conditions for the interview, taking into consideration that the victim may for instance need frequent breaks, or someone to take care of their children during the interview, as well as to review any prior contact with the person and to choose a quite setting. She furthermore, advised to take a legal counsel with them, and in any case to know their role and the office procedures (for example, if the person is illiterate, how can they sign their testimony?). It is important to carefully contact the person by paying special attention to security considerations linked to the person.

During the phase of the actual interview, the interviewer must keep in mind that the person in front of them may be a severely traumatized person, but above all he/she is a person who has survived victimization. Hollis, supported that unlike the general opinion, male investigators in cases of sexual violence against women should not be excluded; in fact in some cases in Bosnia male investigators were preferred. Neither should female investigators be excluded from cases of sexual violence against men, who can also be victims of sexual violence being equally traumatized as the female victims. Attention should also be paid to the interpreters: they must be well-qualified and preferably not local persons, since this would result in the victim feeling threatened for their privacy.

The interviewers may empathize with the victim, but must remain objective; objective assessment of the received information is necessary for the success of the interview. Before starting the interview, the interviewer must explain who they are, the purpose of the interview and the uses to which the provided information can be subject to (for instance, any exonerating information must be handed to the defence). However, the interviewers should not raise concerns, such as with respect to the victim's privacy; if the victim has any concern, they will ask when being explained the procedure. It should be noted that interviewers should never promise protective measures, because they don't have the authority to do so, and there have been cases where relevant applications were rejected by judges. The interviewers should also be ready for an emotional burst at the beginning of the interview, as maybe some of the victims have not told anyone about their experience. The interviewers need to let this go-listen to what they have to say and then start a more structured approach to the interviewed. They must also ask for linguistic clarifications; Hollis brought the example of the phrase "he used me as a wife" as being open to refer to rape, and therefore in need of clarification. In addition to the information provided with respect to the crimes of sexual violence, the interviewer should collect information related to any crime committed. Women kept in camps in Bosnia could, for example, offer a lot of information on beatings occurring in the camps, the identity of the people working there, as well as general life conditions. There is no need in focusing on the time element, since months are not important for some cultures; instead, the interviewers may follow other methods of determining time, by asking for example if the crimes were committed during the raining season or close to local religious holidays.

If the interviewed victim is considered suitable for witness, protective measures may be needed, as long as there is an objective threat and not just the –reasonable- fear of the victim. Treatment according to their special needs should be provided if they are to travel at the country of the international tribunal (e.g. someone to take care of their children, support for handicapped persons). It is advisable, also, to show them in advance the place where they are going to give their testimony, and in general to make them familiar with their surroundings. During the procedure before the Court, the interviewers having met the victim before, are in the best position to understand how the victim feels (e.g. needs a break, doesn't understand a question).

At the third phase, that after the testimony, the interviewers should always meet the witnesses again to thank them for their participation and to answer any questions they might have. They should be aware that the witnesses may feel excited immediately after their testimony feel because someone listened to them, but often when they go back home they experience painful flashbacks. Hollis concluded that the Court cannot assist them further, and that such would be inappropriate for a criminal court. What it can do, however, is that it can network with national and international groups, which are willing to offer education to the victims' children or micro-finance them and their spouses.

The Chair at this point commented on the complexity of the individual cases and expressed her hope for the development of jurisprudence.

Akin answering to a question posed by Niamh Hayes concerning the selection of evidence, emphasized once again the difference in conducting an interview to make an application for proceedings from conducting an interview to build a case. Referring to the situation in Darfur she commented that the ICC did not have the luxury to go in camps to take statements, so there was no choice of who can be interviewed, given the fact that the witnesses were spread in many cities. Even victims who have arrived in the US often lack the proper documents, have problems of bad memory, they want to escape the situation in their countries of origin by giving –sometimes false- information, or are affected by hearing their story over and over and by wanting to satisfy the court by saying what they think the judges want to hear.

Hollis commented that the interviewers should ask the question "how do you know?" when doubting the credibility of the information.

Hollis replying to the question of Helene Nguyen van rot-Cisse about the gender crimes that the Special Court for Sierra Leone has prosecuted, said that all the cases before it involved sexual crimes, but there were some, like the Revolutionary United Front case, with broad basis of allegations of rapes and sexual slavery. Reparations, however, have not so far been given.

Further commenting on the question, she said that victims often do not have a voice, while she expressed her disagreement with the general amnesty which has been given in some cases. Although some view it as a means of ensuring peace, Hollis wonders how the victims can live next to the perpetrators.

Continuing, Hollis said that there is usually a collective charge against the perpetrators of crimes of sexual violence, but the Court also brings forward individuals. It may be unknown exactly how many were victims of the specific perpetrators facing trial, but what matters is that the specific perpetrators have committed rapes in this region. They also often call overview witnesses, such as doctors and human rights investigators. In any case she noted that the higher-ranking the perpetrator the less important is the connection with specific victims. Nevertheless, she mentioned that for some time the practice at the ICC was to attach lists of specific victims.

Huma Saeed referring to Hollis' comment made earlier that the interpreters should not be locals, asked if the same is true also for the interviewers. Hollis agreed but Akin added that in reality there is a problem of resources, especially since all the procedures before the filing of the application are unfunded. Hollis clarified that it may be a national of the country where the crimes were committed but not from the same region, and she also stressed the constrains on resources.

On a question posed by Fabian Raimondo regarding the permissibility of preparing the witnesses, Hollis replied that simple rules have to be followed when preparing the witnesses; namely, that they should tell the truth at the best of their memory, they should ask if they do not understand and they should look at the judges to avoid getting nervous. She recognized that almost always the defence counsels respect the witnesses but in any case the opposing counsel can object if disrespect is shown to them. It is, however, the Prosecutor who asks the most difficult questions, as the experience itself is the most horrific thing.

On the same question, which challenged whether proofing of witnesses should be allowed, Akin argued that it is required and it is not coaching a witness. She went on expressing her hope that there will be opportunity for witnesses to testify in ICC cases "in their own voice"

and she noted that it is important not to bring the witness back twice, but rather they should receive reparations from the trust automatically once the guilt is established.

Hollis moreover commented on the decision of the ICC on proofing which was mentioned by Raimondo, arguing that it was based on UK practice which has now changed.

Akin added that it is imperative that the victims from the countries which are related to cases currently before the ICC are informed before the trial.

Patricia Viseur Sellers commented that the interpreter might be uncomfortable with sexual language and so it is essential that he feels part of the team.

Hollis said that at the ICTY they concluded that the interpreters, being the first ones to get the details from the victims of violent crimes, were in need of support as the traumatization of the victims has definitely an impact on them. She observed that the institutions must offer them support whenever they need it.

Continuing the discussion on the interpreters, Akin mentioned the case of the first witness of a crime of sexual violence that testified in the Sierra Leone court and the fact that the interpreter used softer language in order not to offend the court, something that frustrated the Head interpreter, who came down to the court room and corrected the translation. She noted that neither the interpreters nor the witnesses should use softer language.

Marleen Bosmans expressed her concerns with respect to the focus on the international criminal law approach and on how can it be reconciled with other approaches, particularly given the fact that there are almost no convictions; while the victims have to tell their story repeatedly, in the end it is not enough because more details are needed. With regard to the situation in the DRC she commented that there the rapes are conducted in many ways, while the DRC law defines rape only as the penetration of penis in the vagina, leaving out all the other methods of raping. Moreover, she referred to the involvement of civilians in these acts and to their uncertain international criminal responsibility. She finally argued that sexual violence can be expressed in other ways than rapes which cannot be brought before a criminal court, while in general gender-based violence is increasingly used in armed conflicts. There seemed to be a consensus in the room to Bosmans' comment that it is difficult to explain to the victims the importance of the ICC when their application is rejected.

Concerning the required -under the current procedures- repetition by the victims of their experience, Hollis stood in favour of an integrated approach according to which a single statement by the victims will be used by all agencies. Regarding the definition of rape in the DRC law, she commented that it was the same until recently in the USA so that the other forms of sexual violence had to be criminalized under the headings of other crimes.

Akin commented that justice comes at a high price and that the preamble of the Rome Statute is aspirational, as long as there are no funds to support it; there may be a trust fund for the victims but it cannot support the full procedure, so that additional funding is necessary.

Rahma Banana made clear that there is an assessment before the interview and in some cases, where the victims are very traumatized, as it often happens with children, it is either postponed or cancelled. She went on mentioning the difficulties involved in gathering linkage evidence, meaning that it may be easy to get the evidence about the crimes but it is problematic how to link them to a certain perpetrator.

Hollis replied that the crimes are not always linked to individuals but to the group which was perpetrating them. By collecting evidence from international sources, media and insiders who know the command up and down, they can establish that the accused is superior to those committing the crimes and that he was aware of what the group was committing. Even though

in the beginning it may be just knowledge, as an individual continues association with the specific group, intention may be established.

Akin added that if the victims participate in the case they have to make a link with the specific case and with the specific accused, which is often difficult. For instance, in the Al Bashir case, focus on the areas mentioned in the application for the arrest warrant had to be put and information from the Prosecutor was also useful. Nevertheless, it is difficult to tell victims that they cannot participate in the case.

Replying to a question by Elena Martin Salgado concerning the form of evidence, Hollis stated that it depends on the individual: whereas some are satisfied that their statement will be heard even if they do not appear before the court, others want to appear themselves to tell their story. If the victim wishing to appear before the court is an adult, their wish is the most important criterion to allow their appearance; the situation is different with the children.

Akin mentioned at this point the Lubanga case as being the first where the testimony on reparations and guilt was made at the same time; in this way, she contended, it is more likely that the witnesses would want to appear before the court.

Hollis added that the criminal courts have to be seen as part of the whole situation, in which national courts, international reports and oral histories, which are an important social aspect for the countries and the victims, also give the victims a voice; she concluded that there are a lot of tools to bring the stories of the victims in front and criminal procedures is only a very limited means to that purpose.

Kim Oskam commented that after she conducted interviews in Bosnia, she realized that the victims who got excluded from the Court's proceedings felt hurt.

Niamh Hayes stated that the international tribunals are sometimes the only ones which can address this problem-even if they can only punish few perpetrators- and therefore they bear responsibility for that.

The Chair argued that there is always going to be the problem of the limited funds even if they are increased.

Helen Hamzei expressed her frustration on the contrast between the recognized importance of allowing access of the victims to the Court and the difficulty to get data on them from the Court.

Akin supported that the way the Court is funded dictates its priorities, but at the end of the day –and although we should be seriously concerned about the funding- it is a politically established body. She pointed out that there have been no bodies for victims until the establishment of the ICC. Regarding the fact that hundreds, maybe thousands, of applications have been rejected by the ICC, it would be bad for the Court's public relations if these numbers would come out, she said. She concluded that the topic of the access to the Court by the victims is not sufficiently debated and needs more attention.

The Chair at this point suggested that part of the answer could be the strengthening of the national systems.

Patricia Viseur Sellers commented that the way rape victims are treated in domestic law and at international level is not taken as seriously as it should have.

The Chair concluded that the aim of this discussion is to get a universal view of the topic and ended the session by thanking the participants.

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