COLLOQUIEM SEXUAL VIOLENCE AS INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES TO EVIDENCE

18th June, 2009

Working group 1: Prosecuting sexual crimes and transitional justice
Report by Hélène De Pooter

Chair:
Larissa van den Herik, Grotius Centre for International Legal Studies, Leiden University

Speakers:
Patricia Viseur Sellers, Office of the High Commissioner for Human Rights: *International Prosecution of Sexual Violence: General Introduction*

Dianne Luping, International Criminal Court: *International Prosecution of Sexual Violence: The International Criminal Court*

Liesbeth Zegveld, Grotius Centre for International Legal Studies, Leiden University: *Domestic Prosecution of Sexual Violence: The Experience from Dutch Court*

Sofia Candeias, REJUSCO Program on Gender and Sexual Violence: *Domestic Prosecution of Sexual Violence: The Experience from the Democratic Republic of the Congo*

I. Patricia Viseur Sellers

We heard at the beginning of this Conference that intersection of social sciences and law, criminal Courts and tribunals, and statistics is not only a methodology, but also a goal.
Wants to go back on three important issues, two of those are foreshadowed: peace and security. The third one will be dealt with at the end the speech.

Two steps backwards, one forward. The two steps backwards have been looked upon as gathering up speed and strengthen to charge up another mountain: the mountain that we have been able to establish has been described during the past two days. But want to add another stone.

Humanitarian law, at its essence, at its basics, at its policy level, was an endeavor to make war more human. This is why this law is constantly balancing out the ability of combatants to fight and kill each other; but the human character of war is not to be put asunder by the political military goal of eventual killing. In that human character of war, we protect groups which are presumed to be innocent, those who are not on the battlefield: women, children, farmers, priests.
The underlined policy of international humanitarian law was to treat those presumed innocent in a humane way so that you will preserve your societies and at the same time you will be allowed to kill everyone on the battlefield.
The 1907 Hague regulations underlie that principle. Most people would look at Article 46 as pertaining to rules of armed conflict. But Article 46 is part of Regulations, and those Regulations pertain to persons, how do you treat this group of persons during times period of

occupation. It is not about the rules of law on the battlefield. It says that during time periods of occupation, you will respect family honor which is a nice Victorian way of saying you are not to rape inhabitants who are being occupied. The underlined basis of this extension of humanitarian law is that it is inhumane to rape occupied inhabitants. And militarily, it is not a really good strategy. When you rape people you occupy, you form a dissent among the occupied group. This has nothing to do with the individual character of a person. It is not about human rights, it is not about respect of a single woman. It is a policy to make sure that occupied persons are secured as a policy before, it is to make sure that they are presumed innocent, treated humanely, i.e. are secured.

The 1929 Geneva Convention merely reminded us that some of the persons who are prisoners of war, after WWI, would be females, and females prisoners should be treated with all due consideration, given their sex. You cannot rape females prisoners of war. Not that you can do it to the men, but it is more explicit for the women. So we extended a human approach to the law of armed conflict.

By the end of WWII, we had the four 1949 Geneva Convention. The Fourth Geneva Convention protects the civilians. More specifically, it pertains to civilians in the hand of one of the party to the conflict. As a humane development within humanitarian law, those civilians in the hand of the other Party are not to be raped and there should be no forced prostitution. It is another restatement of the Regulations from the Hague Convention. Even though they might not be in a situation of occupation, they are within the hands of a Party to the conflict which is not their own. And they have to be treated humanely. Not inflicting sexual assault is a way of treating humanely. It is a question of security.

Humanitarian law merely repeats this in Additional Protocol I, Article 75: fundamental guarantees, where these things are prohibited in all times and all places, including rape and forced prostitution (Article 76), and Additional Protocol II reiterates in Article 4 that certain acts are prohibited, irrespective of the circumstances, and it underlines that you cannot commit any sexual assault towards a person who is outside the combat, which amplifies Common Article 3.

We arrive at the *ad hoc* tribunals, and eventually at the Court for Sierra Leone, for East Timor, and at the permanent Court, with graves breaches and war crimes inserted within the statutes. But also what is inserted (but it is not clear in the jurisprudence) is that protection of women relates to the security of those groups to which they belong (whether they are protected groups in the Geneva language, whether they are persons presumed innocent in the Hague language, or whether they are persons who are outside of combats *via* Common Article 3). If you were to read the different judgments coming out of these tribunals, in particular the Yugoslav tribunal, you will not see this policy discussion going on. This policy discussion has almost been overridden by just looking at the facts before us, the accused, understanding the due process rights of the accused, the elements of the crime, and jurisdiction elements. We do not discuss what the underlined policy of humanitarian law is when we are looking at war crimes. To that extent, neither to we discuss it when we are looking at crimes against humanity, which as a policy basis differs from war crimes, but is to protect the civilian population. The civilian population cannot be attacked. “Not attacked”, in the humanitarian law sense, can be a military attack, but also any violence that could be committed against them, such as massive rapes. In the Forter (?) case, part of establishing the jurisdictional elements was that the civilian population has been attacked; not just woman. Detention, deportation and sexual violence has been inflicted upon civilians.

Genocide also has underlined policy basis, and one of them is that you do not want to destroy a group in whole or in part. It offers group protection. Women are not one of those explicit groups, but women are part of each of those groups.

So, I am taking two steps backwards, and this is where I am going forward.
Security Council Resolution 1820: we do not completely understand what it says. But at its very least it should be looked upon as a restatement of a policy basis of humanitarian law. It reiterates that to rape, sexually violate, orabuse women and children who are civilians is a threat to peace and security.

Wants to mention three things in relationship with SC Resolution 1820.

1.The first is a gap, a lacuna. The Geneva Convention of 1929 has to rectify a gap. SC 1820 does not talk about child soldiers, and more specifically the girl child. It is only about civilians. The girl child who has been recruited or conscripted within armed forces should not be considered a child soldier, because then she loses the protection of civilians and becomes a military objective. On the other hand, the girl child soldier who is sexually assaulted, not that the boy child is not, is not considered enough evidence to qualify for youth participation in armed conflict. She is really not protected in terms of the use of children in hostilities. And she is not protected as a civilian because she is a soldier. And she is not protected as a soldier, because only the child soldier who is participating in hostilities is kind of protected. This has to be resolved, and 1820 does not resolve and does not look at it.
But 1820 has been a decree it will put forward a report in June, on situations in each of the Member state countries that might relate to GBV and violence against women during war. In essence, it is going to create a huge new database.

2.Wants to suggest this: since 1820 is supposed to take us back to a type of humanitarian security and peace, I would like to see the social scientists along with the attorneys, to start looking at the evidence and finding out: what does it say about peace for women? Or more importantly, what is the aggregate of those facts in a situation created by the absence of peace for women. That information/data/evidence could then be truly applied within UNSC sense of what is peace. Security Council is tasked with looking at threat to the peace, breaches of peace, maintenance of peace, restoration of peace. We can “genderize” peace, and determine whether the peace has been breach had an impact on women, peace has been restored, or peace has been maintained. How do these facts tell us now that we might not be at war, but for the Security Council purpose, we have a threat to the peace, and peace needs to be restored.

Conclusion on this remark: the Rome Statute has one crime that it could not reach a decision upon: the crime of aggression. The UN Charter allows self-defence and collective self-defence. That can be distinguished from allowing for aggressive war. I prefer the crime of “crime against the peace” as opposed to a crime of aggressive war. I would suggest and challenge social scientists and the attorneys to retake that as a crime against the peace, to make sure that the data that we are gathering relates more closely to the crime.

3.These challenges are what will define our humanity, are what will finally give us peace, and what will possibly broaden the definition of security to encompass a world in which our body does belong to ourselves and our communities’ body is our body also. On that note, I will say: the last challenge we would have is humanitarian intervention, as humanitarian law allows humanitarian intervention to exist for women. When we know that women are not at peace, is that reason enough for humanitarian intervention. UN Charter does not speak on that, there have been no articles written on that.

End.

Patricia Viseur Sellers adopted a perspective on sexual violence not through the lens of criminal law but through the lens of peace and security.

II. Dianne Luping, giving the lens of international criminal law

What are the Methodologies and tools at our disposal? The starting point is the investigation phase.

The Rome statute and the Rules of Procedure and Evidence that we have result from the huge advances, the significant gains made by the *ad hoc* tribunals and even before (WWII). One of the obvious indications of how important and what advances we have made in legislation on gender based crimes is the fact that this category of crimes is considered to be amongst the most serious crimes of international concern. And another indication on the importance and how far we have gone is simply by looking at the Rome statute and the range of crimes we have at our disposal, and the tools that we have to use. The Rome statute provides one of the most comprehensive and first explicit list of sexual violence and gender based crimes, as forms of genocide, crimes against humanity, as well as war crimes, in both international and non international context. We have explicitly stated the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence against women as crimes against humanity and war crimes, with explicitly stated the crime of gender persecution as a specific ground. Genocide refers to biological genocide. And using the interpretation of the *ad hoc* tribunals, we are also able to use provisions relating to causing serious bodily or mental harm, inflicting on group conditions of life calculated to bring about their physical destruction. And there are other crimes at our disposal within the Rome statute that can take a genders form that we can use, for example attacks on civilian population which by their very nature can target the majority of the population of whom being women and children and vulnerables ; the use of child soldiers can take a gender form as **Patricia Viseur Sellers** stated. Girl child soldiers can be used as sex slaves. And there is also the war crime of mutilation which can take the gender form.
The emphasis on rights of victims of sexual and gender based crimes is also placed in the Rome statute, in particular by Article 68. This explicitly states that the Court as a whole (not only the office of the Prosecutor) has obligations specifically in relation to the well being and protection of individuals victims of sexual and gender based crimes. The statute requires that the Court (and the office of the Prosecutor) must have various experts to deal with gender issues. Article 42(9) of the Statute imposes obligation on the OTP to have advisers specifically with expertise on sexual and gender matters, as well as issues relating to children.
The specific provision I would like to focus on is the obligation under the Rome Statute to provide for effective investigations and prosecutions of sexual and gender based crimes. This is provided for under Article 54(1)(b) of the Statute: this obliges the OTP to take appropriate measures to ensure the effective investigation and prosecution of crimes within the Court's jurisdiction, in particular when they involve sexual violence, gender violence, or violence against children. The OTP, in seeking to fulfill its obligations, has tried to take a focused and main streamed approach when dealing with this category of crimes. It starts from the pre-analysis phase, before the OTP has even determined what situation or case it is going to proceed with. In deciding what situations and cases the Prosecution should focus upon, besides of dealing with issues of admissibility or jurisdiction, another aspect that the Office looks at are issues relating to gravity. When looking at these issues, the Office pays particular attention to the full range of criminality from evidence available before it, but even at that

stage it has to have particular regard to sexual and gender based crimes, to see if these are amongst the key forms of criminality evidenced in that situation or case.

Some of the key approaches taken in the investigation phase:

One of the approaches of the OTP, as stated by **Gloria Atiba Davies**, is to select those individuals deemed the most responsible for the crimes. This can obviously differ situation to situation, case to case. But the policy of the OTP has been to identify, when determining who are the most responsible, in particular those individuals who should be held responsible in particular for providing the context and the opportunities for these types of crimes to be committed. Those individuals we identify are ultimately the most senior commanders of the groups who have allegedly perpetrated the crimes. This identification of senior commander has implication, including in the types of evidence we need to collect.

The approach in the investigation phase has been not only to rely on the invaluable advice of the gender experts within the Court, but also to be sure that every staff man involved in the investigation phase and the prosecution phase is sufficiently gender competent, by providing the necessary training. The training that is provided is not only in relation to the legal framework, it is also to understand the cultural context; it is extremely important to understand the cultural context of what you are entering into. It is also extremely important to provide training on best practices and methodologies of collecting evidence, in particular from sexual crimes victims themselves. And this is for all members of the teams of investigators, males and females.

The factual contexts that we select for investigation are necessarily focused. In every situation we are dealing with, we look at massive instances of criminality, very serious crimes, large numbers of crimes, thousands, if not tens of thousands of victims, as well as hundreds of factual incidents, which is simply not feasible. So what we seek to do is, on the basis of an analysis of the key forms of criminality that have already been identified, to select the key types of factual incidents that would properly represent these key crimes that we have identified, and that includes sexual and gender based crimes.

Another important aspect of the factual scenarios that we do select for investigations, is that we also are mindful of those individuals we identified as being most responsible, and in that context it is also important to select factual context for investigation that do provide the linkage upwards to the senior commanders or superiors that we have identified.

In relation to witnesses: this selection process is also necessarily focused. In addition to be conscious of the evidence that they are likely to provide and the usefulness of that information, we pay particular attention to their physical and psychological means. We want to ensure that from amongst the large of individuals that we could potentially speak to, we are focused and we really identify the people before we are in the field, who we can speak to and that we can use for prosecution purpose. And it is important to be at all stages to be mindful of our obligations of protection and security. One of the most important issues is the issue of the security on the ground.

In the field, one of the means to try to remain focused is to be sure that everyone uses questionnaires formulated on the basis of our legal framework and our tools, but also to ensure that while we conduct the interviews, the focus must be obviously on the crime based witnesses, the individuals who experienced the sexual crimes themselves, but it is equally important for us to identify individuals such as those who were within the militia groups themselves, or others who treated victims, to provide the full picture and to understand exactly the sexual crimes regime that may be applicable.

At the prosecution phase, we have to take into account the same obligations in relation to the selection of our charges to ensure that we reflect the whole range of criminality of the cases, in particular having regard to sexual and gender based crimes. What evidence needs to be

collected, in particular in relation to the suspect we have identified, making sure we have that crucial linkage with evidence.
While we are at trial, we have tools at our disposal which, as **Gloria** mentioned, are extremely helpful, and perhaps would be extremely helpful to be domesticated and replicated by national parties. First of all, the evidentiary rules: consent is essentially not relevant in these types of cases. The conduct of the individual should not be relevant; corroboration should not be required, in particular for victims of sexual and gender based crimes.
Finally, the cases we have currently before the Court. As **Gloria** mentioned, we have four cases in which sexual crimes have been explicitly stated, in relation to Joseph Koni and Vincent Otti and the Uganda situation. We have specific charges in relation to sexual enslavement and rape constitutive of war crime and inducement of rape constitutive of war crime. We also have sexual crime charges, in relation to the Central African Republique case against Jean-Pierre Bemba. And in the Darfur case, in relation to Mister Harun, Kushayb, and the President Al Bashir. And the case where I am involved in: Katanga and Ngudjolo, we also have specific and explicitly stated sexual crimes and gender based crimes.
Finally, to bring to light some of the issues in the Trial where I am involved in, I would like to highlight points made by the majority and the dissenting judge, to emphasize how important it is that we really focus throughout the investigation and prosecution stage, on the whole range of evidence that needs to be collected. The majority and dissenting judge, in the confirmation decision at the Pre-Trial Chamber stage, basically agreed that the objective elements of the crimes (rapes and sexual slavery) took place. The debate and the issue, in particular for the dissenting judge, was the issue of responsibility of the senior commanders (Mister Katanga and Mister Ngudjolo). The majority found that there was substantial evidence to believe that the co-accused had joined the perpetrators, through members of their forces, and committed the crimes of rape and sexual slavery. And they also found that sufficient evidence was provided, in particular looking at the widespread and systematic nature of this common practice of sexual slavery, rapes, in prior attacks, in subsequent attacks, and widespread knowledge among civilians and combatants, and commanders alike, that these accused must have been aware that in the ordinary course of events, by implementing their common plan to attack villages, that these types of crimes will occur. The dissenting Judge disagreed in terms of the nature of evidence (on how widespread it was) that would be sufficient to establish this evidence.

End.

Then we are going from the international level to the national level, looking to cases of national prosecution of international crimes, both in the context of a country exercising its universal jurisdiction.

III. Liesbeth Zegveld

On 23 March 2009, the Dutch district Court in The Hague ruled in a case against a Rwandan Hutu, Joseph Mpambara. Mpambara came to the Netherlands to seek asylum, in 1998. The Court found Mpambara guilty of the death of two Tutsi mothers and their children, as well as of the torture of a German doctor and his Tutsi wife. For these crimes, he was sentenced to 20 years in prison. However, Mpambara was acquitted of all the sexual crimes on the indictment. He had been charged with rape of four women. However, the Court cleared him of these charges. What went wrong? The main problem was lack of evidence. But the sexual crime charges against Mpambara also suffered from Dutch law on evidence standards. I will discuss these two issues. I will do so from the perspective of the victims of the sexual crimes

committed by Mpambara. Like many other domestic judicial systems founded on civil law, Dutch law allows victims to participate in criminal proceedings and also to join as a civil party to obtain reparation. I have acted as counsel for the victims of Mpambara. I will also discuss questions of evidence relating to these victims' claims for compensation.
First, the evidentiary issues related to proving the sexual crimes.

Taking facts seriously
I have a standard advice which I repeat in any individual case. That advice is: take the facts of a case more seriously. After the facts, the procedure comes. Academic lawyers love the law rather than the facts. Basically because they have no experience with the strategic role of the facts, and the way they are collected, weighted, verified and disputed. But in law suits, the facts tend to be decisive.

The case of Consolata Mukamurenzi
Mpambara was acquitted of all charges of rape. The Court considered these charges not to have been sufficiently proven. What were the problems? All the rape victims, who were all Tutsi, were killed. Therefore, none of them could testify against Mpambara. In only one case, the rape was witnessed by a third person. Adrien Harorimana saw the crimes that were committed against his cousin Consolata Mukamurenzi.
On 13th May, 1994, Consolata and Adrien were on the run for four Interahamwe. As Consolata could not run as fast as Adrien, she was caught by four men; one of them was allegedly Mpambara. Adrien was able to hide in the bushes and watched the scene that was unfolding from then on. Consolata was gang raped by the four men. She was stabbed in her private parts with a gun which was topped with a bayonet, until she was badly bleeding. She was then shot in the back.
The day after the crime, Adrien came back to the spot where his cousin was assaulted, to bury her. She was gone, apparently carried off by dogs.
Adrien testified extensively in the Court case against Mpambara. When the trial started, he also travelled to The Hague to participate in the hearings. When confronted with Mpambara in Court, Adrien recognized Mpambara immediately, 14 years after the crime against Consolata.
Adrien's active participation both as a witness and a victim made a significant difference in the case against Mpambara. Adrien gave a face to the case. In the Netherlands, criminal trials are for 90% based on paperwork. Few or no witnesses are heard in Court. In the case against Mpambara, the Court itself heard no witnesses at all. All witnesses were heard by the investigating judge.
However, victims are entitled to take the floor and explain personally to the Court the impact of the crimes on them. Adrien himself was the evidence of the crimes committed by Mpambara. The story he told in Court about what had happened to his cousin and himself brought the crimes coming alive. He made a huge impression on the judges. The prosecutors too had a clear interest in Adrien's participation in the trial against Mpambara. While representing the victims is also a responsibility of the prosecutors, the active participation of the victims in Court clearly helps them in presenting their case. In Court, the victims tell their stories in a way the prosecutors would never be able to do.
In its verdict, the Court said it considered Adrien's testimony "without doubt reliable". Still, the rape and murder of Consolata, like the other charges of sexual crimes against Mpambara, suffered from a lack of evidence. Although a very credible witness, Adrien was the only witness of the crime against Consolata. Under Dutch law, one witness is not enough to convict someone.
Let me explain a bit more the Dutch standards of evidence.

Dutch and international rules on evidence
In international Courts, only one witness would not necessarily have posed a problem. The ICTY and ICTR may convict on the basis of the evidence of a single witness, provided such evidence is viewed with caution and taking into account the requirement of a fair trial.
This is also true for evidence of sexual crimes. The ICTY and ICTR accord to the testimony of a victim of sexual assault the same presumptions of reliability as the testimony of victims of other crimes. As Adrien was considered by the Dutch Court to be a very credible witness, there is little doubt that, if Mpambara would have been tried before an international Court, he would have been convicted for the rape and murder of Consolata.
In civil law systems, however, some degree of independent causal corroboration of evidence is required. The Dutch Code of Criminal Procedure explicitly forbids the Court to base a conviction on the basis of the testimony of only one witness. In most of the modern continental systems, the rule that one witness is not witness has been mitigated. This is the case in France, Germany and Belgium. In the Netherlands, the rule that more than one witness is required is still applied quite strictly. Our Supreme Court has provided some leeway in that it accepts corroborative evidence supporting the testimony of the single witness. The corroborative evidence does not have to deal with the criminal act itself, but may also provide circumstantial evidence. But in the case of Consolata, such circumstantial evidence was not available. The defence disputed the rape, the place of the crime, the presence of Mpambara at that place at that time. He even disputed the existence of Consolata. Mpambara's lawyer suggested the girl had been invented. The prosecutors went at great length to come up with evidence of the life of Consolata. For example, they asked the Rwandan authorities for a copy of the list of students of the school the girl was attending in 1994, but without success. The fact that the rape took place more than 14 years ago did not help the prosecution.

Proving the victim's claims
Adrien was not only a witness of the rape and murder of Consolata. He was also a victim in his own right as he had been traumatized by what he had seen. In Court he submitted a claim for damages against Mpambara. The crimes Mpambara was charged with also constituted a tort against Adrien as he suffered damage as a result of these crimes. However, as the rape of Consolata was not considered proven, Adrien's claim for damages was also rejected. As both the prosecutor and the defence have appealed, Adrien will submit his claim for damage again in appeal. A tremendous advantage of victims' compensation cases that are linked to criminal proceedings is that the facts proving the crimes are to be provided through the criminal proceedings. The victims' case is built on the indictment and it is for the prosecutor to prove the allegations in the indictment. Of course, the prosecutor faces his own problems in establishing the facts. This will in turn affect the victims' claims because if the prosecution is not successful (as was the case in the trial against Mpambara), the victims will lose the opportunity to have their requests for reparations dealt with by the Court.

While the facts proving the criminal behavior are for the prosecutor to deliver, this is different for the damage suffered by the victims. In principle, it is for the victims to prove the scope of their injuries and losses. However, in compensation claims that are linked to criminal proceedings, the burden of proof resting on the victims is not that heavy. Victims' claims are awarded on the basis of fairness. Victims are thus not required to provide definite proof of their injuries.

Statute of limitations
There is one serious problem that victims face when claiming damages in Court and which is directly related to evidentiary difficulties. This is the statute of limitation that applies to these

claims. In Court, Adrien Harorimana ran into the question of whether or not his claim was within the limitation period. While Mpambara could still be prosecuted for war crimes and torture, application of the statute of limitation might preclude the civil claims of the victims against Mpambara. Their claims may be barred due to a passage of time. The difficulties the prosecutor encountered in obtaining the necessary evidence against Mpambara had a direct bearing on the ability for Adrien Harorimana to get justice. Time passed until the Prosecutor was ready to bring his case to Court. By the time he was able to do so, Adrien's claims could well have become time barred.
For a long time, prosecution of international crimes also faced time bars. But since the establishment of the ICC, most States have abolished or amended domestic time bars. As a consequence, prosecution of these crimes can be delayed endlessly. Hence Mpambara was prosecuted in the Netherlands 14 years after the Rwandan genocide and 10 years after his arrival in the Netherlands.

International law does not contain rules on statutory limitations for civil claims of victims of international crimes. In domestic procedures, victims' tort claims are therefore regulated by domestic provisions on prescription. Domestic law generally limits civil claims to a certain number of years. In the Netherlands this is five years. In view of the number of years the prosecution needed to find the facts to underpin the charges against Mpambara, it is unreasonable to send Adrien and the other victims home as they submitted a claim after five years, with the argument that their rights are barred due to the passage of time. Under Rwandan law, it seems that the time limitation is 30 years. This would give victims a better prospect. This is an exceptional long period; most countries apply much shorter periods.

I propose that the time limitation set on civil claims for victims of sexual crimes must be lifted, or at any rate, it should be considerably extended. The most important argument supporting this proposal is that international crimes are prosecuted long after their commission. These crimes are not pardoned. So damage should not be pardoned either.

Conclusion
The case against Mpambara has been the first, and so far the only case tried in the Netherlands concerning sexual violence. It features in a range of international crimes cases tried in the Netherlands concerning torture in Afghanistan and war crimes in Iraq and Liberia. This is an impressive list in terms of the complexities of the cases. Still, the total list of international crimes cases tried in Dutch jurisdiction can be counted on two hands. That the Netherlands tried only one sexual violence case so far is for that reason not surprising.

The case against Mpambara failed due to a lack of evidence. Most of the sexual assault charges could not be supported by any witness. In the case of Consolata, where a credible witness was available, the charge suffered from Dutch evidentiary standards. Under Dutch law, one witness is not witness. International cases involving sexual crimes tried in the Netherlands are for these evidential standards an issue of concern. In rape or sexual assault in which the suspect denies the allegations made by the victim, there is often little, if any evidence other than their statement.

As for the participation of victims of sexual crimes in domestic Courts, my main concern is the statute of limitations. With no time car applicable to the *prosecution* of sexual crimes, such limitations should also be abolished for victim' claims for damages, or they should be applied flexibly by the Courts. A justification for the doctrine of prescription is the principle of "forgive and forget". However, this principle does not apply to damage claims related to

international sexual crimes. These claims are concerned with such gravity that they cannot be pardoned or forgotten.

End.

IV. Sofia Candeias

Not talking of DRC when dealing with sexual violence would be impossible. What is going on there? This intervention will focus on North Kivu, South Kivu and Ituri.
We tend to associate sexual violence with the ongoing conflict, and we think of rape as a weapon of war, as a strategy of the groups. There are three types of sexual violence that we can represent as a pyramid. At the top of the pyramid, there are many cases of sexual violence committed massively by militaries and militia groups as part of their strategy. They are targeting specific groups of women and specific ethnicities. This happened a lot.
But this is only the top of the pyramid. Below, there are many soldiers who commit sexual violence in an opportunistic way, because know they will not be sanctioned. They have done so during the conflict, and they have continued to do so after the conflict.
At the bottom of pyramid, there is sexual violence committed by civilians. Looking at human rights report, we can see that this form of sexual violence is increasing, despite the fact that the intensity of conflict is going down.
Rapes are an international crime, committed within the context of a conflict. But when the conflict is over, the number of rapes increases.
Quotation from the Report of the Special Rapporteur on violence against women, its causes and consequences: "Women (…) suffer extreme level of sexual violence, committed by FARDC, PNC, armed groups, and, increasingly also civilians. (…) Extreme sexual violence used during the armed conflicts seems to have eroded all protective social mechanisms (…). Rape among civilians is increasing."

There are many numbers on sexual violence in Congo. Unfortunately, there is no database. The numbers are gathered by NGOs, but do not cover comprehensively the territory. They do not reflect the reality on the ground. UNFPA between said that, between January 2007 and March 2008, 13230 cases were identified in the DRC. Only 11% reached the judicial system. The other 90% remain totally unknown to the judicial system.

The legislator in Congo passed two new laws. These two new laws are very good for the victims. They provide for procedural guarantees for the victims, protection, and there is a wide definition of rape. These laws were enforced in 2006. Unfortunately, most of the persons working in law enforcement and judiciary area do not know them yet.
For the massive crimes, there has been a revision of the *Code pénal militaire* of Congo in 2002, that included rape and sexual violence within crimes against humanity.
Military Courts in Congo have a very wide jurisdiction. Everyone committing a crime found in possession of a weapon can fall under the jurisdiction of a military Court. Military Courts are not only for soldiers.

90% of the cases never arrived into the judicial system. Why?

- The obvious answer is fear of the victims. Fear of stigmatization and reprisals. Most of crimes are committed by police and armed forces.
- There is also a physical impossibility. Congo is not a country; it is a "continent": there are no roads; you have to walk for 10 hours to reach a police station.

- There are strong traditions on Congo that allow families/communities and perpetrators to reach agreements. There are local mediators. This happens not only for "ordinary rapes" but also for rapes committed by soldiers against several women.

11% cases arrived at the police. There are only two specialized police stations in the area of Kivu, which receive women and children victims of gender based crimes.

And where you do have police stations, people do not have training, do not know that rape is a crime. There is not trust in the local police, and there is no reason to trust the system.

Police is part of society. The Chief of the police station is the first one to propose for a friendly settlement. One of the reasons is that the police has 24 hours to file a complaint and share it with the Prosecutor. This is not enough time to go to the capital of the Province. They do not have the resources, they do not have a car, and they do not have a telephone.

10% do reach the Prosecutor's office. Here, there is the same problem. They do not have transport to gather evidence, to contact the witnesses, they are not properly trained, and they are not sensitive. There is strong corruption. If the alleged perpetrator offers some money to be released or to stop the process, the prosecutor will say yes.

Another issue is the one of protection. Another one is poverty. There is no judicial assistance from the state. The population is very poor. The MONUC have a protection office for witnesses. This office would have to provide for protection of witnesses and victims. Unfortunately, none of the judges Sofia contacted was aware or used this mechanism.

Another problem is that, after being condemned, the perpetrators often escape from prison. This is almost "a national sport".

Reparation is not paid, although the Courts allow for $5.000 to $10.000 to victims. But Congo has never paid reparation to the victims.

At the top of the pyramid, the first thing the international community has to do is fight against impunity of sexual violence committed on a massive scale or sexual violence committed by leaders (political/community/police/military).
On the ground, there are attempts to try crimes committed massively or committed by leaders. But there is a lack of security for judges, investigators, witnesses, victims. They are not escorted by MONUC. It is a heavy procedure.

There are political obstacles: several prosecutors have started investigation of massive crimes of rapes, but they were asked by their superiors to stop.

Another issue is the law on amnesty issued on May 7th, 2009. It does not apply to crimes against humanity, war crimes or genocide, but legal language can be manipulated.

More training is necessary, and there is the necessity to deploy more people. The two Provinces are huge and not accessible. 2 judges and 2 prosecutors have received specialized training on international crimes. It is not enough.

There were rapes as a crime against humanity in 2005, 2006, 2007. All of them occurred in the Province d'Equateur. For the first time in April 2009, rape was tried as a crime against

humanity. 24 pigmy women were attacked in their village by Congolese armed forces. There were 12 accused. 3 of them escaped from prison, but they were condemned! It is the first time that in the Kivus there is a case of rape as a crime against humanity, using command responsibility.
There are also cases of rape as a war crime.
There is one case in Goma, dealt with by *Cour opérationelle militaire*. Two foot soldiers were condemned to death, with a one page judgment, and there is no possibility of appeal. Is it a proper complementary justice?

"If the sexual violence associated with war is addressed in isolation (…), violence endured by women in 'peace' will be grossly neglected and the war on women reinforced." (Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk).

End.

QUESTIONS

Question 1:
From a barrister in Senegal
To Liesbeth Zegveld

"On which procedural rules and substantive law did the Dutch Court find they have jurisdiction for sexual crimes committed in Rwanda? Did the Dutch law incorporated international instruments on international crimes?"

Answer: The verdict is available in Dutch where you can see the substantive law. It started with charges for genocide. But it turned out that the Netherlands does not have the proper law to charge a foreigner for genocide on the basis of universal jurisdiction.
Then we try to find a basis for genocide in the Security Council resolution implementing the ICTR Statute. This failed before the Supreme Court.
What was left? War crimes and torture. It was stretched! Concerning torture, the question was whether Mpombara was a state agent, because under the Convention against torture, you must be linked to the State. The Court found he was sufficiently linked to the State, and he was convicted for torture. Concerning war crimes, it failed because the Court found that it was not committed in a context of war. They made a clear (but artificial) distinction between the genocide and the armed conflict. The ICTR has its own conclusion on this regard. There is an extensive decision on this issue, which might be worth reading.
One of the victims said he wanted to withdraw from the procedure. He said he was standing also for his family, and if there is no charge of genocide, he did not want to go along as a single victim for war crimes and torture, while the family is excluded because genocide is not part of the charges.
Torture and war crimes are both implemented in the Dutch national legal standards (52 and 84). Genocide is punishable since the implementation of the Rome Statute, which came too late in this case.

Question 2:
From SCSL
To Liesbeth Zegveld

"The victim's impact and the difference they made whether they stand for themselves or whether they are represented by prosecution."

Answer: They were represented by the Prosecution because they took part of the trial as witnesses. When you read a statement from paper, you miss the face, the details and you might miss the impact and the conviction that comes from such a statement. The Court is based in The Hague; they have never been to the place. Do they have a clue of what they are talking about? The communities, the surroundings… If a victim makes the efforts to come to Netherlands, the impact is quite different. It may contribute in a significant way.

Question 3:
From IBA
To Dianne Luping

a) *"To the extent that the decision on witness proofing in the Lubanga case becomes established practice at the ICC, what steps has the OTP completed to ensure that victims who are interviewed are not put at disadvantage later on?"*

Answer: The decision of Trial Chamber I in the *Lubanga* case prohibits the OTP, once the familiarization process begins with the witness, to dove questions on substance relating to the testimony.
How can we deal with witnesses before they appear in Court? What we propose to do is, even before the familiarization process, to meet with the witnesses. If it is considered appropriate, we do need to discuss key issues related to their evidence.

b) *"Issue of positive complementarity:* ***Sofia Candeias*** *mentioned the need for reinforcing national justice. What assistance does the OTP provide to national jurisdictions?"*

Answer: Issue of a separate independent judicial institution, we can reappropriate, provide and share information with national authorities if it is requested, if there is no problem with security of individuals. Article 93(10), with the consent of the Chamber, can be used.
In terms of technical assistance *per se*, the primary message is that when national institutions implement legislation, they have the ability to draw from the Rome statute and RPE and they can use these tools to deal with international crimes in their own jurisdiction.
As to other technical assistance, it remains to be seen what types of assistance can be provided, it depends on the context.

Question 4:
From Niamh Hayes, Irish Centre for Human Rights in Galway

a) To Patricia Viseur Sellers. "*Patricia mentioned Resolution 1820. Does this have significance to the shift in the language, from a more aspirational language in the 1993 Security Council Resolution to more imperative goals? Does it show an evolution on purpose?"*

Answer: Yes, there has been a shift because of reports made by many organizations.

c) To Sofia Candeias: *"It seems to be a gap in research in relation to perpetrators of sexual violence, particularly in armed conflict situation. We are imposing*

rationalization and logical steps on people, and that without finding out how it works."

Answer: There is a study by two Swedish researchers who went to DRC in 2005-2007? They interviewed the perpetrators. What would be the ideal army?

Question 5:
From OTP ICC

a) To Patricia Viseur Sellers: "*How should we deal with the issue of medical confidentiality and disclosure to the defence?"*

Anwer: Most of that is not in public domain and Patricia Viseur Sellers cannot speak about it. There is an issue that on the one hand, in certain situations such as in the former Yugoslavia, women did not have access to doctors after being held for months in death camps or rapes camps. When they went to the doctor, it was not in their mind that they have to produce documents and give information that would become evidence. There is a privilege between the patient and the doctor. To what extent are they impinging upon their privilege that they are not allowed to release? The privilege really lies with the client.
One has to look at that in combination with exculpatory evidence, rule 68. We can have hypothetical situations where a woman is going to the doctor because she thinks she is pregnant; she talks about what happened to her. Some of the facts might be correct, some might be confused. That information then might be seen, if by some way the Prosecutor has it, as being inconsistent with what become a story and a declaration. Those are very complicated issues.

b) To Sofia Candeias: *"Is there any way further to what Sofia described? Is the Impunity strategy useful or does it come from the top towards the bottom and does not really work?"*

Answer: Because sexual violence is so grave, the UN was asked to formulate a global strategy to fight it. The UN Global strategy in partnership with the Congo and NGOs was launched and finished in the end of March it finished, after long consultations. Is it imposed from the top? This strategy is criticized because it does not take into account local considerations. The characteristic of each region in Congo are different. The strategy is ambitious; it is very theoretical, so now we have to work on implementation at the local level, with local actors. The Minister of justice said he wants provincial strategies to fight against impunity. They will be launched in the beginning of July.

Comment 6:
From Chichi Nwosu
To Sofia Candeias

"All other the world, when women complain about rapes, there is a typical reaction. The whole process is humiliating and degrading, and at the end of the day, their request is dismissed. This happens even when there is no armed conflict.
So is there any surprise that in war situations, we have these statistics? Shouldn't we look at the underlined reasons why women are subjected to this treatment and why prosecution is so difficult?"

Question 7:
From Christopher Wing, Counsel at the ICC, English Criminal Bar.
To Dianne Luping

"As a prosecution counsel, how do you view the role of victim's counsel? Do you think it would assist you to know what evidence they may seek to introduce?"

Answer: The role of victim's counsel is invaluable.
It is important that there is no significant overlap between prosecution and victim's counsel in terms of providing evidence. So yes, we will need to know.

Question 8:
From Research unit in Zimbabwe
To Patricia Viseur Sellers

"Zimbabwe is not a signatory of the Rome Statute. What do you do? It shows that there was a systematic and wide spread armed activity last year and previously, since 2000."

Answer: crimes against humanity and genocide do not need, in customary international law, a nexus to war. The high rate of sexual violence around the world shows that there is some type of low level or high level of crimes against humanity going on in several places. If we look at the situation in Zimbabwe, there is no *jus cogens* crime of rape which make States forced to act. If we had so many people being tortured, one could ask the question of universal jurisdiction. We do not have this equivalent for women. So what can we do in Zimbabwe? There is knowledge. If any of the sexual violence is categorize as a form of torture, we can use universal jurisdiction. Is it going to happen? Patricia doubts. We do not understand that when one State evolves into crimes against humanity, it is not war time. We do not look at that as being a threat to the peace. And if we do, let's make sure that we have negotiations and diplomatic initiatives, but ultimately the voice of the women is not heard at these negotiations, they are not requested to be present, and if they are present, they will be asked what legitimacy they have to discuss peace.

End.