



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on Sexual Violence in Conflict

Inquiry on

SEXUAL VIOLENCE IN CONFLICT

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Questions 110 - 117

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4.45 pm

Witnesses: Ms Niamh Hayes, Judge Mary McGowan Davis and Dr Shana Swiss

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on
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Members present

Baroness Nicholson of Winterbourne (Chairman)
 Lord Black of Brentwood
 Bishop of Derby
 Baroness Goudie
 Lord Hannay of Chiswick
 Baroness Hilton of Eggardon
 Baroness Hodgson of Abinger
 Baroness Hussein-Ece
 Baroness Kinnock of Holyhead
 Lord Sterling of Plaistow
 Lord Williams of Elvel
 Baroness Young of Hornsey

Examination of Witnesses

Ms Niamh Hayes, Head of Office, Institute for International Criminal Investigations, **Judge Mary McGowan Davis**, former acting Justice of the Supreme Court of New York and **Dr Shana Swiss**, Founder and Director, Women's Rights International

Q110 The Chairman: Good afternoon, and thank you very much for joining us. We are immensely grateful. Although you will have heard it the first time, I will repeat that this meeting is on the record. We will give you a transcript, which you will be able to check for minor corrections. The meeting is being broadcast and will be on the website. You have had, I think, the details of the interests of individual Members of the Committee. I do not think we have any new ones, so my suggestion is that we go straight ahead. We have a number of questions for you. There is no need for you to answer all of them—if one is not up your street, just discard it and wait for the next one. Afterwards, we are bound to have more questions, and you may have more answers or more points to raise, so please elaborate in writing. That would be massively welcome. Could each of you, whoever wishes to go first, kindly talk for a moment or two about your own work and why you think this is an important issue?

Ms Niamh Hayes: I have both an academic and a professional interest in the issue. My original introduction to it was as part of my PhD research, which related to the investigation and prosecution of sexual violence by all the international criminal tribunals to date. Some of them have got on better than others: it has been quite a Sisyphean process, with a lot of steps forward, followed by steps backwards, but it is remarkable how much commonality there is. Even though they are investigating very different conflicts, the issues that they have encountered relating specifically to how to effectively investigate and successfully prosecute sexual violence have been common throughout the different tribunals. For the last three years, I have been working for an NGO based in The Hague called the Institute for International Criminal Investigations. We provide expert specialist training to professional practitioners who are already doing this kind of work. We are aware that it requires a very specific set of skills. It is not only about the underlying professional skill—whether that be as a lawyer, investigator, forensic scientist, psychologist, security expert or whatever it might

be—but about how to apply those skills in an ongoing or a post-conflict context, which can be extraordinarily difficult. There is also the question of how to work as an interdisciplinary team in situations of security instability, to put it this way. We have noticed that there is a huge demand for training on how to investigate sexual violence, in part because of the increased attention that it has received over the last couple of years. That can be a good thing or a bad thing. The good thing is that at least we are talking about it. The bad thing is that sometimes there can be a tendency to engage in box-ticking exercises. I am happy to go into any kind of detail that you want me to go into about the legal or the investigatory side of things, but that is what has brought me to this issue.

Judge Mary McGowan Davis: I am a retired New York Supreme Court Justice. That sounds very exciting and august, but it actually means I am a trial judge and tried serious felony charges for many years. The Supreme Court of the State of New York is not the top court but the main felony trial court. Since retiring from that work, I have been roaming the world, basically, working on various projects relating to training judges and assessing justice systems. I am here today, despite the relatively small amount of time I have spent on this compared with the distinguished people who are sitting at my side and who have focused on eastern Congo, because I was asked by the Open Society Foundations in the spring of 2011 to make a trip out to eastern Congo. We ended up on a hilltop in Kamituga, eight hours into the bush from Bukavu, attending mobile court sessions facilitated by the American Bar Association's Rule of Law Initiative. Much of the funding at that time was provided by the Open Society Foundations. I spent several days sitting in a tent on a hilltop watching and attending the proceedings. I wrote a long report afterwards assessing my experience with that mobile court session. During the time that I was researching this in the field, I spoke with many judges, with the lawyers involved, with community organisers in Bukavu, with NGOs and with local civil society. To get a good sense of the issues, I also spoke to some of the survivors who had testified during the court session. The week I spent in place focused intensively on South Kivu, which in particular was a granular experience. I guess that is why I am here: to tell you about that and about the local courts, which are one way in which I think justice has been brought to some survivors in that part of the Congo.

The Chairman: Thank you very much. We met Charles Guy in Kinshasa last week, so we learned a lot about the ABA in east Congo. Dr Swiss.

Dr Shana Swiss: How did I get into this work? When I finished my medical and clinical training, I went to Physicians for Human Rights to start their women's programme in the early 1990s. As part of a mission for the Special Rapporteur on the former Yugoslavia, a team of five women physicians was sent into the former Yugoslavia to try to address the incredible explosion in the media of stories of women being raped—up to 60,000 women, according to the media—and what was going on. The team of physicians I was with had all decided that we had a fairly good human rights background and were going to interview women who had been victims of sexual violence. When we arrived in Zagreb, we found out that a refugee woman in Spain had committed suicide after talking to a psychiatrist there. So we looked around and said, "There is no safety net here, no services and no support for women, and we cannot interview women, as it would be unethical to do so". We had 10 days to come up with some way to understand what was going on in the former Yugoslavia. We divided ourselves up. Two of us went to Zagreb, I went to Zenica and Sarajevo, and two people went into Serbia. We decided that we would go to hospitals, talk to doctors and look at hospital records. We really had no idea what we were looking for. I just said, "Look for everything."

Look for sexually transmitted diseases, look for pregnancies, look for whatever you can, and talk to the doctors. We are going to have to come up with some proxy here and some reason for what is going on". It was very interesting that in a sample of six hospitals—two in each of the three countries, which is a very small sample given the size of the former Yugoslavia, which had 20 million people—we found that 119 women had become pregnant as a result of rape.

We had no data on the first-trimester abortions, because abortion was legal in the former Yugoslavia, and the doctors had decided not to ask those women why they were having abortions, so these were appeals to the hospital ethics committee for a second-trimester abortion. Starting with the 119 pregnancies as a result of rape in these six hospitals, we used the medical statistic that an unprotected act of sexual intercourse will result in a pregnancy between 1% and 4% of the time. In order to have 120 pregnancies, you would need between 4,000 and 12,000 acts of rape. So we were able to say that, yes, the scale and scope of rape in the former Yugoslavia was huge. Although we could never come up with the exact numbers, it was certainly happening. This was the first war that really made rape public. That is how I got into this work. In talking with a few women in the former Yugoslavia who wanted to talk with us, we had a paralegal with us: someone who understood what talking to human rights people was about and could really understand informed consent, which I would like to talk about a bit later today as well. We heard how betrayed women felt, which we now know from other conflicts as well. People come in and ask the same questions multiple times, and the same survivors are spoken with by multiple groups and organisations that come through. Out of that grew the work that I have developed over the last 20 years, which is to put the documentation into the hands of women in the countries that they are living in, to work with them to develop skills, to do very good, sound scientific research on documenting violence against women, sexual violence against women and the impact of war on women, and to be able to determine the questions and what they want to find out about what has happened to women during the conflicts in their countries. This work has been published in the *Journal of the American Medical Association*, the *Lancet* and other journals, and just underscores how possible—and if not easy, then worthwhile—it is to help women in their own countries to become the documentarians, along with other ways of helping women survive violence in conflict.

Q111 The Chairman: Thank you very much. We have about eight questions, and we need to finish at about 5.45 pm, or 5.50 pm at the latest. It might be that just one person chooses to answer a question. If you all answer them, perhaps you could be fairly brief. I will start with the first couple of questions.

The first is about the visibility of justice. How important is it that justice is seen to be done, and not merely done? Secondly, what barriers do survivors face in trying to achieve accountability for the crimes of sexual violence in conflict?

Ms Niamh Hayes: I can address the visibility question, if you would like. It has a tremendous impact on a number of different levels. The witnesses in the earlier sessions spoke about the impact, positive and negative, of impunity on survivors who have been through an experience like this. One thing that struck me most about some of the work that Dr Dolan's organisation does with male survivors is that when they testify in public, one of the things that they all say is, "I thought I was the only person on earth this had happened to. I thought I was the only one". Everything about the way sexual violence is committed is designed to

psychologically intimidate someone, punish them, and induce stigma and shame. There is a tendency for people naturally and automatically to feel as if there must have been something about their behaviour that led to this incident. The more visible all possible examples of victims of sexual violence are, the more that is undermined because people realise that if it could happen to someone else, maybe it is more explicable that it could happen to them.

On a legal basis, on a normative basis particularly, the importance of precedent in this question is absolutely overwhelming. To look at the international criminal tribunals alone, just over 20 years ago, when the Yugoslavia tribunal was being set up, from a legal point of view there was a genuine dilemma and proper academic debate about whether rape could constitute a crime against humanity. There was less of a debate about whether it could constitute a war crime, and I do not even think anyone was even having the argument about whether it could be an act of genocide at that point, as it would have been purely theoretical. Twenty years later, purely on the basis of the work of the Yugoslavia tribunal, the Rwanda tribunal, the Special Court for Sierra Leone and the International Criminal Court to date, we can say, as a matter of law, that rape committed in situations of ongoing armed conflict and in connection with that armed conflict constitutes a war crime. If it is committed as part of an ongoing or systematic attack against a civilian population, it constitutes a crime against humanity. If it is committed as part of an overall policy to destroy a national, ethnic, racial or religious group, in whole or in part, it constitutes an act of genocide. Evidence of sexual violence is relevant to prove other crimes, such as torture, extermination, persecution and outrages against personal dignity. In such a short space of time—20 years—the law on this has completely changed and the conversation has changed as a result. If you can say that this is a marginal crime and do what people always try to do and downplay the obvious, overwhelming criminality of it, it becomes easier to gloss over it, ignore it in policy and not deal with it on a societal basis. If it is held up as the absolutely appalling crime that it is, it becomes almost untenable to not react to it. That is part of the issue and one thing that is worth mentioning to all of you.

I know you have used the phrase “conflict-related sexual violence” to refer to the type of situations that we have all discussed. The pedantic lawyer in me looks at the word “conflict” and says that it is not entirely necessary, but the very fact that we are having this conversation means that we are not glossing over it and are not pretending any more that it did not happen. The genie cannot be put back in the bottle: there is no circumstance in which anyone, whether they are a potential perpetrator or the Prime Minister of a diplomatically recognised country, can say, as matter of legal notice, that they are not aware that rape committed in those circumstances is a violation of international criminal law. War is a complex thing, and if someone is killed in an armed conflict, any lawyer will tell you that you need a lot more information to know whether that constitutes an international crime. But there is no circumstance in which it is legally permissible to use sexual violence in armed conflict. It is never not a crime, whether it is committed against a young civilian woman, a male child soldier or a four-star general. There is no circumstance in which it is not an international crime when committed in those circumstances. It is because of the prosecutions that we have had to date that we can say that as an established fact.

The Chairman: Perhaps you could guide us on why it is proving so difficult at the moment to bring a charge of a crime against humanity or genocide, whichever way you look at it, right up front for the Yazidi people in northern Iraq at the moment?

Ms Niamh Hayes: The Yazidi issue is purely one of jurisdiction. The problem is that for the International Criminal Court to have jurisdiction, it would have to have either physical jurisdiction over the countries of Iraq and Syria or the situation referred to it by the Security Council. Alternatively, it could—maybe—prosecute nationals of States parties that had joined the ICC. So if you had an ISIS fighter from France, the UK or another European country that had joined the ICC, the ICC could exercise jurisdiction over them. Otherwise it is not possible for it to do so, so at the moment it is purely a question of being able to exercise jurisdiction over the situation. What has proved so difficult in practice is tying the sexual violence to more remote perpetrators. That has been the hardest part.

The Chairman: So your point is related only to the ICC not to global justice in general?

Ms Niamh Hayes: It relates to international criminal prosecutions, because they require a degree of political or diplomatic establishment that domestic prosecutions would not. Chris Dolan made a point about the Rome Statute earlier, and it is worth pointing out that there are more than 130 States parties to the ICC, all of which have had to incorporate the Rome Statute into their domestic law or to ratify it. That means that all of them have validated the definitions of rape and of gender violence and the fact that all of these constitute international crimes. Unfortunately, people's determination tends to waver a bit when it comes to actually grabbing someone and putting them in a dock. That generally tends to be where the wheels come off the bus, unfortunately.

Judge Mary McGowan Davis: I will comment briefly, if I may, on the visibility question that you mentioned. To be quite candid, I was completely blown away in the eastern Congo after a week spent talking with people who had been able to access the justice of the mobile courts. The phenomenon that I found really extraordinary was that young women were coming forward and saying, "That man did this to me". Visibility means that they know that if there is a court, a prosecution is brought and the evidence is there, people will be convicted and will suffer punishment. Even a 10 year-old girl testified at a trial I attended. Her father was counselled by the judge: "You can tell her she can come and talk to me in camera". They said, "No, I want to tell everybody. My community is listening, and this man did this to me". Throwing off the silence is what visibility is about.

Dr Shana Swiss: I will speak to the barriers, but first we need to ask about the definition of justice. What is justice? It is a very different thing to different people. It is very different to us in the global north than it may be to rural women in the global south. It is really important to constantly and continually be in discussion with women in these countries about what justice is, what it would look like, what it would mean and what needs to happen in order for them to feel that justice has occurred. In a lot of countries, the perpetrator is still in the village: they teach in the school or work at the police station. Cases can take six to 10 years in Sri Lanka, and longer in some countries, where they can go on and on. The justice systems are pretty much universally broken in the countries that we are talking about that have seen years or decades of conflict. The health systems are broken or in severe need of a lot of help and a lot of input. Besides all of the things that we have talked about—that they do not have transportation or money to buy legal documents or to do this or that—there are bigger questions that need to be answered first. I do not have those answers but I know that the women do, and all of our work is based on that. Justice will look different in different countries, so I would just encourage us to do this. I know the Nairobi declaration on reparations for women and girls discusses throughout that women need to be included in any and all discussions of reparations and justice in these countries.

I want to make one other point here, about informed consent, so I am going to jump over to prosecutions. I will let you all know my bias from the beginning: I am not at all in favour of encouraging or promoting prosecutions. If a woman wants to come forward and understands what that process is about, I would totally support that and give her as much support as I possibly could and as she needs in order to come forward. But partly as a result of my background as a physician and public health person, and partly as a result of having worked in the field for a couple of decades, I think it is very hard for a rural women living in Africa, Asia or somewhere else to really understand what this process is about. It is not just a question of reading of a list and saying, "This is what is going to happen, this is what we are going to do. Can we use your data and who can we give it to?". It is a much deeper and more ethical question than that. We really need to look at that as we are planning what is going to happen post-conflict. I am very in favour of transitional justice mechanisms. I was involved with the Truth and Reconciliation Commission in Liberia and would very much like to talk a little about that at a different question.

Lord Hannay of Chiswick: Could I possibly ask a supplementary question?

The Chairman: I am going to move on Lord Hannay if you do not mind, as we have a lot of questions. Could we go to the Bishop?

Lord Hannay of Chiswick: I am asking a supplementary question.

The Chairman: We are coming to you in a minute.

Lord Hannay of Chiswick: I am not trying to ask that question. I am asking a supplementary question. I am sorry. I was very interested in what you said, but does that not cut across efforts to deal with the issue of impunity?

Dr Shana Swiss: Cut across?

Lord Hannay of Chiswick: I mean contradict. If you are saying to women who have been horribly treated in this way, "I am not encouraging you to bring this matter to court if you do not feel like it", then are you not basically weakening the effort to clamp down on impunity?

Dr Shana Swiss: There are other ways to address impunity, and maybe we can get into that in another question. I am not against what you are talking about, but we need to think of other ways that we can do that as well.

Q112 Bishop of Derby: This is probably a question primarily for Dr Swiss. You have just taught me a new word, "documentarian". You said it is important that the women themselves become documentarians. Especially in the light of this last little debate, could you say a bit more about the role of documentation? What are we trying to achieve by it and how does it best help survivors?

Dr Shana Swiss: I am so glad that you asked that. The former Yugoslavia was our first. I had been to Liberia before that and started thinking about working on the documentation that we did there. Then the former Yugoslavia and everything with the media happened and I thought, "Well now the whole world knows that rape in war is a huge problem, so we don't need to keep documenting it any more, because we know about it". Well, it took a while. We did not know it then, but I think we know it now. In Liberia, I said, "I don't think we need to do the documentation, because of the former Yugoslavia. I think we can move on and develop the programme that we were going to develop after we found out how extensive a problem this was". They said, "No, no, we want to do this". I realised—this is important—

that the documentation itself was extremely empowering. We think we know what happened to women during this conflict, but now we have the raw data, as they call it, to prove it. It gives me the goose bumps just saying that again, but that is exactly what they said. Documentation has a very empowering role. Do we need to go and document how many women have been raped in every conflict in the world? No, I do not think we should be doing that; we do not need to count any more. If we ever had a war where there was no rape, maybe we should start counting again, but until that happens, we do not need to be counting.

There has been a shift in the last number of years, and documentation has been increasingly driven by donors, who say they are not going to fund a programme until they know the numbers. This has a very destructive aspect, and I think we need to stop it. We do not need to be counting any more, 20 years later.

Ms Niamh Hayes: Can I make one brief point about the counting issue to back up something that Dr Dolan said earlier? One area in which we absolutely do need to keep counting, simply because the process has not existed before, is in relation to male victims. There is an amazing quote from Sherlock Holmes: “It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts”. One of the things that you encounter here is phrases such as “women and girls represent the overwhelming majority of victims”, or, “this is an issue that disproportionately affects women and girls”. The only point that I want to make is that in the absence of certainly sufficient information, in the absence, frequently, of anyone even asking the question of men, I do not think you can use phrases like “majority” or “proportion”, because they necessarily involve two comparable figures. We really only have one, and even that represents, in many ways, an iceberg figure of the true total. That is one thing.

Baroness Young of Hornsey: Again, a quick question to Dr Swiss but also to others in the light of this claim that we do not need to count any more. Do you not feel perhaps, without trying to put words into your mouth, that there is a case for an historical record of what has happened, which is not necessarily about counting but is just to say, “This is what happened in this particular period, in this particular place”, for the record?

Dr Shana Swiss: Absolutely. I totally believe in historical records. There are other ways to get them. I am going to speak about the Liberian Truth and Reconciliation Commission, because I am most familiar with it. It took about 21,000 written testimonies and about 500 public testimonials. Half the written testimonies and about 40% of the public testimonials were from women. The Commission was also able to document male sexual abuse. It had a very different character, and I think it is very important that we keep these separate. I do think that sexual violence disproportionately affects women—that is my hypothesis—and that the sexual violence is very different. For men I think it is more shaming, humiliating—a variety of different things, at least in Liberia. The Commission also documented a large percentage of men. This is another way of getting documentation without having continually to interview women for that information if what we want is an historical record.

The Liberian Truth and Reconciliation Commission was terrific in the way it really put women and children forward in the gathering of information for the Commission. It invited the team that I worked with in Liberia to present its quantitative data on violence against women in the conflict to give background at the thematic session for women at the beginning of the Commission before it heard women’s testimonials, because it also realised—this is a place

where this data can be useful—that you can have 10,000 women come forward and say they were raped and you still do not know what percentage of women were raped in the country. I thought that was very forward-thinking, and it was wonderful that we could do that. We did it in a very creative way. Hundreds of women came from the countryside, many of whom had never had any formal education. We had statistics to share with them, and we did that through a presentation of dramatic plays and pictorial graphics relating back to the plays that we had presented. People were very thrilled with that.

The Chairman: Thank you for that very helpful supplementary.

Q113 Lord Sterling of Plaistow: The full title of this Committee, by the way, is the Select Committee on the Prevention of Sexual Violence in Conflict. Doctor, you said that given the numbers who were pregnant in Yugoslavia, some 10,000 people must have been raped. As many people in the army will say, most of the women do not have a clue who raped them, so bringing them to justice is impossible. We have witnesses here with huge experience—a Justice from New York and someone at The Hague itself—and some of us are extremely keen to hear your views on how the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict is being used. When there is rape on a massive scale in an area, what form of law would you want to see take place and really happen that could prevent that sort of scale of rape in violence, which affects numbers of people running into the thousands? If somebody facing you says, “That bloke across the road at the post office raped me”, if you do not mind my saying so, that is reasonably clear cut. This is very different.

Judge Mary McGowan Davis: There are several problems relating to the incidents of rape in conflict zones that I learnt about when I went out. There are these ghastly mass rapes involving hundreds of victims on a wide scale, which are suited for prosecution in some sort of a court that applies international rules—the Rome Statute essentially, or some version thereof. I also learnt in the Congo that when you have this mass rape going on and impunity for that, it has this trickle-down effect; suddenly everybody is raping. They called it the ‘normalisation of rape. When I was there in 2011, which was a quieter time in terms of some of the bigger mass rapes, the cases that the court I visited was trying were of little girls being raped by their relatives, their priest or their teacher. Apparently when you have impunity on this scale, it trickles out into the civilian, the wider, community, so not only do you need to prosecute these huge cases and to bring in the resources that those who are experienced in trying and prosecuting these cases can bring in, but you also need to build up the local justice system so that the ones that are closer to home—in the sense of everybody’s lives—can be tried and prosecuted too. You have to work on two levels, I think.

Ms Niamh Hayes: I agree. I can give you quite a detailed example of that. If you look at Rwanda, the statistic that you will also encounter is 250,000 rapes in a 100-day period. As Dr Swiss said, if you look into how that figure was obtained, 2,500 children in the 1995 census in Rwanda were listed as having been conceived as a result of rape. They applied the “one in every 100 acts of unprotected sex results in pregnancy” statistic to that, multiplied the number of acknowledged rape babies by 100 and came up with the figure of 250,000. That does not take into account the number of people who were raped by more than one perpetrator, people who were raped and then killed, people who availed of the amnesty on abortion that was introduced in the aftermath of the genocide in Rwanda. So essentially 250,000 rapes in 100 days, which is already at a scale that is nearly beyond comprehension,

is in fact the lowest starting guess. So how can any legal process, or any combination of legal processes, address criminality on that scale, particularly when—you are right—a lot of the time the victims could not identify an individual perpetrator.

Lord Sterling of Plaistow: Just to develop that, have you ever come across a time when a commander, or whoever is in command in some form, has actually ordered a mass rape? Have you ever got one of those and hung them up a tree? We cannot get the lot of them, and the one who gave the instruction is the one you have to get your hands on.

Ms Niamh Hayes: This is the whole point: that you cannot go after every individual perpetrator. Even between the International Criminal Tribunal for Rwanda, the national prosecutions and the informal Gacaca justice process, you still cannot come close to every perpetrator. There have been situations, including with the Rwanda tribunal, where both military and political leaders have been held responsible for directly ordering rapes. What is quite interesting and one of the routes, I think, with the greatest potential is the facility for holding someone responsible for failing to prevent or punish sexual violence. They do not even have to be stupid enough—and it would take a degree of stupidity—to give a written order to rape; they simply have to allow it to happen and let people get away with it to become criminally responsible themselves. The most valuable outcome would be a systematic targeting of the senior leaders. That has been of limited success so far because of the difficulty that the international tribunals have had with the mode of liability. In holding someone who is more remote from the crimes to account, you are not prosecuting them for committing a crime but for a failure to prevent and punish it, for complicity in it, for aiding and abetting it or for something like that. The legal elements are quite complex, but if I had a magic wand I would remove the reticence of judges to hold more remote perpetrators accountable. What you find is that when it comes to mass killing, ethnic cleansing or any other large-scale policy, the judges are fine holding remote perpetrators to account. However, they develop a degree of squeamishness, caution or legal purity when it comes to holding people responsible for mass sexual violence. You find that some judges will even enter a dissenting opinion giving out to their fellow judges for not being willing to take that extra step. Basically, if you have different justice systems addressing different targets, then you have some hope of providing overall accountability in a very limited form. But you have to manage expectations. The chances of any international criminal tribunal prosecuting anyone's individual rapist are beyond minuscule. However, they are in the best position in terms of the rules of evidence, the forms of liability and the way the crimes are defined. If anyone has any hope of holding senior leaders accountable, it is international tribunals. That is the role that they can play, rather than pretending that they can go around and find every rapist. The ICC is looking at eight countries. You could not possibly begin to deal with all of them.

Judge Mary McGowan Davis: I will make a pitch for local justice systems taking up some of the slack here. Yes, the ICC is very important for the ringleaders, but the mobile courts that I have been assessing in eastern Congo have had some success. They not only convicted a colonel over his individual rape of women in Fizi in January, on New Year's Day 2011, but held him and eight of his soldiers accountable on command responsibility for rape, pillaging and other serious crimes. So it can be done. This was a Congolese military court applying international law, and I think 42 women came forward as witnesses. They testified anonymously, but that was huge in terms of the message it sent out to South Kivu at the time. More of that is needed. It can be local; it does not have to be the ICC.

Q114 Baroness Hussein-Ece: This is extremely interesting. I wanted to ask a supplementary about the mobile courts. They are ad hoc, I suppose, having been established in places where there would normally not be a court, and you have large numbers of women coming forward. We heard from Dr Swiss how she does not think it is a good idea to press women who do not want to give evidence if they do not feel like it. On the other hand, how much support is given to women in those situations out in the field—and protection, because there must be intimidation? How much support and protection is given to women to encourage them? Obviously, we want prosecutions, especially of these senior commanding officers, because that in turn will prevent this happening again, even post-conflict. I am interested in what support networks there are.

Judge Mary McGowan Davis: The model that I was assessing, as I mentioned, was supported—facilitated is perhaps the right word—by the American Bar Association’s Rule of Law Initiative. Other NGOs are also operating mobile courts in eastern Congo, many of which are supported by the United Nations and by governments. There are various different models. Most of those models, as the ABA model clearly did, rely on local medical facilities such the Panzi Hospital in Bukavu—places where people go and can get counselling—to refer directly to the mobile courts. They are supported in the field, and locally before the court even goes out into the field to have its hearings. So it is not only about going to court and testifying; there are support services that are definitely part of the mobile courts package and what it offers survivors who testify before them. It is not one or the other. They provide holistic services in some of the more urban areas such as Bukavu and Goma, although it is much harder when they are way out in the bush. Usually when they have access to a mobile court, people are given protection. This is all taken very seriously from what I was able to see from the programme that I evaluated. Good things are happening with these mobile courts, although they are not the only answer. I know they are also talking about all kinds of mixed chambers and that there are various proposals out there. But the mobile courts offer a model. One thing that the Congolese like about this is that it is all Congolese. That is hugely important. I was down there and heard people say, “We care that the international community cares about us, and we appreciate the funding and the resources, but we are proud people, we have an excellent legal framework”, which they do. They have hugely experienced judges, prosecutors and lawyers; it is very sophisticated. They have great laws, including a 2006 sexual violence law that is excellent and up to date. They have protections under a revised constitution. There is good stuff. They have to be able to put it into practice, and implementing is always hard, but I liked what I saw. I think it is a good model. There have been mobile courts in the Congo forever, because so much of it is inaccessible. In 2011, when the feeling was that the government was totally absent out there, they fulfilled a real function. I was very moved when the presiding judge, who is one of the most distinguished military judges and has tried a lot of these important cases, said, “We appreciate the international community, the American Bar Association and the UN, but we want our government to give us the means to do the work ourselves”. I respect that, and we have to understand that that is part of what we are working with when we try to figure out what the best model is.

The Chairman: A second supplementary from me. We have not touched on the question of protecting the judges. In many of these instances, the judges themselves, or members of their families, in particular their sons, are targeted and killed. Could you comment on that?

How do you see that proceeding? It is sometimes very difficult to get local funding or local arrangements for that. What is your guidance?

Judge Mary McGowan Davis: Speaking from the experience of the mobile court situation that I know about, in 2011 in Bukavu and Kamituga, this was a very particular concern in April that year, because one month earlier, a prison transport taking one of the defendants from Uvira to one of the courts was attacked and a prisoner, a prison guard and, I believe, a civilian were killed. In April 2011, there was a huge sense of concern on the part of the judges. There is security—it is built in as part of the model that the American Bar Association was facilitating—but there was concern that some of the lodgings that they were staying in were not the best. That was a very real concern. On the other hand, it was interesting that the presiding judge in the Fizi case said one of the reasons why the whole case with the colonel had such an impact locally was that the judges, the prosecutors and the lawyers travelled way out and lived in the same conditions as the victims and the community. He said, “That made an impression”. These kinds of things do. These judges are brave and go out knowing that they are going to be vulnerable. Security is clearly an important concern.

The Chairman: Were the sentences handed down actually served or were they merely notional?

Judge Mary McGowan Davis: One of the features of the American Bar Association programme is that they actually follow up and go to the prisons, because some of these prisons are not secure. Again, this was in 2011, but I saw statistics that said that each person who had been convicted by one of their courts was still in prison.

The Chairman: The question is really more general, as we cannot rely on the American Bar Association to look after every set of judges everywhere. Do you not have a more general comment to give us on this?

Ms Niamh Hayes: Part of the issue is stigma. You will find that whoever the crusading character is or whoever the person is making life awkward for somebody else—whether that is the judge, the prosecutor, the person running the support network or the particularly rowdy victim group representative who keeps knocking on doors—that is what tends to make people a target. In many cases, it is the refusal to be silenced that leads to the escalation of reprisals against them. In many ways, people are relying on a general culture of stigma and intimidation. It already takes an unusual and quite persistent personality type to persist in the face of that. It is one of those issues that is a bit like asking, “How do we prevent sexual violence?”. How do you make people not be awful in the way they behave towards each other? Essentially, the human element cannot be removed from the equation here because it is the single most relevant factor for security, stigma, impunity, prevention, societal responses and everything else. If individuals behave in a way that is worthy of the word “humanity”, then quite a lot of these secondary issues are not as acute. If people are going to behave in an appalling, barbarous, unfair and unjust way, to what extent can you build a system that is designed to make that impossible and to what extent should you?

Lord Sterling of Plaistow: Let us come down to brass tacks: when you went to the prisons, what sentences were handed out?

Judge Mary McGowan Davis: Some life sentences were handed out recently. A general, I believe, received life. Colonel Kibibi Mutware received 20 years. So there are some significant sentences.

Lord Sterling of Plaistow: But is it a comfortable sentence? It is not in his own quarters, is it?

Judge Mary McGowan Davis: Not to my understanding. I did not actually visit that prison. I have visited prisons in Rwanda but not in Congo.

The Chairman: Do any colleagues have more questions to ask that they do not think have yet been covered?

Lord Hannay of Chiswick: I have a question if you want me to ask it.

The Chairman: Do you want to ask it?

Q115 Lord Hannay of Chiswick: I will be very happy to do so. Leaving on one side the question of prosecution, does documentation help survivors in other ways than preparing the ground for a criminal prosecution? Is it useful for survivors that you carry out this documentation—not for statistical purposes, which is what I think you were talking about at an earlier stage, but in individual instances? Or is it simply a continuation of the trauma?

Ms Niamh Hayes: It depends very much on the individual person. This goes back to the question that you asked earlier about whether you are taking one step forwards and two steps backwards in terms of impunity. Any accountability process that is at the expense of the victim is so counterproductive that, to my mind, it is not worth engaging in. I say that because whether you look at traditional justice processes, prosecutions or documentation processes by civil society, there is an underlying tendency, however well-intentioned people are in their actions, to commodify victimhood or to turn it into something that you need from them. Victims are very sensitive about that once they feel that it is not about them or about making them feel better but about what somebody else needs from them. That makes sense in the context. If someone is suffering from a feeling of a lack of control, of being exploited and of not being in charge of what happens to them, any process that you corral someone into that triggers or reinforces that is one that ultimately no one would be happy with, because it does not contribute to prevention and does not even contribute to improving the situation that they find themselves in afterwards.

I would say the following about documentation generally. The overwhelming majority of the work that is done with survivors of sexual violence in conflict is documentary work, not investigatory work. It is not something with a mandate or with the authority to compel information. It is not done by someone who necessarily has anywhere further to take it. What you find if nothing else is that, whether they are for future prosecutions or not, the data is valuable to the survivors themselves. You can say to them, as with the Refugee Law Project, that they are in a situation where X proportion of all the people who are present at that refugee camp have been through an experience like the one they had in their country of origin, and that they are not unusual, not exceptional and not alone. However, it also means that at a certain point you can start to identify patterns. How many of those people experienced the sexual violence immediately before they fled their country or sought refuge? How many of them have experienced it in the IDP camps since they arrived? How many of them had experienced it in a domestic context that predates the conflict? You will find that people do not fit into just one box. There is a level at which all those groups interact: even just something as simple as being able to find out how many victims of sexual violence, never mind their gender, also experienced persecution on the basis of their ethnicity, their sexual orientation or their political opinions—something else about them—helps you in, hopefully, a comprehensive and minimally invasive way. Again, there is the

human element. If you are going to sit down with someone who has been through something like that, you need to conduct yourself in a way that reflects the duty of care not to put them in a worse situation as a result of interaction with you. That is the absolute minimum. The best possible standard is empowerment through participation, but the absolute minimum is to do no harm. If you can navigate those two buffers, I would say that, in general, it is a worthwhile exercise.

The Chairman: Baroness Goudie will ask the last question of this afternoon.

Q116 Baroness Goudie: I am very impressed with what you have had to say on a number of issues today. One issue we need to look at is what role truth and reconciliation commissions play in achieving accountability, as we have seen in South Africa and Chile.

Dr Shana Swiss: I will start with the Truth and Reconciliation Commission of Liberia. It is ironic—more than ironic, very unfortunate—that that particular report, which is public, has not been implemented, even though it came out in 2009. The reason for the lack of implementation is the recommendations that were made by the Truth and Reconciliation Commission to guarantee non-repetition, saying that anyone who had been part of the conflict could not serve in the government. It also recommended prosecutions of specific people, so the legislature did not act on it. I have heard very recently that they might try to implement some of it in the near future—maybe the next couple of years, I do not know. It was an amazing truth commission. It looked at historical and root causes, and interviewed women—I will talk about women, as that is the part I am familiar with, although it was obviously much broader than that. They interviewed women in the diaspora: in Africa and in Europe and the United States. They had a gender committee and a gender policy. They had some excellent things in place: for example, every woman who testified, in all of the 15 counties, got six weeks of follow-up in groups with psychosocial support, or whatever you would like to call it. The groups themselves said they had 100% participation in those groups. It was done in a truly respectful, supportive and empowering way for the women who participated in it. The recommendations were quite excellent, and that Truth and Reconciliation commission went a long way towards helping to heal some of the wounds of that conflict. I hope that the implementation, which is half of it, will happen. If they implement half of what they are suggesting should be implemented, that would be really good. It is a question of building the justice system and the healthcare system, rather than having a lot of special groups: instead of having a special group here for women who were raped, which will be responsible for that issue, and a special group there for whatever, they are integrated into the government systems. I feel quite strongly that we need to strengthen government systems. In Liberia and other places, when you go from emergency to development, the healthcare system takes a deep nosedive. I know it is a huge challenge, and I have not always felt this way, but I have come to the view more recently, over the past couple of years, especially since a little bit of work I did in northern Uganda, that we have to build the government systems. As difficult and awful as they are, that is what is going to last, whereas everything else will leave the country. Just coming in and doing some little thing here and another little thing there, even if it is for several years, does not help in the end.

Ms Niamh Hayes: With some conflicts, a truth and reconciliation commission is essentially the only historical record, or even the only talking shop, that you are going to get. Some really valuable work was done in the Truth and Reconciliation Commission in Guatemala in relation to sexual violence. So many conflicts in central and southern America have featured

sexual violence to a huge degree, and there has been absolutely no other formal or informal justice process that has tried to address that. Sometimes they are the only show in town, and as a result they are very valuable.

Judge Mary McGowan Davis: I have one quick, final remark, which is not truth and justice-related. Although I respect the commissions and think they are very appropriate and useful, I am a judge and a prosecutor. I think that people should be held accountable after court cases where the evidence has been produced and investigated, people's rights have been respected scrupulously, including those of the accused and the victims, and the survivors who have come to testify are treated appropriately. What is needed in the eastern Congo at this point is the local mobile courts doing the work that they are doing. There is also talk of creating specialised mixed chambers that would really be in a position to take on the higher-ups who, frankly, are being protected at various different levels of the military and political system. The internationals who participate in that would be Africans—there are so many specialised African judges, for example those from the Rwanda tribunals and from Sierra Leone. I would make the pitch that it would be good to get the special mixed-chambers Bill out of committee or wherever it has been lingering for the last year or so in the Congo. That would be an effective complement to the ICC and to the other courts that are doing the work for people who have been raped in their communities. There are various levels that need to be looked at, but I do think that prosecutions are important.

Q117 The Chairman: A quick question for the judge. A truth and reconciliation commission, as you have highlighted, almost involuntarily does not contain true justice. It is really a form of mediation. I gave evidence to the Truth and Reconciliation Commission in South Africa, for example, and was struck by the fact that there was no judging or sentencing at the end. Nonetheless, given the extreme value of them that we have been told about this afternoon—

Judge Mary McGowan Davis: The value is in setting out the evidence of what happened. One of the reasons why these international court proceedings take forever is that the judges think that is part of what they have to do. Personally, I do not think so: take a couple of the higher-up people and prosecute them if you have the evidence. The TRC can lay it all out.

The Chairman: Would you therefore recommend that we think about proposing that formal mediation courts are set up in countries that have been in conflict? Would you see that as a longer-term form of truth and reconciliation or not? Mediation courts have been set up for example in Jordan and in one or two other places—the ABA has been highly instrumental in this. Do you think that mediation as a formal part of the justice system might be something to propose?

Judge Mary McGowan Davis: I certainly think there is a role for mediation in justice systems. The courts are overburdened, and it is appropriate. But in terms of some of these mass crimes of rape and sexual violence, no: I say prison for the higher-ups who are ordering this. Mediation would not be quite enough for me, I am afraid, but it certainly has a role at the lower levels that we have been talking about.

Ms Niamh Hayes: Ms Wambui said earlier that sometimes the informal justice process essentially gets turned into a form of mediation. For this type of crime, there is an element of horse-trading about it. If, in principle, it is wrong, do you just provide someone with a receipt?

Baroness Goudie: I think you have to have room for both. Truth and reconciliation commissions are sometimes the only way of getting some form of closure for some people. At the same time, we have to have prosecutions—there is no question about that. But the commissions are very important for closure because we want people and the generations after them to be able to move on, as we have seen in Ireland and other places. Otherwise it is not three generations but 10 to 12 generations. That is where I personally feel that they are very important.

The Chairman: Thank you all very much indeed. We are most grateful. We have covered a lot of ground in a relatively short space of time. There may well be some further written questions, and you may, as I said at the beginning, have further comments, in which case please provide them. We are most grateful to all of you.