Members present
Bishop of Derby (Chairman)
Lord Black of Brentwood
Baroness Goudie
Lord Hannay of Chiswick
Baroness Hussein-Ece
Baroness Kinnock of Holyhead
Lord Sterling of Plaistow

In the absence of the Chairman, the Bishop of Derby was called to the Chair

Examination of Witnesses

Dr Kirsten Campbell, Principal Investigator, Gender of Justice: Prosecution of Sexual Violence in Armed Conflict research project, Goldsmiths, University of London, Professor Patricia Sellers, Special Adviser, International Criminal Court, and Visiting Fellow, University of Oxford, and Ms Elizabeth Wilmshurst, Distinguished Fellow, International Law, Chatham House

The Chairman: I welcome you and thank you very much for giving up your valuable time to come and help us this afternoon. I know that one or two of you sat in on a previous session, but I just need to give some housekeeping notices. You have a list of interests that have been declared by the Committee Members. This is a formal evidence-taking session of the Committee. A full note will be taken. It will go on the public record in printed form and on the website. We will send a transcript of that to you, and if you want to make any minor corrections you are very welcome to do so. It is also being webcast live and will be accessible on the parliamentary website. If we run out of time, as we often do because there is so much to cover, you are very welcome to submit further thoughts and evidence to us in writing. Thank you so much for coming to be with us. We have a number of questions, so rather than inviting you to make opening statements we will go straight to the questions. If you want to say anything about yourselves you can fit that into your first answer.

Q132 Lord Black of Brentwood: To echo the Chairman’s comments, thank you very much for joining us. You will have heard a bit of what Mrs Bensouda was saying and her very compelling evidence about the problems associated with investigating and prosecuting crimes. The experiences of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have been different, and they have had much more success in prosecuting and convicting. What factors have made it easier to prosecute and convict there than at the ICC?

Ms Patricia Sellers: I am Patricia Sellers. I will take that question, because I was at both the Yugoslav and the Rwanda tribunals and I am a Special Adviser to the ICC. There are several reasons. One is that when the Yugoslav tribunal started up, very early on it appointed a legal adviser on gender in-house, whose job was to look at what we needed for investigation,
substantive law in terms of prosecution and the mandate to move those cases forward using our statute. I think that made a difference. It did not make it perfect: there could certainly have been more prosecutions, in my view; we could have dedicated more resources; we could have had prosecutions on sexual violence instead of adding charges in after cases had already been indicted and gone forward. The same thing happened in the case of Rwanda: the mandate of the same legal adviser on gender was to push these, and you ended up identifying people in-house who also wanted to bring forward these cases. The difference with the ICC is that with the first case there were no counts of sexual violence. There was no one in-house dedicated to this. There is a unit, which looked at that, but the experience of Rwanda, Yugoslavia, Sierra Leone and now the Cambodian tribunal is that you need in-house staff who follow with budget and internal political power, and that when cases are being decided, when investigations are being decided, when investigators are being hired, when we understand what issues will go with an appellate decision, they can ensure that there is a gender perspective in the beginning and that there is no, “Oh, let’s see if we can add it on and the judges will grant discretion to reopen certain issues”.

Dr Kirsten Campbell: Can I add one thing to complement that? This is very much from the OTP perspective. Of course there are other sections of judicial institutions. For example, we mentioned supporting the prosecution work, but the work of the victim and witness section at various points was also crucial. Also, one could argue that there were certain weaknesses in judicial training, for example, or equally, in terms of success, gender competence on the bench. There is also a need to look at the prosecution strategies within the other sections of the judicial institutions.

Lord Black of Brentwood: Is there anything to prevent the ICC having that in-house support?

Professor Patricia Sellers: I do not think so. One thing the ICC is faced with is certain budget cuts, if not restraints. The other body, the Assembly of States Parties, does not have a gender committee or a committee dedicated to looking at how the assembly works within a gender framework within its administrative action. Certainly, one could do this in a more diffuse manner, and it could proceed.

The other thing that is crucial with the ICC, other than the first case not having Lubanga, is that in subsequent cases the judiciary bent over backwards to make both factual findings and legal holdings that sexual violence had been committed. What occurred, in that there was no conviction, was the liability theory that was used to attach the accused to the sexual violence. Under the liability theory it was not proved beyond reasonable doubt that there had been a common plan that included sexual violence.

Q133 Lord Sterling of Plaistow: In taking it that what we all are trying to achieve is getting the evidence to have successful prosecutions, could I ask this? Following up a wee bit what you were both saying just now, as a matter of interest are there many prosecutions that do not lead to convictions as a percentage, and is that why, to an extent, as you were saying, better training is needed and why people need to be more skilled in what they are doing, as against calling the prosecution in the first place and it then getting dropped? Do any of you have any examples—perhaps, Professor, you might have one from your side—of any aspect of the law that you think needs to be readdressed, that might help to get successful prosecutions, that we are missing at the moment?
Ms Elizabeth Wilmshurst: Are you talking about prosecutions before the International Criminal Court, or prosecutions generally before national courts as well?

Lord Sterling of Plaistow: As far as you are concerned, if one can go the national route and eventually get these countries to do it themselves, is that the best answer of the lot, as our former witness claimed?

Ms Elizabeth Wilmshurst: Yes.

Lord Sterling of Plaistow: In practice, is there anything lacking in the law itself that causes complication in getting a successful prosecution, in your joint view?

Ms Elizabeth Wilmshurst: I defer to my colleagues, because I know they feel that there is a problem with the substantive law.

Professor Patricia Sellers: I think there are certain issues within the substantive law, but thank goodness we are now at the stage where we can really look at it and have a conversation that can be quite profound. Let me go back to understanding, within the Rome Statute, how they have set forward some of the liability theory, such as persons acting in a common manner and committing a crime that they agree upon, such as killing. Because those persons have not agreed, “Let’s do the sexual violence”, but it happens and it looks as though it happens naturally, those persons are convicted only for the killing, and the sexual violence raises convictions only for the physical perpetrators. We now know that when we go after the highest, the most responsible, politicians and military and we are not using a command responsibility theory but just a joint liability theory, we miss the sexual violence. No one sits around and agrees, “Let’s rape”, although they might agree, “Let’s go into the town, burn it down and kill who we have to”. That has been a question. Customary international law is broader in its aspect and it would pick up that sexual violence, because in the commission of one international crime, a natural foreseeable consequence might be the commission of sexual violence. When one understands how sexual violence often happens in armed conflict, it is usually the natural foreseeable consequence of prerequisite crimes. It is not necessarily something that has been ordered to happen. I see that as a gap.

I also see gaps in the genocide convention, particularly in relation to persecution under crimes against humanity. You cannot be persecuted based upon your gender, your gender identity, your sexual orientation, although we know that in situations of war those populations are targeted for persecution; that comes straight from the Holocaust and the pink triangles. Yet there is no specific protection for that under crimes against humanity, whether it is the Rome Statute or customary law. Nor can one commit a genocide based upon gender, sexual orientation or gender identity. Those are some of the gaps that I see.

Lord Sterling of Plaistow: Is there any reason why those gaps cannot be rapidly filled?

Professor Patricia Sellers: We are drafting convention, with the treaty and the willingness of States to sign.

Lord Sterling of Plaistow: This is exactly what we are about. Is this something that we should be pushing for very hard?

Professor Patricia Sellers: I think it is time to have a conversation about genocide and persecution, and not be completely reliant on the recognised human rights violations of today. When we tie it to that, sometimes human rights are not as progressive as some international crimes. Very little discussion is going on about that.
Lord Hannay of Chiswick: You mentioned gaps in the genocide convention and gaps in the ICC, the Rome Statute, and so on. Do you think that these should be addressed by amendments to the conventions or by an overall convention on sexual violence, which I know some doubts have been expressed about? Professor Wilmshurst’s testimony, which she gave in writing and was very valuable indeed, expressed some doubts about that. How do you think those gaps could best be filled? What would be the most likely way to achieve something? I know that it will take time.

Professor Patricia Sellers: I hate to sound cliché but, on a case-by-case basis, one could look at the genocide convention first and understand that in some national jurisdictions you can commit genocide based on a political group. But under customary law and the genocide convention, it is limited to just four groups: racial, ethnic, national and religious. Why not have gender now? We have evolved as an international community. Why not have culture? Why not have political? Why not have sexual orientation? It is time to really understand what we as a society want to have protection from in terms of annihilation or destruction of groups in whole or part. Why not have children as a group? Why not have the disabled as a group? We certainly have historical precedents for those two groups. Looking at the genocide convention, that is one drafting exercise that could be done.

Looking at the Rome Statute, one would have to see whether some State party members wanted to amend that Statute much as they amended and added aggression as a substantive crime. Now that I have heard a lot of critical discussion about the Rome Statute and what could and should be amended beyond aggression, a few of us are raising certain concerns.

Crimes against humanity that are not based upon the Rome Statute but are under customary law almost do not need a treaty amendment. That goes along with opinion, assurance and State practice. If we recognise that one can be persecuted based on these grounds and States act in that manner, customary law evolves and therefore crimes against humanity as a customary-based international crime would evolve.

The Chairman: Professor Wilmshurst, do you want to say anything?

Ms Elizabeth Wilmshurst: I suppose that in terms of priorities of recommendations as to what should be done, one has to assess the amount of effort that would be required to make a change to the hallowed genocide convention; many people want to change it to add other things besides gender.

One also has to ask: is it because the genocide convention is limited that there have been no successful prosecutions, or is it because of other factors?

The Chairman: Is that all right, Lord Sterling?

Lord Sterling of Plaistow: I think I got an answer to that.

Ms Elizabeth Wilmshurst: I would say that that is not the major problem, but my colleagues may differ.

Dr Kirsten Campbell: I would argue for a treaty actually, for the simple reason that it would be one of the most effective ways to address this—leaving political considerations aside, of course. In terms of substantive law, it is not just about the definition of the elements of the offence. As Patricia said, it is also precisely about those modes of liability. At the ICTY, the most successful convictions come in the so-called direct perpetrator cases. It is precisely in
these leadership cases that the ICTY has faced the most significant challenges of prosecuting sexual violence. That is why the modes of liability are so important. That also connects to legal norms around what happens in a trial concerning evidence.

The way in which conflict-related sexual violence as a distinct offence is articulated can be through the core crimes, or we can ask whether it is possible to describe it as a distinct offence with certain elements, specific modes of liability and specific enforcement mechanisms. That is why I would argue that it is worth considering if not a treaty then at least some protocol or beginning position that addressed those substantive issues. It is precisely those substantive issues that can make prosecution difficult in part.

The Chairman: That is very helpful indeed. Thank you.

Q135 Lord Hannay of Chiswick: We have got on to the issue about gaps and the question of whether one needs new treaty law. I think you have covered that very helpfully in your responses. But in the evidence that you gave to the Committee, Elizabeth, you addressed one particular problem facing the international community at the moment: the appalling use of sexual violence in Iraq and Syria, particularly in Iraq. We have heard from Yazidi girls about the way in which they have been treated: sexual slavery, multiple rape and all those sort of things. You suggested in your written evidence, I think, that there might be a way of approaching at least Iraq’s non-acceptance of the Rome Statute. Could you tell the Committee a bit about how one could set about doing this? It seems to all of us, I think, to be a pretty high priority that our report tries to find something effective to suggest in the appalling circumstances in eastern Syria and Iraq. Any help that you can give us would be really gratefully received.

Ms Elizabeth Wilmshurst: As the Committee knows, there is a jurisdictional problem in getting cases to the International Criminal Court. The main criterion for getting to the court is that the alleged offence has to have occurred in the territory of a State party, it has to have been committed by a national of a State party, or the Security Council refers the situation to the court. We do not expect that the Council will be referring this kind of situation.

Iraq considered becoming a party to the Rome Statute some time ago. If it became a party and, as it were, timed its acceptance retrospectively so as to cover the sorts of offences we are talking of, that would cover those occurring in Iraq. I do not know the political reasons why Iraq is not a party now to the Rome statute, but it could do that. If it did not want to become a party, it could accept the jurisdiction ad hoc for this particular situation. That was simply one practical suggestion. I am sure we all think that Syria is not going to accept the jurisdiction of the court, but Iraq—why not?

Lord Hannay of Chiswick: If Iraq were to be persuaded to do one of either of the two routes you suggested, it would of course cover most of the crimes being committed against Yazidis, for example, because they are Iraqi citizens. They are not living in Syria; they are living in Iraq. So it would be very helpful in that respect. If Iraq took one of those two routes, would it also mean that any IS crimes committed by Syrians or people based in Syria could also be prosecuted if they were against Iraqi citizens?

Ms Elizabeth Wilmshurst: Yes, if they were committed in Iraq; but not because they were committed against Iraqis.

Lord Hannay of Chiswick: Would they have to be committed in Iraq?
**Ms Elizabeth Wilmshurst:** Yes, or by Iraqi citizens.

**Lord Hannay of Chiswick:** So if they took Yazidis from the Sinjar region to Raqqa and then submitted them to multiple rape and sexual slavery, that could not be caught by an Iraqi acceptance?

**Ms Elizabeth Wilmshurst:** In the ICC we are talking about those at the top, those who ordered and planned the actions; not the low-level perpetrator. If ordering and planning happened in Iraq, it would not matter if the victims were then taken out of Iraq.

**Lord Hannay of Chiswick:** So if Syrian IS operatives took these people from where they lived in Iraq to Syria and did all these horrible things—

**Ms Elizabeth Wilmshurst:** Yes, and it was part of a plan managed in Iraq—

**Lord Hannay of Chiswick:** —they would be prosecutable?

**Ms Elizabeth Wilmshurst:** They would be, yes.

**Lord Hannay of Chiswick:** —as a result of Iraq accepting the jurisdiction.

**Ms Elizabeth Wilmshurst:** Yes.

**Lord Hannay of Chiswick:** That is very interesting.

**Professor Patricia Sellers:** I agree. The other way of conceiving of this would be to set up a separate ad hoc tribunal. If the Permanent Five members of the Security Council arrived at a consensus to set up an ad hoc tribunal, its jurisdiction could then span Iraq and Syria, whether they contest or not. Therefore, the territorial jurisdiction would not necessarily have to worry about this problem of whether the Iraqis are directing this within Syria.

The other situation would be the substantive crimes that one would have to answer to. They would probably have to be based on customary international criminal law, such as what the Yugoslavia and Rwanda tribunals were based upon, so that there would not be any problems with principles of legality.

I think one of the issues with Iraq or any State joining is their being fearful that cases might be brought against them and their political and military leaders.

**Lord Hannay of Chiswick:** The problem you raise there would require a Security Council resolution to set up that court.

**Professor Patricia Sellers:** It would. It would require a United Nations resolution.

**Lord Hannay of Chiswick:** And that would come up against the problem of Syrian sovereignty and so on all over again, would it not?

**Professor Patricia Sellers:** It seems that certain members of the Permanent Five are more co-ordinated than they have historically been on military actions and one could wonder whether they would co-ordinate in political action. They probably would not want the in personam jurisdiction to reach certain persons, but those would be in negotiations, I imagine.

**Lord Hannay of Chiswick:** That is very interesting.

**Dr Kirsten Campbell:** I underscore Patricia’s suggestion, precisely because one of the really useful mechanisms for what would become investigations of the ICTY was the *Bassiouni*
investigative commission. Of course, this kind of process would enable that kind of investigation to lay the groundwork for future prosecutions.

The Chairman: Thank you.

Q136 Baroness Kinnock of Holyhead: Thank you very much. It is fascinating and very interesting to hear all that you have to say. Can you tell us how international courts can assist national courts in the domestication—a terrible word—of international criminal law? How can they do that, and what methodology applies?

Professor Patricia Sellers: In the past seven years, I have been involved in training investigators and prosecutors from around the world on jurisprudence from the ad hoc tribunals, the Rome Statute and things of that nature. I have seen it literally take effect in work in Guatemala. I am involved in current cases in Colombia. I have advised on cases in Uganda. Not only is the State interested. Particularly when it has enabling legislation, it finds out how that legislation should be interpreted in very operational and practical ways, whether it be with its prosecution office, its judiciary or a witness protection ombudsman. It is interesting, and I am seeing more synergy now. Certain national cases, such as in Bosnia, have more assiduous and progressive jurisprudence. Some of the jurisprudence that came out of the Yugoslav tribunal was based upon some of the same factual scenarios.

Baroness Kinnock of Holyhead: That is interesting.

Lord Sterling of Plaistow: As you were saying, if one caught somebody in Syria who committed a crime as far as Iraq is concerned and is prosecuted, countries like Iraq and one or two others still carry out the death sentence, others do not. When the ICC is involved, what happens to the eventual decision as to what will happen? Do they get extradited? Do they stay there? I am just curious. Jordan normally does not but did recently after the pilot got burnt. Certainly after Sudan, they all got hanged. If it goes to the major court of where it is committed, at the end of the day who decides on the final sentence?

Professor Patricia Sellers: The jurisdiction of the ICC, as well as the ad hoc tribunals with their jurisdiction, is complete in terms of investigation, prosecution, adjudication and sentencing. Even following those sentences, persons are still followed as they have been imprisoned in various European countries and African countries.

Per se within these international courts and tribunals, you can only impose a sentence of imprisonment and not a sentence of death. As a matter of fact, in order to have persons transferred under procedural mechanisms back to their home States for the ad hoc tribunals, they had to be assured that the death penalty would not be applied. So Bosnia changed its regulations in terms of the sentences, as did Rwanda.

Lord Sterling of Plaistow: Thank you.

The Chairman: Thank you. In response to Lord Hannay’s question about Syria and Iraq, you talked about the complexities of jurisdiction. Could the General Assembly create an ad hoc tribunal in cases such as this to try to have a focus for justice? Is there any precedent for that?

Ms Elizabeth Wilmshurst: There are precedents for bilateral agreements between the UN Secretary-General, often with the consent of the General Assembly, and the country concerned. So you have a sort of hybrid or internationalised court. There are precedents such as the ones you mentioned.
Lord Hannay of Chiswick: Sierra Leone.

Ms Elizabeth Wilmshurst: Yes, Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

The Chairman: So there are mechanisms?

Ms Elizabeth Wilmshurst: There are, yes. But those, of course, were both established before the existence of the International Criminal Court. Whether there would still be appetite for new courts is another question.

Q137 Baroness Goudie: I have found all your evidence very interesting. I have just one not so short but interesting question. How do you feel that the campaign from Great Britain on PSVI has had an impact on criminal prosecutions? What more could the United Kingdom Government do to try to put more pressure on international justice?

Dr Kirsten Campbell: I will speak to this in the context of the former Yugoslavia. In that context, PSVI has been very important, first, because it has brought this to mainstream public attention; but, secondly, because it has focused the attention of judicial institutions and NGOs on this issue, which, shall we say, has not previously been the case. That in itself has been a very important step forward.

There is another important thing within which to frame PSVI. You asked about criminal prosecutions, but many of the funded programmes—again I am thinking of Bosnia—are very much concerned with all the other processes necessary to make criminal prosecutions happen. Witness support, victim compensation and military training are all crucial in getting to the stage where you can actually prosecute. Those programmes have been very important in reframing how we think about that process. For that reason, I would argue that it has been a very useful political and legal action, and one that should continue.

On the question of support, it needs resources—and of course my personal focus - the treaty.

Baroness Goudie: Thank you, that is very helpful.

Lord Hannay of Chiswick: Has any of the PSVI work started to appear in prosecutions in the International Criminal Court? Is it likely that documentation and evidence produced by signatories of PSVI following that up could be or has been made available to the court? Are you aware of any?

Dr Kirsten Campbell: I am not, but that is not to say that it has not happened.

Professor Patricia Sellers: Absolutely. I am not aware of it. It probably has.

Lord Hannay of Chiswick: It will probably happen soon.

Professor Patricia Sellers: Yes.

Q138 Lord Hannay of Chiswick: Could I ask all three of you to help us to grapple a bit with UN peacekeepers? Your written evidence, Elizabeth, was very helpful in that respect. We are confronted with continual claims that sexual violence offences have been committed by peacekeepers—the most recent, I think, being in the Central African Republic—and by huge amounts of evidence that nothing much ever happens. The worst that happens is that they stick the alleged perpetrator on an aeroplane and send him home, allegedly to be prosecuted by his own military authorities, which then does not happen. Of course, the
other possibility of handing him over to the courts of the country in which the peacekeeping operation is taking place is usually not very attractive, probably because the rule of law has broken down completely. In any case, there could be violent prejudice about a case like this.

We are trying to work our minds around what to do. The Secretary-General keeps saying that there is zero tolerance. Zero tolerance is not quite the same thing as effective prosecution. Could you throw any light on what you think the best way forward is, whether it is something like what Prince Zeid produced in 2005? He more than hinted that there might be a need for an international tribunal of some kind to be set up to handle sexual violence in peacekeeping cases.

The Chairman: Who would like to respond to that?

Professor Patricia Sellers: I will go first and then have my colleagues join me. I tend to agree with Prince Zeid. Several years ago, I sat on a special panel that looked at international investigation within the United Nations. My task was to look particularly at peacekeepers and sexual violence. The report is confidential, but what has been made public, and what is certainly in the public domain, is that this problem appears not only not to dissipate but to increase. You have to ask yourself why and where this impunity is acting as a growth mechanism. I think it comes down to the fact that, even though the United Nations has the first bite in terms of investigation—30 days to 60 days—as soon as the national investigator shows up, you are supposed to turn over to national. The peacekeeper often goes back to their country prior to the national investigator seeing them in situ and conducting an investigation. It is very hard at that point, back at the peacekeeper’s home, to have the political will and the resources to investigate this one supposedly international case. For many reasons it just falls to the bottom of the barrel. At the same time, the international community, and specifically the persons within the peacekeeping nation who called on the peacekeepers, not only feels offended, threatened and outraged but betrayed by the United Nations, whom the peacekeeper represents.

I would agree—I know that Prosecutor Jallow has recently been involved in this—that the United Nations has to set up an internal and qualitative disciplinary mechanism or tribunal. It has to be in agreement with both nation states to a certain extent. We really have to stop the impunity gap, or it is a matter of saying that the United Nations does not believe in the principles that it is there to promote.

The Chairman: Thank you.

Dr Kirsten Campbell: I am absolutely in agreement.

Ms Elizabeth Wilmshurst: There are basically two components of peacekeeping missions. First, the UN personnel, who are covered by immunity; they are the only ones who can be dealt with by UN disciplinary procedures and that kind of thing. Second, the troops, who may be sent home if they offend; they could be court martialed en place, but that is not happening.

The Security Council could be doing something about this. In every resolution for every new peacekeeping mission or for the renewal of every mandate, it could put in conditions. I understand that some of the recommendations are being blocked by General Assembly Committee 34, the peacekeeping committee. The Security Council could put requirements in the relevant resolutions; I think that things could be done by the UK taking the lead and pushing for this.
The other thing to say on the UN personnel component is that the recommendations of a UN committee of experts have gone to the Sixth Committee of the General Assembly, which can be a grave for issues that governments want to have talked about. Again, one of the many recommendations for dealing with this issue could be that the matter be pushed through the UN, if there were the necessary political will, instead of being chatted about every year.

**Professor Patricia Sellers**: If I could make one comment on that, I agree with everything that has been said. It really comes down to a question of political will and of understanding that many peacekeeping-sending nations in essence are getting a subsidy for their department of defence and a subsidy for their army. Yet one will hear, “If we really pursue them for crimes that have occurred, they won’t stand up for peacekeeping any more”. We should just ask whether that might be what they should be faced with so that their peacekeeping represents the best of the international community.

**Lord Hannay of Chiswick**: There is yet another thought, which is that the Secretary-General could start firing a few force commanders when these things happen under their command. After all, in a national setting, it would be quite likely to happen if troops of this country were involved in that way. So there are possibilities because we really must try to push this discussion forward a bit if we can.

**Lord Sterling of Plaistow**: In various navies, you are court martialled at a port and then wait to be flown home.

**The Chairman**: There are some very practical things that we need to note and think about. I am going to call the formal session to a close. We are really grateful for your wisdom and your expertise. If you have any thoughts going home, do send us further written evidence. Thank you very much indeed.