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The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today

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THE RELEVANCE OF THE UNITED NATIONS WAR CRIMES COMMISSION TO THE PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES TODAY

ABSTRACT. This article discusses aspects of the origin and development of jurisprudence relating to the prosecution of sexual and gender-based violence (SGBV) in the context of international criminal law. It examines a selection of archival material from the United Nations War Crimes Commission (UNWCC) and other bodies connected to it, noting that the UNWCC was the first multinational criminal law organization to explicitly endorse SGBV crimes as international crimes. UNWCC-supported trials in both Europe and Asia suggest that rape committed in the context of armed conflict or situations of mass violence was punishable as a serious crime nearly 70 years ago. Moreover, many of the theories of liability used by contemporary tribunals today were used in the UNWCC-supported cases. The authors maintain that the UNWCC archives are not only valuable for tribunals prosecuting conflict-related SGBV cases today, but the jurisprudence emerging from UNWCC-supported cases may also be quite relevant to contemporary policy debates.

I INTRODUCTION

International and internationalized criminal tribunals have developed a rich body of jurisprudence that has broadened and deepened concepts of individual criminal responsibility for sexual and gender-based violence offences that amount to international crimes. Yet, tribunals continue to wrestle with recurring issues particular to the application of international criminal law to such crimes. Among these

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issues are: (i) whether acts of sexual and gender-based violence (SGBV) committed in the context of conflict or mass violence constituted crimes under national or international law at the time they were committed; (ii) the definition of such crimes, including how such definitions incorporate the concept of coercion; (iii) what theories of criminal responsibility can be used to find perpetrators – particularly top political or military leaders – accountable for SGBV crimes; and (iv) the ways in which victims and witnesses of such crimes are treated. An examination of archives from the United Nations War Crimes Commission (UNWCC) and the many tribunals connected to it offers some surprising insights into these issues.

1.1 *The UNWCC's Recognition of Sexual Violence Offences as War Crimes*

The UNWCC was the first multinational criminal law organization to explicitly endorse SGBV crimes as international crimes.[1] The UNWCC was the result of an Allied effort to create a process for the investigation and prosecution of those aligned with the Axis powers who had committed atrocities. Member states created an international agency, the UNWCC, to legitimate and support national efforts to investigate and prosecute such crimes.[2] The UNWCC provided member states with a working list of offences enumerating the various charges national jurisdictions could pursue through their own military or domestic penal codes.[3] In its minutes the Commission explained that the purpose of the list was to provide general guidance on individual war crimes while avoiding "unduly [tying] the

[1] The International Military Tribunals at Nuremburg and for the Far East heard evidence of sexual and gender-based violence and considered such evidence in support of charges of other inhumane acts as crimes against humanity, but did not explicitly include rape or enforced prostitution in their foundational charters or judgments. See D. Luping, 'Investigation and Prosecution of Sexual and Gender-based Crimes Before the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy and Law* 431, 436–443.

[2] D. Plesch, *America, Hitler and the UN: How the Allies Won World War II and Forged Peace* (London, I.B. Tauris, 2011) chapter 5. See also D. Plesch and S. Sattler, 'A New Paradigm of International Criminal Law' (2013) 2 *International Criminal Law Review* 203, 210. See the contribution by M. Ellis, in this volume.

[3] *War Crimes Committee: Report of the Subcommittee* [6] (enclosed as part of *United Nations War Crimes Commission: Notes of a second Unofficial Meeting held on 2nd December, 1943, at 3 p.m. at the Royal Courts of Justice, London*) (2 December 1943) <https://www.legal-tools.org/doc/3e7e05/>. The list of offences is included as 'Annex 1'.

hands either of the Commission or of the Governments of the United Nations''.[4] In other words, the list was not meant to replace domestic legal codes but merely to give national jurisdictions guidance about the types of war crimes that could be tried and to help coordinate the work between the Commission and the national jurisdictions.

According to the minutes of the unofficial meetings, there were two lists considered by the Commission at the October 1943 meeting and a third list discussed at the December 1943 meeting.[5] It is this third list that was used by the Commission and disseminated to the national jurisdictions.[6] Notably, rape was explicitly included as a war crime in all three draft lists of offences considered by the Commission[7] and forced prostitution was included in two of the three,[8] including the final list sent to UNWCC member states and used by the UNWCC to coordinate its review of the cases.[9] Of the thirty-two crimes listed by the UNWCC, rape appears as number five and forced prostitution as number six.[10] Hence,

[4] *Ibid*., [8].

[5] *United Nations Commission for the Investigation of War Crimes: Notes of Unofficial Meeting held at 2:30 p.m. on the 26th October, 1943, at the Royal Courts of Justice, London* (26 October 1943) <https://www.legal-tools.org/doc/ad8990>. See also *Notes of a second Unofficial Meeting held on 2nd December, 1943* (n 3), The first three meetings are often described as ''Unofficial'', although at the 5th meeting the Commission retroactively approved the actions of these meetings upon the arrival of the US Commissioner see UNWCC M5, 1.

[6] *War Crimes Committee: Report of the Subcommitte* [9] (enclosed as part of 'Notes of a second Unofficial Meeting held on 2nd December, 1943' (n 4). The list of offences is included as 'Annex 1').

[7] *Notes of Unofficial Meeting held at 2:30 p.m. on the 26th October, 1943* (n 5). The first draft list of offences is on p. 5 of the minutes, listing rape under item #1 in the category of 'Grave crimes against person and property committed without any pretence of legal authority or order'. The second list of offences follows on p. 6, listing rape under the 'Second Category' described as 'Acts not directly connected with warfare and which have caused death, illness, bodily harm, or loss of liberty to those to whom they were applied'. Rape is listed under 'A' in this category. See also *Notes of a second Unofficial Meeting held on 2nd December, 1943* (n 3) The final 'List of War Crimes' is enclosed as 'Annex 1' in which rape appears as item 'V'.

[8] *Ibid*. Forced prostitution was not included in the first list of offences included in the Notes of the October 26, 1943 meeting. In the second list of offences, under the Second Category, Item # 8 states 'Abduction of women with the object of prostitution'. In the *Notes of a second Unofficial Meeting held on 2nd December, 1943*, Item 'VI' lists 'Abduction of girls and women for the purpose of enforced prostitution'.

[9] *War Crimes Committee: Report of the Subcommittee* (n 3) [9].

[10] *Notes of a second Unofficial Meeting held on 2nd December, 1943* (n 4). The 'List of War Crimes' is enclosed as 'Annex 1'. Rape appears as item 'V' and 'Abduction of girls and women for the purpose of enforced prostitution' appears as item 'VI'.

there was consensus amongst the Allied powers that acts of sexual violence committed against their nationals by enemy forces constituted international crimes. Indeed, while the UNWCC discussed many issues that its members considered contentious – including when the war could be regarded as having begun as well as the nature of the crimes of aggression and crimes against humanity – there was no debate about whether rape and forced prostitution should be included on the list.[11]

1.2 *UNWCC Records of Cases Involving Sexual Violence*

Significantly, these two offences were prosecuted successfully in UNWCC-supported national trials across Europe and South and East Asia. Countries that prosecuted cases of sexual and gender-based crimes before national or military tribunals or both include Australia, Belgium, China, Denmark, Italy, France, Greece, Poland, Yugoslavia, and the United States and the UNWCC itself.[12] Of these,

[11] The list of offences adopted and disseminated by the UNWCC was based on the list agreed on by the Commission on Responsibilities at the 1919 Paris Peace Conference, a commission of experts tasked with making recommendation regarding the prosecution of war crimes committed during World War I. Notably, the list included both crimes. *Notes of a second Unofficial Meeting held on 2nd December, 1943*, (n 4) [9]. For a more detailed explanation of the Paris Peace Conference, see the contribution by H. Rhea in this volume.

[12] *Case Against Yoshio Yaki* Australian Military Forces: Record of Military Court (Japanese War Criminals), File No. 21376 <https://www.legal-tools.org/doc/a2a2d7/>; *Belgian Charges against German War Criminals*, Registered No: 3174/B/G/297, Case No. D. 540 (23 May 1946); *Belgian Charges against German War Criminals*, Registered No. 3811/B/G/316, Case No. 313 – 821–830 (23 December 1946); *Belgian Charges against German War Criminals*, Registered No: 3811/B/G/316, Case No. 313, 43 (6 August 1946); *Belgian Charges against German War Criminals*, Registered No. 5084/B/G/354, Case No. 1557 (1 May 1947); *Chinese Cases Against Japanese Nationals*, Trial and Law Reports Series No. 27, *Summary Translation of the Proceedings of the Military Tribunal, Nanking, on the trial of Takashi Sakai* < https://www.legal-tools.org/doc/3789a0/>; *Danish Charges Against German War Criminals*, Registered No. 5287/D/G/104 (H. H. F. Kruger); *Italian Charges Against German War Criminals*, Charge No. 6, Registered No. 778/9/G/6 (13 April 1945); *France Charges Against German War Criminals*, Registered No. 54/Fr/G/26, Charge No. 28 (7 March 1944); *Greek Charges Against Bulgarian War Criminals*, Registered No. 3758/Gr/B/89, Case No. B/63 and 285/24; *Polish Charges Against German War Criminals*, Reference No. 5438/P/G/372, Case No. 372 (2 June 1947); *Yugoslav Charges Against Italian War Criminals*, Registered No. 235/Y/It/8, Charge No. R/I/8; *Case of Nicholas T. Sablan*, The registration numbers cited here and below are as they are cited in the still restricted archives of the UNWCC held in the United Nations Archives and Records Management Section (UN ARMS) in New York. Authorized individual researchers, including Plesch and Sattler, may now note from

Australia, China, Italy, the United States, Yugoslavia, Denmark, France, Greece, and Poland all prosecuted individuals for rape.[13] Furthermore, France, Poland, and the United States charged individuals with forced prostitution.[14] Reports of these prosecutions were submitted by national jurisdictions to the UNWCC,[15] while surviving trial records remain in countries' individual national archives, a small portion of which have been reviewed for this article.

Before analyzing this material, it is important to make some caveats. First, the number of prosecutions is in no way equal to the number of crimes committed, as is the case with war crimes in general

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Footnote 12 continued
as well as read this archive but may not make copies. The charge files are ordered alphabetically by the state undertaking the prosecution. The numbers refer to the Commission's own overall lists, to the subdivision in chronological order of the number in the list of cases by each state, and by the order and coding of the state's own system. Record of Proceedings of a Military Commission Convened at Agana, Guam by Order of The Island Commander (30 March 1945) <www.fold3.com> WWII JAG Case Files, Pacific-Navy.

[13] *Case Against Yoshio Yaki* Australian Military Forces: Record of Military Court (Japanese War Criminals) File No. 21376 <https://www.legal-tools.org/doc/a2a2d7/>; Chinese Cases Against Japanese Nationals, Trial and Law Reports Series No. 27, Summary Translation of the Proceedings of the Military Tribunal, Nanking, on the trial of Takashi Sakai <https://www.legal-tools.org/doc/3789a0/>; Italian Charges Against German War Criminals, Charge No. 6, Registered No. 778/9/G/6 (13 April 1945); *Case of Nicholas T. Sablan*, Record of Proceedings of a Military Commission Convened at Agana, Guam by Order of The Island Commander (30 March 1945) <www.fold3.com> WWII JAG Case Files, Pacific-Navy; Yugoslav Charges Against Italian War Criminals, Registered No. 235/Y/It/8, Charge No. R/I/8; Danish Charges Against German War Criminals, Registered No. 5287/D/G/104 (Kruger, Hans Harry Foul); France Charges Against German War Criminals, Registered No. 54/Fr/G/26, Charge No. 28, 7 March 1944; Greek Charges Against Bulgarian War Criminals, Registered No. 3758/Gr/B/89, Case No. B/63 and 285/24; Polish Charges Against German War Criminals, Reference No. 5438/P/G/372, Case No. 372 (2 June 1947).

[14] Polish Charges Against German War Criminals, Reference No. 6974/P/G/1233, Case No. 1233 (previously submitted as no. 5897/p/g/643 adjourned on 25/7/47 for further information); *Case of Samuel T. Shinohara*, Record of Proceedings of a Military Commission Convened at Agana, Guam, by Order of the Island Commander (28 July 1945) <www.fold3.com> WWII JAG Case Files, Pacific-Navy. France Charges against German War Criminals, Registered No. 50/Fr/G/22, Charge No. (7 March 1944); France Charges Against German War Criminals, Registered No. 51/Fr/G/23, Charge No. 25 (7 March 1944); France Charges Against German War Criminals, Registered No. 54/Fr/G/26, Charge No. 28 (7 March 1944).

[15] See for example the UNWCC's index to reports received <http://www.legal-tools.org/uploads/tx_ltpdb/File%2020632.pdf>.

during this period. Second, UNWCC-supported cases are not immune from critiques of post-World-War II justice mechanisms as representing "victors' justice" susceptible to violations of defendants' rights or other issues of fairness.[16] Third, UNWCC cases are primarily prosecutions of citizens of the Axis powers for acts against citizens of the Allied nations. The UNWCC and its attendant tribunals did not have a mandate to address crimes by citizens of the Allied nations. Finally, it must be noted that only a small fraction of the UNWCC trial records have been made publicly available for analysis. Nonetheless, the records we have been able to examine reveal that national jurisdictions dealt with a number of issues facing contemporary tribunals and, thus, are quite relevant to ongoing debates surrounding the investigation and prosecution of SGBV crimes today. At the same time, the review has highlighted the fact that greater access to these documents and further research is needed to build a more comprehensive account of the landscape of investigations and prosecutions of such crimes in the post-World War II era.

II *NULLEM CRIMEN* CHALLENGES TO PROSECUTION OF SGBV CRIMES

Currently, the legal basis for prosecution of crimes of sexual violence as serious international crimes is well established. For instance, the statutes of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) explicitly recognize rape as a crime against humanity.[17] Similarly, the law establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC) includes rape as a

[16] B. VanSchaak, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *Georgetown Law Journal* 119, 132 (discussing this criticism of the Nuremburg and Tokyo Tribunals).

[17] See article 5(g) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UNSC Res 827 (1993) U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993); article 3(g) of the Statute of the International Tribunal for Rwanda, UNSC Res. 955 (1994) U.N. Doc. S/RES/955. Note that the Statute of the ICTR also provides for jurisdiction over rape as a war crime. See article 4(e) (enumerating war crimes including "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault").

crime against humanity.[18] Article 7(1)(g) of the Rome Statute establishing the International Criminal Court (ICC) goes further by listing as crimes against humanity additional acts of sexual violence, including: ''[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparative gravity''.[19] Other so-called hybrid courts – such as the Special Court for Sierra Leone (SCSL) and the Special Panels for Serious Crimes in East Timor (SPET) – have followed the ICC's example and explicitly recognize several sexual and gender-based crimes as crimes against humanity, including rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.[20] Moreover, the ICTY, ICTR, SCSL, and SPET have all convicted individuals of rape and sexual violence as crimes against humanity, among other SGBV crimes.[21]

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[18] See article 5 of The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Establishment Law) (as amended on 27 October 2004) NS/RKM/1004/006.

[19] See article 7(1)(g) of the Rome Statute of the International Criminal Court (2002) 2187 UNTS 3. The ICC also includes in its subject matter jurisdiction crimes of sexual violence categorized as war crimes in international conflicts under article 8(2)(b) xxii (including ''rape, sexual slavery, enforced prostitution, forced pregnancy… enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions'') and in non-international conflicts under article 8(e)(vi) (including ''rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions''). Additionally, article 6(b) of the Elements of Crimes of the International Criminal Court (adopted 9 September 2002) specifies that included in the acts that can constitute genocide committed by causing serious bodily injury are ''acts of torture, rape, sexual violence or inhuman or degrading treatment''.

[20] See Section 5 of the Statute of the Special Court for Sierra Leone Article 2, and United Nations Transitional Authority in East Timor (UNTAET) Regulation No. 2000/15 'On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences' Section 5.1(g). See also C. Damgaard, 'The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-based Crimes?' (2004) 73 *Nordic Journal of International Law* 488.

[21] See, e.g., *Prosecutor* v. *Kunarac* (Trial Judgment) IT-96-23 & IT-96-23 1 (22 February 2001). For SGBV convictions by other tribunals, see e.g. *Prosecutor* v. *Jean-Paul Akayesu*, (Trial Judgment) ICTR-96-4-T (2 September 1998); *Prosecutor* v. *Brima et al*. (TrialJudgment) SCSL-04-16, (20 June 2007); *Prosecutor* v. *Sesay et al*. (Trial Judgment) SCSL-04-15-T (2 March 2009); *Prosecutor* v. *Taylor* (Trial Judgment) SCSL-03-01(18 May 2012); *Prosecutor* v. *Soares* (Trial Judgment) DI-58-99-SC (20 September 2002); *Prosecutor* v. *Fereira* (Trial Judgment) BO-06.1-99-SC (5

While these developments demonstrate a strong precedent for the prosecution of SGBV crimes as serious international crimes, challenges to such prosecutions continue to arise. One such challenge is based on the legal principle of *nullem crimen sine lege,* which holds that persons cannot be held criminally accountable for conduct that did not constitute an offence at the time it took place.[22] A contemporary example of such a challenge occurred relatively recently at the ECCC. As indicated earlier, the law establishing the ECCC provides the ECCC with jurisdiction over, *inter alia*, the crime against humanity of rape.[23] The Closing Order in Case 002, against the surviving senior leaders of the Khmer Rouge regime, charged each of the accused with this crime, based on a finding that, ''by imposing the consummation of forced marriages, the perpetrators committed a physical invasion of a sexual nature against a victim in coercive circumstances in which the consent of the victim was absent''.[24] On appeal, however, the Pre-Trial Chamber replaced the charge of rape as a crime against humanity with the, ''crime against humanity of other inhumane acts (sexual violence)'', based on the same facts, after finding that ''rape did not exist as a crime against humanity in its own right in 1975–1979''.[25] In other words, the Pre-Trial Chamber determined that the prosecution of rape as a crime against humanity was barred before the ECCC by the principle of *nullum crimen sine lege*.[26] The Pre-Trial Chamber acknowledged that rape existed as a *war crime* during the relevant time period, basing its finding on the inclusion of this offence in several instruments that predate the work

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Footnote 21 continued
April 5, 2003). Notably, the jurisprudence from these tribunals makes clear that rape and other acts of sexual violence can also constitute other international crimes, such as the war crime of torture or an act of genocide. See, e.g., *Prosecutor* v. *Furundzija* (Trial Judgment) IT-95-17/1-T (10 December 1998); *Prosecutor* v. *Delalic et al*. (Trial Judgment) IT-96-21 (16 November 1998), para 496.

[22] See, e.g. Article 22(1) of the Rome Statute (n 19) (''A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'').

[23] The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (n 18).

[24] *Case 002/01* (Closing Order) 002/19-09-2007-ECCC-OCIJ (15 September 2010), para 1431. See also para 1427.

[25] *Case 002/01* (Pre-Trial Chamber Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order) 002/19-09-2007-ECCC/OCIJ (15 February 2011) 7.

[26] *Ibid.*

of the UNWCC, including the Leiber Code of 1863 and The Hague Conventions of 1899 and 1907.[27] However, the Pre-Trial Chamber was not convinced that rape constituted a crime against humanity during the same period. In support of its conclusion, the Chamber stressed not only the inconsistency between Control Council Law No. 10[28] – which explicitly recognized rape as a crime against humanity – and the Charters of the International Military Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE), which did not, but also that there was scant evidence of the prosecution of rape as a crime against humanity in the post-World War II period.[29]

Had the Extraordinary Chambers been aware of the UNWCC-supported cases, it might have come to a different conclusion. While many of the post-World War II tribunals focused on war crimes – which arguably has a stronger basis under customary international law than rape as a crime against humanity – some post-World War II tribunals, including the IMTFE, treated crimes against humanity as essentially subsumed within war crimes,[30] the distinction between the two centering primarily on the nationality of the perpetrator vis-à-vis the victim.[31] Significantly, in at least one of the UNWCC-supported cases brought by the Chinese War Crimes Military Tribunal against Japanese officer Takashi Sakai,[32] the Tribunal concluded its findings by referring to the offences at issue as both war crimes and crimes against humanity. In the trial record submitted by the Tribunal to the UNWCC in that case, the Tribunal noted:

> In inciting or permitting his subordinates to murder prisoners of war, wound soldiers, nurses and doctors of the Red Cross and other non-combatants, and to

[27] *Ibid.,* 151.

[28] Control Council Law No. 10 was issued by the Allied Control Council on 20 December 1945, and authorized the four nations occupying Germany after World War II (France, the USSR, the UK, and the US) to establish tribunals in their respective zones to try individuals accused of war crimes, crimes against peace, and crimes against humanity. See *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol 1 (US Government Printing Office) XVI.

[29] *Case 002/01* (n 25), 152.

[30] See generally N. Boster and R. Cryer, *The Tokyo International Tribunal: A Reappraisal* (Oxford, Oxford University Press, 2008).

[31] *Complete History of the United Nations War Crimes Commission and the Development of the Laws of War* chapter 9 (United Nations War Crimes Commission, His Majesty's Stationery Office 1948) 188–189 <http://www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517>.

[32] *Takashi Sakai* (n 12) <https://www.legal-tools.org/doc/3789a0/>.

commit acts of rape, plunder, deportation, torture and destruction of property, [Sakai] had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and *crimes against humanity*.[33]

As previously noted and discussed in more detail below, rape was charged in a fair number of UNWCC-supported cases, including in cases prosecuted in Australia, China, Italy, the United States, Yugoslavia, Denmark, France, Greece, and Poland. Although the records reviewed to date are unclear regarding whether the tribunals adjudicating these cases similarly considered rape to constitute both a war crime and a crime against humanity, UNWCC-supported trial records that have yet to become public might well reveal this to be the case. Moreover, the fact that rape occurring in the context of conflict and/or mass violence was prosecuted with such frequency lends support to the argument that rape was clearly recognized as a serious crime in the post-World War II era. Thus, even if prosecuted as a war crime rather than as a crime against humanity, the notion that rape occurring in the context of conflict or mass violence was widely understood to trigger individual criminal responsibility – regardless of the nationality of the victim – may have provided the judges at the ECCC with a better sense of the seriousness with which such offences were taken in the immediate post-World War II period, notably, nearly 30 years prior to the period of time during which Khmer Rouge leaders were accused of having committed the crimes at issue. Indeed, had the ECCC been aware of how extensively rape was prosecuted in the post-WWII era – and the approach post-World War II tribunals took with respect to such crimes – it might have come to a different conclusion regarding whether rape was recognized as a crime against humanity by the time the Khmer Rouge came to power in 1975.

In light of the potential impact of these cases on contemporary debates about when rape was recognized as a serious international crime, it is useful to briefly explore a few of the UNWCC-supported rape cases we have been able to identify and review thus far. Full trial records of these cases are still being uncovered from the archives of the United Nations (UN) and the national archives of UNWCC member states, but the reports countries submitted to the UNWCC clearly indicate that cases involving sexual and gender-based violence

[33] *Ibid.*, 6 (emphasis added) <https://www.legal-tools.org/doc/3789a0/. For more on trials held in China and China's role in the UNWCC, see the contribution by Wen-Wei Lai in this volume.

were often investigated and prosecuted. Charges of rape were brought, for example, by an Australian Military Court against *Tanaka Chuichi and Two Others* on 12 July 1946, and by a Chinese War Crimes Military Tribunal of the Ministry of National Defense against Takashi Sakai on 29 August 1946.[34] The Greek government tried Italian Lt. Giovanni Ravalli and Bulgarian Lt. Anton Kaltcheff for rape on 15 February 1946, before the Special War Crimes Court of Athens.[35] The Polish Case 7069 also included rape amongst a range of charges against some 150 individuals.[36] Moreover, the UNWCC cited in its 1948 human rights report to the UN the case of Hans Muller, tried before a French tribunal in November 1945 on the charge of rape.[37]

Importantly, in several instances, rape or rape-related charges were brought in the absence of any other alleged crimes, underscoring the fact that prosecutors believed crimes of sexual violence alone were sufficient to warrant prosecution. For example, the Australians prosecuted Yoshio Yaki for the rape and related torture of a woman named Betty Woo and there were no other charges besides these two counts.[38] Other cases in which only rape was charged include a Greek case against Bulgarian national Boris Tsernosemski, ''president of the Community of Siderohorion Kavalla'', who was charged with raping two women;[39] two US cases against unnamed Japanese soldiers, one

[34] Report of trial by the Chinese War Crimes Military Tribunal of the Ministry of National Defence of Takashi Sakai, 27 August 1946 <http://www.legal-tools.org/uploads/tx_ltpdb/File%2013729-13756.pdf>.

[35] *Synopsis of Miscellaneous Trials: Canadian, Czechoslovak, Polish, Greek, Chinese, Dutch, Norwegian* 7 <http://www.legal-tools.org/uploads/tx_ltpdb/File%2021077-21089.pdf>.

[36] See UNWCCC.I mtg. (10 December 1947) 4.

[37] Information Concerning Human Rights Arising from Trials of War Criminals: Report Prepared by the UN War Crimes Commission In Accordance with the Request Received from the United Nations (15 May 1948) E/CN.4/W.19 147. See also United Nations War Crimes Commission First Supplement to the Synopsis of Trial Reports (Doc.C.204) (27 June 1946) 11(stating that Hans Muller was tried by the Military Tribunal at Angers and on 20 November 1945, he was found ''guilty but with extenuating circumstances'' of rape committed against a French civilian and was sentenced to two years of prison <https://www.legal-tools.org/doc/8f39f8>.

[38] *Case Against Yoshio Yaki* (n 12). Yaki was convicted and his sentence of execution by hanging was carried out on December 13, 1945. See media report of crime and sentence in Australian newspaper article 'Death Sentences for Japs' in *Morning Bulletin* (December 14, 1945) <http://trove.nla.gov.au/ndp/del/article/56440467>.

[39] *Greek Charges Against Bulgarian War Criminals*, Registered No. 3758/Gr/B/89, Case No. B/63 and 285/24.

for rape and one for assault with intent to commit rape on an American nurse;[40] a Yugoslavian case against Italian Lieutenant Rondoninin for rape as a violation of the Yugoslavian Penal Code and of article 46 of The Hague Convention of 1907;[41] and a Danish case against a German policeman for rape as a violation of the Danish penal code,[42] among others. Just as important, the records also indicate that prosecutors not only charged but, in many instances, won convictions for rape. Yoshio Yaki was convicted of rape and torture and sentenced to death,[43] as was Takashi Sakai, who was prosecuted by the Chinese for – among other offences – inciting or permitting his subordinates to rape civilians.[44] Other successful prosecutions include the case mentioned above by the Greek government against Italian Lt. Giovanni Ravalli and Bulgarian Lt. Anton Kaltcheff for rape and other charges, as well as a Greek case against defendants Friedrich Wilhelm Mueller and Bruno Oswald for rape and additional crimes.[45]

In sum, UNWCC-supported trials in Asia and Europe suggest that rape committed in the context of conflict or mass violence was punishable as a serious crime nearly 70 years ago.[46] Indeed, records of the frequent indictment and conviction of accused for rape offences in the post-World War II period strengthen the argument that rape

[40] *US Charges Against Japanese War Criminals*, Registered No. P.250/US/J/211, Case No. 301J; Registered No. P.266/US/J/277, Case No. 317J.

[41] *Yugoslav Charges Against Italian War Criminals*, Registered No. 235/Y/It/8, Charge No. R/I/8. This report to the UNWCC notes that Lt. Rondoninin was in charge of distribution of rations to the population. The victim – an unnamed 13-year-old girl – approached him to get some food and he seized the opportunity to rape her.

[42] *Danish Charges Against German War Criminals*, Registered No. 5287/D/G/104 (Kruger, Hans Harry Foul).

[43] *Case Against Yoshio Yaki* (n 12).

[44] *Synopsis of Miscellaneous Trials: Canadian, Czechoslovak, Polish, Greek, Chinese, Dutch, Norwegian* 8 <http://www.legal-tools.org/uploads/tx_ltpdb/File%2021077-21089.pdf>.

[45] *Ibid.*, 7.

[46] Notably, the UNWCC chose the list of offences created at the 1919 Paris Peace Conference because Axis powers Italy and Japan "had taken part in drawing [the list up] in its present form and Germany had not objected to it". *Notes of a second Unofficial Meeting held on 2nd December, 1943*, (n 4) 2 <https://www.legal-tools.org/doc/3e7e05/>. The UNWCC felt that this history would help guard against future criticism that the UNWCC was creating new law. See also *Complete History of the United Nations War Crimes Commission* chapter 15 (n 31) 478.

was recognized as a crime against humanity under customary international law during World War II, or at least at the conclusion of the war. Our review thus highlights how critical these records are for contemporary courts and tribunals tasked with deciding the merits of *nullum crimen* challenges in rape cases occurring in the context of conflict or mass violence in the decades following World War II.[47]

III DEFINING SEXUAL AND GENDER-BASED CRIMES

It is important to note that the UNWCC did not provide definitions of any of the offences included in the list of war crimes it provided to member states. The definitions and elements of these offences came from domestic and military penal codes applied by each country's tribunal or military commission that tried UNWCC-supported cases.[48] A preliminary review of these cases reveals that member states prosecuting SGBV crimes dealt with issues contemporary tribunals continue to wrestle with, including how to analyze issues of consent and coercion in cases involving SGBV crimes committed in situations of conflict or mass violence.

3.1 *Lack of Consent as an Element of Rape*

Many, if not most, domestic jurisdictions today define rape as including a lack of consent to sexual acts on the part of the victim.[49]

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[47] It should be noted that the ICTY has dismissed *nullem crimen* challenges raised in cases involving charges of rape as a war crime and/or crime against humanity where the acts in question were committed after 1991. See *Kunarac* (n 21) paras 436–460 and *Furundzija* (n 21) paras 165–186. Thus, the precedent provided by the UNWCC-supported trials are most beneficial in the context of *nullem crimen* challenges involving conduct committed prior to 1991, such as those allegations involving the Khmer Rouge from 1975 to 1979 discussed above.

[48] *Notes of a second Unofficial Meeting held on 2nd December, 1943* (n 3). Note that the domestic tribunals or commissions often cited international instruments such as The Hague Convention of 1907 as the legal basis for charges against an accused. For instance, article 46 of the Hague Convention – which provides that "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected… ", was frequently cited by national jurisdictions prosecuting rape in the documents they submitted to the UNWCC. See e.g. *Yugoslav Charges Against Italian War Criminals*, Registered No. 235/Y/It/8, Charge No. R/I/8; *Australian Charges Against Japanese Criminals*, Registered No. P16/A/J/16 Charge No. 17.

[49] The ICTY Trial Chamber reviewed a number of jurisdictions' approaches to this element in *Prosecutor* v. *Kunarac et al.* (n 21) paras 453–456 (citing the following

However, there is a wide range of approaches in domestic systems regarding whether this requires that the defendant use physical force, whether the victim must attempt to physically resist the defendant, and to what extent threats against the victim or others render the victim unable to genuinely consent.[50] Some jurisdictions also take into account the circumstances surrounding the incident to determine if such factors made the victim particularly vulnerable or negated her ability to genuinely consent.[51] When addressing rape as a war crime or as a crime against humanity, the analysis is complicated by the ways in which consent or lack thereof is affected by situations of armed conflict or mass violence. Different courts have taken different positions on this question.[52] For instance, although the first *ad hoc* tribunal case that addressed the legal elements of rape defined the crime without reference to non-consent – requiring only that the prosecution show "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"[53] – later ICTY and ICTR cases introduced non-consent as an element of the crime by requiring proof that the sexual act was committed without the consent of the victim and that the perpetrator knew such consent was

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Footnote 49 continued
jurisdictions as ones that define rape as intercourse without consent: the United Kingdom, Canada, New Zealand, India, South Africa, Zambia, and Belgium).

[50] *Ibid*., paras 443–445. The ICTY Trial Chamber reviewed a number of jurisdictions' approaches to this element in the *Prosecutor* v. *Kunarac et al*., citing jurisdictions that incorporate the use of force into their definitions, including Bosnia and Herzegovina, Germany, Korea, China, Norway, Austria, Spain, and Brazil. The Trial Chamber also noted that Germany and Bosnia and Herzegovina's criminal codes recognize threats to the victim or a third party as constituting force for the purpose of defining rape. The cited portion of the Bosnia and Herzegovina code provides that "[w]hoever coerces a female not his wife into sexual intercourse by force or threat of imminent attack upon her life or body or the life *or body of a person close to her*, shall be sentenced to a prison term of one to ten years" (emphasis added).

[51] *Ibid*., paras 442, 447–449. The Trial Judgment cites jurisdictions that incorporate this concept into their rape definitions including Switzerland, Denmark, Sweden, Finland, Estonia, and Japan.

[52] Scholars have also taken differing views on this issue. See e.g. J. Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78 (exploring the jurisprudence with regard to the issue of consent in conflict-related rape and its relationship to coercive circumstances and suggesting a presumption that such circumstances vitiate consent is problematic).

[53] *Akayesu* (n 21) para 598.

absent.[54] While the tribunals concede in these later cases that lack of consent can be established through the "existence of coercive circumstances under which meaningful consent is not possible",[55] the absence of consent remains central to the definition of rape.[56] Indeed, in its first case involving allegations of rape, the Special Court for Sierra Leone defined the elements of rape as including "nonconsensual penetration" of the victim,[57] although like the *ad hoc* tribunals, the Special Court acknowledged that "[c]onsent of the victim must be given voluntarily, as a result of the victim's free will, assessed in the context of the surroundings", and that "in situations of armed conflict, coercion is almost always universal".[58] Finally, while the ICC's Elements of Crimes do not explicitly require that the prosecution establish lack of consent,[59] it does require a showing that the perpetrator committed a physical invasion of a sexual nature against the victim "by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent".[60] Notably, the court has yet to interpret this phrase, and, as one commentator has noted, there is a risk that "judges of the ICC will deviate from the more principled focus on coercion… and will [instead] attempt to embrace, in a single test, concepts [of non-consent and coercion]"[61] that have marked the jurisprudence of the *ad hoc* tribunals.

Though limited access has circumscribed our ability to draw too many conclusions, the archives we have been able to examine thus far suggest that the way in which post-World War II cases approached issues of consent could be of interest to contemporary tribunals

[54] *Kunarac* (n 21) para 460; *Prosecutor* v. *Gacumbitsi* (Appeal Judgment) ICTR-2001-64-A (7 July 2005), para 153.

[55] *Ibid.*, *Gacumbitsi*, para 55.

[56] For a discussion of the non-consent issue in the jurisprudence of the international tribunals, see generally K. O'Byrne, 'Beyond Consent: Conceptualising Sexual Assault in International Criminal Law' (2011) 11 *International Criminal Law Review* 500–502, 504–508.

[57] *Brima* et al. (n 21) para 693.

[58] *Ibid.*, para 694.

[59] Articles 7(1)(g)-(1), 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1 Elements of Crimes of the ICC (n 19).

[60] *Ibid.*

[61] Byrne (n 56) 513.

struggling with the issue of consent in conflict-related rape cases. The UNWCC-supported cases deal with situations ranging from forcible rapes committed with the use of physical force or firearms[62] to cases alleging the use of alcohol or drugs, rendering the victim unable to consent,[63] to cases in which threats to family members were used to compel victims into sexual intercourse.[64] One such case – involving a threat to a family member – was the Australian case of Yoshio Yaki mentioned above, who was tried in Rabaul in Papua, New Guinea.[65] Yaki was a Japanese Sergeant who admitted to having had sexual intercourse with the victim, Betty Woo, but argued it was with her consent.[66] The brief record of the trial provided to the UNWCC states that Betty Woo provided evidence to the court that Yaki had forced her to have sexual intercourse with him by threatening to behead her husband if she refused.[67] Woo stated that she refused and Yaki tied her to a tree for 3 h and put ants on her face and body.[68] She then returned to where she had previously lived and was told that her husband had been beheaded.[69] She subsequently went to Yaki's place, where she said Yaki forced her to drink, dance, and then have sexual intercourse with him.[70] Yaki denied having tied Woo to a tree and denied knowledge that her husband had been beheaded.[71] Although the trial record is brief and does not describe the court's reasoning in great detail, Yaki was convicted and executed by

[62] *Polish Cases Against German War Criminals*, Reference No.: 5438/P/G/372, Case No. 372; *Greek Cases Against Bulgarian War Criminals*: Registered No. 359,6756/Gr/B/130, Charge No. 451/36, Case No. Gr/B/13; *Danish Charges against German war criminals*, Registered No. 5287/D/G/104, Case Against Kruger, Hans Harry Foul.

[63] *Polish cases against German War Criminals*: Reference No. 5996/P/G/702, Case No. 702; *Greek Cases Against*: *Italian War Criminals*, Registered No. 47, 4553/Gr/It/37, Charge No. 206, Case No. Gr/1/37 (alleging that Italian national Marjoe Di Prima from Palermo, commanding officer of a disarming unit, gave under-age girls cocaine before raping them).

[64] *Case of Yoshio Yaki*, (n 12).

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*

[71] *Ibid.*

hanging on 12 March 1946,[72] suggesting that as early as 1946, courts recognized threats and harm to one's family members as relevant to an analysis of the issue of consent in rape cases.

The relationship between force and consent was a central issue in another UNWCC-supported case, the US case against Guam national Nicolas Sablan, who was charged with assault with intent to rape. In that case, victim Delores Santos Cruz testified that Sablan, who worked for the local police, came to her house, accused her of theft, and threatened to take her to jail.[73] She testified that when she did not admit to the alleged theft, Sablan removed some of his clothing and threatened her, saying, "[i]f you don't consent to do something with me, I will kill you".[74] When asked what Sablan's exact words were, the victim replied, "he wanted to have sexual intercourse with me".[75] The victim also testified that Sablan grabbed her, hit her, threw her down stairs, and threatened her with a dagger he had on his side.[76] Defence counsel argued lack of force, stating:

> Gentlemen, what does assault with intend [sic] to commit rape mean? It means that at the time of the assault the accused must have the intention to ravish or to have sexual intercourse with the woman by violence and against her will. Mere intent to have sexual intercourse is not enough—it must be intent to rape… All that the girl said was that [Sablan] took her by the hand and asked her to have sexual intercourse. She said she did not want to do it—her words were "No, because I promised my mother I would not do that." He then released her hand and insisted no more. Gentlemen, if that is an assault with intent to commit rape, then ninety-nine out of every hundred men walking down the streets today are guilty of assault with intent to commit rape.[77]

The Judge Advocate responded by recounting the victim's testimony regarding Sablan holding both of her hands, slapping her, and threatening to kill her with the dagger he had on his side.[78] Sablan was found guilty, among other crimes, of two counts of assault with

[72] *Ibid.*

[73] *Case of Nicholas T. Sablan*, Record of Proceedings of a Military Commission Convened at Agana, Guam by Order of The Island Commander (30 March 1945) 29–30 <www.fold3.com> WWII JAG Case Files, Pacific-Navy. Note that the JAG record assigns its own page numbering system to the documents which will be cited as 'JAG Record page'. This footnote is to JAG record pp. 40–41.

[74] *Ibid.*, 30, JAG Record p. 41.

[75] *Ibid.*

[76] *Ibid.*

[77] *Ibid.* No page number on document. JAG Record p. 63.

[78] *Ibid.* No page number on document. JAG Record p. 65.

intent to commit rape for this incident,[79] suggesting that the Judge Advocate gave significant weight to the circumstances surrounding the incident when analyzing whether the accused intended to have sexual intercourse with the victim without her consent. In other words, it appears that the Judge Advocate understood the surrounding circumstances as rendering genuine consent implausible, thus enabling a finding of intent to rape on the part of the perpetrator. The very brief details we have about this case as well as the *Yaki* case discussed above suggest that domestic tribunals recognized that threats to the victim or others, and/or taking advantage of surrounding circumstances, could render victims unable to refuse sexual acts. For instance, in at least one case emerging from Yugoslavia, the limited records we have indicate that the accused was convicted for rape where he controlled war-time rations, the victim went to him for food, and the accused "seized the opportunity to rape [the] 13-year-old girl",[80] suggesting the court took into account the coercive environment in determining whether rape had occurred. Of course, more complete records of the UNWCC-supported trials would help provide contemporary tribunals contending with issues of consent and coercive circumstances more information about how these earlier courts addressed these issues.

3.2 *Coercion as an Element of Forced Prostitution*

Forced prostitution is included in the statutes of several contemporary international tribunals.[81] Although no prosecutions of this crime have taken place before these tribunals, the ICC Elements of Crimes defines the crime against humanity of enforced prostitution as requiring, among other elements, that the perpetrator have caused "one or more persons to engage in one or more acts of a sexual nature by force, threat of force or coercion…".[82] Thus, the prosecution of forced prostitution in UNWCC-supported cases – and the way in which the issue of coercion was addressed in those cases – adds to the historical and legal foundations for potential future cases involving this charge before contemporary tribunals.

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[79] *Ibid.,* 39, JAG Record p. 50.

[80] *Yugoslav charges against Italian War Criminals*, Registered No. 235/Y/It/8, Charge No. R/I/8 (25 September 1944).

[81] Rome Statute (n 19) art 7(1)(g); ICTR, Statute (n 17) art 4(e); SCSL Statute (n 20) art 2(g).

[82] Elements of Crimes of the International Criminal Court (n 19), art 7(1)(g)-3.

As noted previously, there were several cases of forced prostitution charged in domestic jurisdictions as part of the UNWCC effort.[83] Additionally, the Commission itself only brought charges in ten cases, and in one of these, forced prostitution was included.[84] Coercion was a central issue in a forced prostitution case that was prosecuted by the US Navy Judge Advocate General Military Commission in July of 1945 and reported to the UNWCC.[85] Samuel Shinohara, a Japanese national and a resident of Guam at the time of the alleged offences, was charged with treason, theft, assault and battery, desecration of a flag, and two counts – or "specifications" – of "taking a female for the purpose of prostitution".[86] The victim with regard to "Specification 1" was a 17-year-old girl named Alfonsina Flores who testified that Shinohara and Sakai – an aide to Governor Hayashi – went to her family's ranch, where they told her mother, in her presence, that they were looking for her 17-year-old daughter.[87] Flores stated that her mother told her she had to go with the men because if she did not, Flores and her whole family would be killed.[88] Flores testified that Shinohara told her mother that she would clean and serve in the house of the Japanese governor and would receive

[83] *Polish Cases Against German Nationals, Reference* No. 6974/P/G/1233, Case No: 1233 (previously submitted as No. 5897/p/g/643 adjourned on 25/7/47 for further information). *France Charges Against German War Criminals*, Registered No. 50/Fr/G/22, Charge No. (7 March 1944); *France Charges Against German War Criminals*, Registered No. 51/Fr/G/23, Charge No. 25 (7 March 1944); *France Charges Against German War Criminals*, Registered No. 54/Fr/G/26, Charge No. 28 (7 March 1944).

[84] UNWCC 10/Com/G/10. The crimes concerned events at Riga at the end of 1941 and the charges were brought against the Nazi official Altemeyer, based upon statements from German officers who were prisoners of the American army in Germany. The Commission brought the matter to the attention of the Soviet authorities. More research is needed into the evidence given to US authorities in Germany and into the Soviet trials in Latvia on this case. The atrocities in and around Riga in December 1941 were notorious as an early example of mass executions.The Commission took up the case in the unusual circumstance where member states sought to draw the attention of a non-member but allied state, the USSR, to a crime. The file contains relevant correspondence.

[85] *Case of Samuel T. Shinohara*, Record of Proceedings of a Military Commission Convened at Agana, Guam, by Order of the Island Commander (28 July 1945) < www.fold3.com >. WWII JAG Case Files, Pacific-Navy. Note that the JAG record assigns its own page numbering system to the documents which will be cited as 'JAG Record page'.

[86] *Ibid.,* 2, JAG Record p. 16.

[87] *Ibid.*, 57, [8]. JAG Record p. 78.

[88] *Ibid.*

the best care.[89] Flores's mother accompanied her along with Shinohara, Sakai, and their driver back to a house referred to as the Kerner House, where Sakai and Hayashi resided when on the island, at which point Flores realized that she "was being turned over to a man".[90] According to Flores's evidence, Shinohara told her then she must listen or she would be beheaded.[91] The Commission asked Flores at what point she understood that she might be required to "serve the sexual appetite of the Japs", to which she responded she knew as soon as she heard Shinohara was looking for a 17-year-old girl.[92]

The Commission then questioned Flores regarding the sexual intercourse that she said took place between her and one of the Japanese men, asking, "[d]id you consent to the wishes of the Jap in this occasion?", to which she responded, "I cried and he started to hold me. I didn't want to yield".[93] The defense questioned Flores regarding her ability to come and go from the Kerner House, to visit her family and to have her family visit her.[94] Flores maintained that Shinohara had threatened to punish her if she left the Kerner House for good and that she feared she or her family would be killed if she did not obey Shinohara.[95] Defence counsel questioned Flores about the money she was given in exchange for housework she did at Kerner House and Flores acknowledged she was paid small amounts on occasion but not what she and her family had been promised.[96] She remained at the Kerner House for six months until Shinohara stopped coming there, at which point she left and did not return.[97] Under the Guam Penal Code applied in this case, Shinohara was charged under Section 266(b), which prohibited taking a female for the purpose of prostitution with her consent procured by misrepresentation.[98] Shinohara was found guilty of two counts of "taking a female for the purpose of prostitution", but with regard to the count

[89] *Ibid.,* 58 [17–18], JAG Record p. 79.

[90] *Ibid.*, [22].

[91] *Ibid.,*.

[92] *Ibid.,* 62 [77–80], JAG Record p. 83. Flores testified that, "I knew they were not going to make a good girl out of me".

[93] *Ibid.,* [83].

[94] *Ibid.*, 59–64, JAG Record pp. 80–85.

[95] *Ibid.,* 61–62, JAG Record pp. 82–83.

[96] *Ibid.*, 59–61, JAG Record pp. 80–82.

[97] *Ibid.,* 63, JAG Record p. 84.

[98] *Ibid.* No page number on document. JAG Record p. 396.

involving Flores, the Commission recharacterized the offence from taking a female for the purpose of prostitution with her consent procured by misrepresentation (a violation of Section 266(b)) to taking a female for the purpose of prostitution against her will and without her consent, which is a violation of Section 266(a).[99] The Commission changed the charge from the theory of misrepresentation to that of non-consent at the same time it pronounced its finding of guilt on this charge.[100]

On 13 October 1945, the Commission's findings of guilt for the two counts of taking a female for the purpose of prostitution, as well as treason and assault and battery were approved by the Island Commander.[101] However, on 30 January 1946, the Commander in Chief of the US Navy Pacific Fleet "disapproved" the conviction for the first count of taking a female for the purpose of prostitution, stating that due to the recharacterization of the crime from "misrepresentation" to non-consent, the defendant had been found guilty of a crime for which he had not been charged, depriving him of the opportunity to prepare a defense.[102] On 24 August 1948, Shinohara's sentence of death by hanging was commuted to 15 years of imprisonment.[103] While issues of fairness and the rights of the accused were the primary focus of the Commander's review of the case, the case highlights interesting factors that may emerge in contemporary cases involving enforced prostitution, including the extent to which a broader situation of armed conflict or wartime occupation impacts the ability of a victim to leave a situation of forced prostitution,[104] the ways in which individuals in positions of power may leverage coercive circumstances to compel a victim into forced prostitution, as

[99] *Ibid.*

[100] *Ibid.*

[101] *Ibid.* No page number on document. JAG Record p. 287.

[102] *Ibid.* No page number on document. JAG Record pp. 287 and 396.

[103] *Ibid.* No page number on document. JAG Record p. 289.

[104] Another UNWCC case suggests the possible consideration of the court of a situation involving coercive circumstances. In a Polish case against a German national, forced prostitution charges were brought alleging that the accused – Dr. H. Wilhelm, "while administrating" the Botanic Garden in Krakow, forced the women working at the Botanic Garden into prostitution by threatening to send them to forced labour camps or denounce them to the Gestapo if they refused. This threat and the broader context of intimidation may have played a role in the case, although complete trial records are necessary to draw any conclusions. *Polish Cases against German War Criminals*, Reference No. 6974/P/G/1233, Case No. 1233 (previously submitted as no. 5897/p/g/643 adjourned on 25 July 1947 for further information).

well as the different ways in which forced prostitution can occur, *i.e.,* not only in formal brothels but, as in this case, a residence. Importantly, the analysis of these issues may also be relevant to cases before contemporary tribunals involving charges that share aspects of forced prostitution, such as enslavement or sexual slavery.[105] As such, more information regarding UNWCC-supported forced prostitution cases[106] could offer important guidance to contemporary tribunals dealing with these issues.

IV THEORIES OF CRIMINAL RESPONSIBILITY FOR SGBV CRIMES

The jurisprudence of contemporary international tribunals has recognized that an accused need not have physically perpetrated a crime in order to be found directly liable for that crime. Thus, in addition to convicting the accused for physically perpetrating crimes of sexual violence, the tribunals have held accused criminally responsible for instigating, ordering, and aiding and abetting such crimes.[107] In

[105] For instance, imposing on victims a "deprivation of liberty" – an element of enslavement and sexual slavery under art. 7(1)(c) and 7(1)(g)-2 of the Elements of Crimes of the ICC (n 19) – often involves evidence similar to that used to prove that victims were "forced" into prostitution; see Elements of Crimes of the ICC, art. 7(1)(g)-3 (requiring proof that the "perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent"). See, e.g., *Prosecutor* v. *Kunarac* (Appeal Judgment), IT-96-23 & IT-96-23/1-A (12 June 2002), para 108, where the accused argued on appeal that they should not have been convicted of enslavement because "the victims testified that they had freedom of movement within and outside the apartment and could therefore have escaped or attempted to change their situation".

[106] *Polish Cases against German War Criminals*, Reference No. 6974/P/G/1233, Case No. 1233 (previously submitted as No. 5897/p/g/643 adjourned No. 25 July 1947 for further information). *France Charges Against German War Criminals*, Registered No. 50/Fr/G/22, Charge No. (7 March 1944); *France Charges Against German War Criminals*, Registered No. 51/Fr/G/23, Charge No. 25 (7 March 1944); *France Charges Against German War Criminals*, Registered No. 54/Fr/G/26, Charge No. 28 (7 March 1944).

[107] *Prosecutor* v. *Gacumbitsi* (Trial Judgment) ICTR-2001-64-T (17 June 2004) [292]; *Akayesu* (n 21), para 692; *Gacumbitsi* (Appeals Judgment) (n 54), paras 185–187; *Prosecutor* v. *Nikolic* (Sentencing Judgment) IT-94-2-S (18 December 2003), para 119.

addition, under the statutes of various international criminal bodies, superior responsibility for the acts of a subordinate can be established where there is a military commander or other superior who has effective control over the subordinate, the superior knew or should have known that the subordinate had committed or was about to commit a crime, and the superior failed to take necessary and reasonable measures to either prevent the crimes from being committed or punish their commission.[108] This has had significant consequences for the prosecution of crimes of sexual violence committed in the context of conflict, mass violence, or repression, as such crimes are often tacitly encouraged or tolerated, even if not directly perpetrated or officially sanctioned, by the accused in positions of authority.

However, considerable challenges remain in the effort to hold perpetrators – particularly senior military and civilian officials – accountable for SGBV crimes. For instance, defendants charged with superior responsibility for rape or other acts of sexual violence often argue they were unaware that their subordinates were committing such acts and, thus, should not be held criminally responsible for such crimes.[109] Although the tribunals have recognized that the knowledge element of the superior responsibility test can be established through circumstantial evidence,[110] recent jurisprudence suggests that contemporary tribunals sometimes require direct evidence of such knowledge in cases involving sexual and gender-based violence. For instance, in the *Kajelijeli* case, the ICTR refused to find that the accused knew or had reason to know of numerous acts of sexual violence committed by his subordinates despite significant evidence tendered in support of his knowledge of the crimes. For instance, the Chamber heard testimony placing him at the scene of the rapes or in the

[108] See Rome Statute (n 19) art 28; ICTY Statute (n 17) art 7(3) ("The fact that any of the acts referred to in articles 2–5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"); ICTR Statute (n 17) art 6(3) (same language as ICTY Statute art (7)(3).

[109] See e.g. *Akayesu* (n 21), paras 451–460; *Prosecutor* v. *Delalic* (Appeals Judgment) IT-96-21-A (20 February 2001), paras 383–393. See also C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts* (Leiden, Martinus Nijhoff Publishers, 2012).

[110] See e.g. *Prosecutor* v. *Galic* (Appeal Judgment) IT-98-29-A (30 November 2006), paras 117, 182 n 518. (affirming, at least in principle, that a conviction of superior responsibility may be made on the basis of circumstantial evidence alone).

immediate vicinity of the rapes[111] and indicating that he had been present when his subordinates had told victims that they would be sexually assaulted,[112] as well as other evidence that he was ''informed of all the acts perpetrated by his [subordinates]'', was in ''permanent contact'' with them, and received reports from them on what they had done.[113] Thus, although the tribunals have recognized that circumstantial evidence can be used to prove a superior had reason to know crimes had been or were about to be committed by his subordinates, here the tribunal appeared to reject that standard, requiring direct evidence of a superior's knowledge of his subordinates' actions.[114]

Notably, many of the theories of liability used by contemporary tribunals today were used in the UNWCC-supported cases. Indeed, reports from national jurisdictions to the UNWCC concerning rape charges suggest these cases encompassed a broad spectrum of modes of liability, including direct perpetrators charged with committing the crime, commanders charged under superior responsibility, and other characterizations of participation that constitute pre-cursors to joint criminal enterprise such as ''common design''.[115] The brief facts given

[111] *Prosecutor* v. *Kajelijeli* (Judgment, dissenting opinion of Judge Ramaroson) ICTR-98-44A-T (1 December 2003), paras 17, 19, 37, 42, 73.

[112] ibid [19, 33, 38].

[113] ibid [17, 39].

[114] *Prosecutor* v. *Kajelijeli* (ICTR Judgment) ICTR-98-44A-T (1 December 2003) [683, 924].

[115] *Polish Cases Against German War Criminals* Reference No. 5229/P/G/308, Case No. 308; Reference No. 5523/P/G/433 (explaining that 'The phrase 'Common Design', where used in connection with the perpetrators, means that the said perpetrators are charged with violation of the laws and usages of war in that they, acting in pursuance of a common design to commit the acts hereinafter alleged and as members of the Gestapo Staff and Command in Cracow did, between November 1939 and about February 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of civilian nationals of nations then at war with the German Reich, to cruelties and mistreatment, including killings, death by execution, beatings, tortures, starvation, abuses and indignities'). The language employed suggests this mode of liability overlaps with current categories of criminal participation including aiding and abetting as a form of individual criminal responsibility and joint criminal enterprise. See e.g. Rome Statute (n 19) art 25; ICTY Statute (n 17) art 7(1); ICTR Statute (n 17) art 6(1) cf jurisprudence regarding joint criminal enterprise e.g. *Prosecutor* v. *Simic et al*. (ICTY Judgment) IT-95-9-T (17 October 2003) [149] (finding that terminology such as 'common purpose' or 'acting in concert together and with others' connotes joint criminal enterprise liability). For more on the development of this mode of liability at the UNWCC, see the contribution by Kip Hale and Donna Cline, in this volume.

in some of the reports from the member states to the UNWCC reference many prosecutions for direct perpetration of rape, such as in the US prosecution of Guam national Nicholas Sablan,[116] the Australian prosecution of Japanese nationals,[117] at least one French case,[118] more than one Polish case[119] and a Danish case against a German officer.[120] In addition, several Greek cases were brought against Bulgarian nationals for individually perpetrating rape.[121] In

[116] *Case of Nicolas T. Sablan* (n 73).

[117] *Australian Chagres against Japanese War Criminals*, Registered No. P16/A/J/16, Charge No. 17 (in which 15 Japanese marines were charged, 10 for allegedly raping one woman and 5 for raping another woman, both natives in Lakona, New Guinea).

[118] *France Charges against German War Criminals*, Registered No. 5981/Fr/G/2099, Charge No. 2321 (in which a German national was accused of raping a 20-year-old woman).

[119] Reference No. 5514/P/G/424, Case No. 424.

[120] Registered No. 5287/D/G/104 against Hans Harry Foul Kruger. The report states that on 26 April 1945, ''the accused dressed in the uniform of the German police accosted in 2 cases women which he happened to come across in the street and threatening to use his pistol he forced them to sexual intercourse''.

[121] Greek Cases against Bulgarian War Criminals, Registered No. 3733/Gr/B/64, Case No. B/63 and 285/24 (brought against a Bulgarian mayor of Orphanos and a Corporal of the gendarmerie for raping four women in Orphanos); Registered No. 3758/Gr/B/89, Case No. B/63 and 285/24 (brought against Boris Tsernosemski, ''president of the Community of Siderohorion Kavalla'' for raping two women); Registered No. 4065/Gr/B/105, Case No. B/63 and 285/24 (against Lieutenant Gregory Solef for raping two women and castrating a priest, among other offences); Registered No. 277, 5025/Gr/B/118, Charge No. I4/46, Case No. Gr/B/118 (against a Sergeant-Major of the Gendarmerie, Stephan Slatef for raping an 18-year-old girl); Registered No. 398 7063/Gr/B/156, Charge No. 491/46, Case No. Gr/B/157 (against Ivan Georgi Katsarov in Stavroupoli, who was accused of raping several Greek women, including one who was under age at the time). Some Greek cases involving direct perpetration allege that the rapes resulted in the deaths of the victims. Registered No. 359: 6756/Gr/B/130, Charge No. 451/36, Case No. Gr/B/13 (a case brought against Nicola Yantzev, a rural guard in Nea Santa, who was accused of going in July 1942 to the house of Constantia Bika where he raped and assaulted her, resulting in her death some days later from hemorrhage). See also Registered No. 323: 6957/Gr/B/151, Charge No. 360/46, Case No. Gr/B/152 (a case against Kosta Mitsev, a Gendarme in Doxato, who was accused of entering by force the house of Nicolaos Pispas in December 1942 where he allegedly raped Pispas's daughter Polyxeni several times, resulting in her death ''some hours later''; Registered No. 323: 6961/Gr/B/155, Charge No. 360/46, Case No. Gr/B/156 (a case against Gendarme Petko Stefan Netev for the alleged rape, in February 1943, of Eftymia Lazaridis, who afterward committed suicide). It should be noted that the record does not indicate any murder charges for the resulting deaths in any of these cases.

addition to these prosecutions for direct perpetration of rape, there were several UNWCC-supported prosecutions of commanders who were accused of superior responsibility for rape. For example, several Yugoslavian cases were brought against lieutenants in the German and Italian military for widespread acts of violence against whole villages, including rapes.[122] In one such Yugoslavian case against the chief of the Gestapo in Leskovac for several crimes, including the destruction of houses, pillaging, murder, and the deportation of civilians as well as the rapes of at least two women by Albanian soldiers, the report to the UNWCC alleges that the defendant was responsible for these crimes "[a]s leader of the German and Albanian soldiers".[123]

Just as in many contemporary cases of rape as an international crime, superiors in UNWCC-supported cases denied knowledge of acts of sexual violence committed by their subordinates.[124] For instance, in the case mentioned above brought by the Chinese War Crimes Military Tribunal against Japanese officer Takashi Sakai, the accused pled not guilty to rape and other crimes on the grounds that he was not responsible for the acts of his subordinates as he had no knowledge of them.[125] This plea was rejected and Sakai was found guilty of "inciting or permitting his subordinates to… rape, plunder and deport civilians".[126] As cited above, the report on Sakai's trial

[122] Registered No. 7454/Y/G/496, Case No. R/N/630 (Yugoslavian case against German national).

[123] Yugoslav charges against German war Criminals, Registered No. 7408/Y/G/480, Case No. R/N/614.

[124] The widely reported US case against General Tomoyuki Yamashita is another example of a UNWCC-supported case in which the accused denied knowledge of the crimes of his subordinates, including rape. *Law Reports of Trials of War Criminals Selected and prepared by The United Nations War Crimes Commission* Vol IV (His Majesty's Stationery Office, 1948) 4 (detailing the charges against Yamashita, stating that members of the armed forces of Japan under his command committed various acts which Yamashita allegedly "permitted" including "[t]orture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children"); 35 (summarizing the defence position that Yamashita could not be held accountable for acts his subordinates committed 150 miles away and the Commission's finding that "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them").

[125] *Takashi Sakai* (n 12).

[126] *Ibid.,* 4.

submitted by the Chinese War Crimes Military Tribunal to the Commission states that the Tribunal concluded that:

> In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, [Sakai] had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity… That a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle. It is inconceivable that he should not have been aware of the acts of atrocities committed by his subordinates… All the evidence goes to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war.[127]

Thus, for the purpose of establishing superior responsibility, the Tribunal in this case applied this mode of liability to the offence of rape in the same way it applied it to the other offences charged. The Tribunal seems to acknowledge that once the defendant gave his subordinates *carte blanche* to commit unlawful killings and other atrocities, he should have known rapes and other violations would occur and could, therefore, be held responsible for these offences as a result. As contemporary courts continue to address cases involving superior responsibility for rape and other acts of sexual violence, this example lends support to the notion that as early as the 1940s, courts have recognized that superiors should be held criminally accountable for failing to prevent or punish these offences and that the same standard of evidence should be used for cases involving SGBV crimes as those involving other offences.

V TREATMENT OF SGBV VICTIMS AS WITNESSES

The evolution of protections for SGBV victims as witnesses in both domestic and international tribunals has included a wide range of support services, privacy mechanisms, and the promulgation of rules with regard to the questioning of witnesses.[128] A rule common to

[127] *Ibid.*, 5.

[128] Domestic protections include ‘‘rape shield laws’’ in place in many jurisdictions of the United States, which limit the nature of the questions victims of sexual assault or rape can be asked. For an overview of these laws, see ‘Rape Shield Statutes’ <http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf>. The UK has similar protections under Section 41 of the Youth Justice and Criminal Evidence Act 1999 <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-proc-rules-2013-part-36.pdf>. For an overview of EU countries’ laws on this

many domestic jurisdictions and incorporated into the rules in force at the *ad hoc* tribunals[129] and the ICC[130] prohibits questions regarding the victim's prior sexual history. The UNWCC cases reveal how some of the national courts handled the questioning of SGBV victims prior to the creation of such codified protections. While some instances illustrate the gender stereotypes of the times, others demonstrate that even as early as the 1940s, courts understood that invasive questions violated victims' dignity and rights.

Footnote 128 continued
issue, see 'The Legal Process and Victims of Rape: A Comparative Analysis of the Laws and Legal Procedures Relating to Rape, and their Impact Upon Victims of Rape, in the Fifteen Member States of the European Union' <http://www.drcc.ie/wp-content/uploads/2011/03/rapevic.pdf>. For protections in international tribunals, see International Criminal Court Rules of Procedure and Evidence U.N. Doc. PCNICC/2000/1/Add.1 (2000) Rule 16(2) which obligates the Registrar to "[take] gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings". See also rule 87, which provides that the Chamber may order protective measures such as expunging a victim or witness's identifying information, use of a pseudonym, non-disclosure orders, and testimony via closed-circuit television or videoconferencing or *in camera*. Rule 88(1) provides that the "Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence". See also rule 75 of the ICTY Rules of Procedure and Evidence (22 May 2013) IT/32/Rev. 49 (providing for general protections for all victims and witnesses, stating that a Chamber may order protective measures including the use of a pseudonym, the redaction of identifying information from public records, or the giving of testimony through image- or voice- altering devices or closed circuit television. See also rule 75 of the Rules of Procedure and Evidence of the ICTR (adopted on 29 June 1995; as amended on 10 April 2013) U.N. Doc. ITR/3/REV.1 (using the same language as ICTY rule 75); rule 34(A)(ii) of the ICTY Rules of Procedure and Evidence provides that the Victim Witness Support Unit shall "provide counselling and support for [victims and witnesses], in particular in cases of rape and sexual assault". See also ICTR rule 34 (A)(ii), which provides for the Victim Witness Support Unit to provide "physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault".

[129] *Ibid.* Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, rule 96(iv) ("Prior sexual conduct of the victim shall not be admitted in evidence or as defence".); Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, rule 96(iv) contains the same language.

[130] Rules of Procedure and Evidence for the International Criminal Court (n 128), rule 70(d) ("Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness").

In the *Shinohara* case discussed above,[131] there were two counts, or ''specifications'', of ''taking of a female for the purpose of prostitution''. While the first specification involved the aforementioned victim Alfonsina Flores, the second count involved a victim named Nicholasa Mendiola, a woman whose reputation was thoroughly examined during the course of the trial and again on appeal.[132] During cross examination, the defense counsel asked the victim ''[p]rior to the Japanese occupation, have you ever received any physical examination at the hospital here in Agana?''[133] The victim responded, ''[w]hat kind of physical examination. There were many physical examinations''.[134] The defense counsel asked ''[f]or venereal disease?'' to which the victim responded, ''I do not want to answer that question. It lowers my reputation but if I must answer it then I will''.[135] The record then states that, ''[t]he commission announced that the witness did not have to answer the question.''[136] While contemporary courts in many jurisdictions would have disallowed the question to begin with, the fact that the Commission ruled that the victim did not have to answer the question suggests that the Commission understood that respect for victims' dignity required it to impose some limitations on the questioning by defense counsel.

In another US case based in Guam, Guam national Nicolas Sablan was charged with two counts of assault with intent to rape under the Guam penal code.[137] Count 2 involved a victim named

[131] *Shinohara* case (n 85).

[132] *Ibid.,* 2, JAG Record 16 (charging document); 74–80, JAG Record 95–101, (trial record); 43, JAG Record p. 372 (appeals record). In Shinohara's appeal, defence counsel cited the argument put forth by Shinohara's defence counsel at trial, who asserted the following: ''Gentlemen, a woman who has been convicted of vagrancy before the war, is unmarried at the time but the mother of a 12 year old child, had a venereal examination before the war, and who went to Piti to look over a whorehouse, and two weeks later went to stay there and stayed two days and nights without working, is not a person who entered a life of prostitution under duress.... This unfortunate woman knew what work she was to do and entered it voluntarily. As to her credibility, I call your attention to the fact that upon cross examination, in answer to the question: 'Have you ever been convicted of a crime?' she said, 'No'. Recall the testimony of Sgambelluri, who said she had been convicted of vagrancy before the war''. Document 43, JAG Record 372.

[133] *Ibid.,* 78, JAG Record 99.

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

[137] *Sablan* (n 73) 2, JAG Record p. 11.

Agueda Duenas Diego.[138] During cross-examination, the defense counsel asked Diego if the accused, Sablan, had previously spent the night with her, prior to the night of the alleged assault.[139] The Judge Advocate objected to the question, stating it was irrelevant and improper, but the Military Commission overruled this objection,[140] although it then advised the victim that "she could claim her constitutional rights and refuse to answer any question that might tend to degrade or incriminate her".[141] The victim then answered that the accused had slept there once.[142] She was asked if he slept there more than once, to which she responded "no".[143] She was then asked if she had been having sexual relations with another man named Shimada, which she refused to answer "on the ground that it might tend to degrade her".[144] The question was not pressed further. Although the Commission allowed a number of intrusive questions, it made clear that the victim had the right not to answer questions that "might tend to degrade… her". Contemporary cases demonstrate that defense counsel continue to press victims on their prior sexual histories and to object to rules prohibiting such lines of questioning.[145] The UN-WCC-supported cases indicate that, although only recently codified in the rules of some contemporary tribunals, the practice of pro-

[138] *Ibid.,* 34, JAG Record p. 45. The charges identify this victim as Ida Duenas Diego but she gives her name as Agueda Duenas Diego during her testimony. See 2, JAG Record 11.

[139] *Ibid.,* 34–35, JAG Record pp. 45–46.

[140] *Ibid.*

[141] *Ibid.*

[142] *Ibid.,* 35 [26–27], JAG Record p. 46.

[143] *Ibid.*, [27].

[144] *Ibid.,* [37].

[145] *Prosecutor's Office of Bosnia and Herzegovina* v. *Zrinco Pincic* (Court of Bosnia and Herzegovina Appellate Verdict) KRZ-08-502 (28 November 2008) [10] (detailing argument on appeal by the defence that the Trial Panel erred in limiting the Defence's cross-examination's of Witness A regarding her prior sexual history). The Appellate Panel cited article 264 of the Criminal Procedure Code (CPC) of Bosnia and Herzegovina (BiH), which states, in relevant part, that the defence is not permitted to ask the complaining witness about "any sexual experiences prior to the commission of the criminal offence in question. No evidence offered to show the injured party's involvement in any previous sexual experience, behavior, or sexual orientation shall be admissible". *Ibid.,* [12]. The Appellate Panel found that the Trial Panel did not err by limiting cross-examination to exclude questioning about previous sexual acts and that it properly prevented defence counsel from questioning the expert witness on prior rapes suffered by Witness A, pursuant to article 264 of the CPC of BiH. *Ibid.,* [13].

tecting witnesses from degrading questions dates back to the post-World War II era. As such, they reinforce rulings issued by tribunals that follow this practice and offer tribunals that have not yet codified such rules important precedent when dealing with this issue.

VI CONCLUSION

As documents relevant to UNWCC prosecutions become increasingly available for review and analysis, the varying ways in which the crimes of rape and enforced prostitution have been defined and prosecuted may offer useful guidance for contemporary tribunals faced with adjudicating similar crimes. Indeed, the fact that these offences were included in the list of war crimes agreed upon by UNWCC member states and that charges for these crimes were brought by prosecutors in a wide range of jurisdictions, resulting in many successful convictions, provides important precedent for contemporary courts and tribunals facing *nullem crimen* challenges in SGBV cases. Moreover, the ways in which these jurisdictions defined SGBV offences in their domestic or military codes – and, in particular, how they approached issues of consent and coercion – could offer important guidance to contemporary tribunals dealing with these issues. Similarly, the application of various modes of liability to crimes of sexual violence in UNWCC-supported cases provides contemporary tribunals not only a better understanding of the roots of current concepts of criminal culpability but also important support for the proposition that the same standard of evidence should be used to hold perpetrators responsible in cases involving SGBV crimes as those involving other offences. Finally, the UNWCC-supported cases indicate that, although only recently codified, the practice of protecting witnesses from degrading questions was observed as early as the post-World War II era, reinforcing rulings issued by contemporary tribunals that follow this practice and offering tribunals that have not yet codified such rules important precedent when dealing with this issue.

The importance of the UNWCC-supported cases for the prosecution of SGBV cases before contemporary tribunals cannot be overstated. For centuries, acts of sexual violence were viewed as "a detour, a deviation, or the acts of renegade soldiers … pegged to private wrongs and … [thus] not really the subject of international

humanitarian law''.[146] Indeed, such crimes were often perceived as ''incidental'' or ''opportunistic'' in relation to other ''core'' crimes.[147] Even when recognized as criminal, SGBV offences committed in the context of conflict or mass violence are often tacitly encouraged or tolerated, making it challenging for prosecutors to link the perpetrator with the crime. Not surprisingly, commentators have noted that while there have been significant improvements in the prosecution of SGBV crimes by contemporary tribunals, particularly in the last 15 years,[148] these cases continue to be plagued by prosecutorial omissions and errors as well as by a tendency on the part of the judges to require that the prosecution meet higher evidentiary standards in these cases than in other types of cases.[149] That UNWCC

[146] See P. V. Sellers, 'Individual(s') Liability for Collective Sexual Violence', (2004) *Gender and Human Rights* 153, 190; see also, R. Rhonda, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law', (2000) 46 *McGill Law Journal* 217, 223 (noting that only after rape began being discussed as a ''weapon of war'' in the former Yugoslavia was it transformed ''from private, off-duty, collateral, and inevitable excess to something that is public or 'political' in the traditional sense''); Press Release, Human Rights Watch, *Human Rights Watch Applauds Rwanda Rape Verdict* (1 September 1998) <http://www.hrw.org/press98/sept/rrape902.htm> (noting that ''[d]espite these legal precedents, rape has long been mischaracterized and dismissed by military and political leaders as a private crime, the ignoble act of the occasional soldier. Worse still, it has been accepted precisely because it is so commonplace. Longstanding discriminatory attitudes have viewed crimes against women as incidental or less serious violations').

[147] See P. V. Sellers and K. Okuizumi, 'International Prosecution of Sexual Assaults', 7 *Transnational Law and Contemporary Problems* 45, 61–62 (1997) (noting that ''[s]exual assaults committed during armed conflict are often rationalized as the result of a perpetrator's lust, libidinal needs, or stress''); C. Eboe-Osuji, 'Rape and Superior Responsibility: International Criminal Law in Need of Adjustment', International Criminal Court, Guest Lecture Series of the Office of the Prosecutor at 6 (June 20, 2005) (arguing that ''the theory of individualistic opportunism proceeds … from the … modest premise that rape is a crime of opportunity which, during conflict, is frequently committed by arms-bearing men, indulging their libidos, under cover of the chaotic circumstances of armed conflict'').

[148] See C. Steains, 'Gender Issues,' in R. S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (The Hague, Kluwer, 1999) 361–364 (concluding that because earlier international law failed to do so, the Statute's inclusion of ''a range of sexual violence crimes, in addition to rape, under crimes against humanity creates an important new precedent'').

[149] See e.g., S. SáCouto and K. Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court', (2009) 17 *American University Journal of Gender, Social Policy and Law* 337–359. Indeed, despite evidence of the widespread use of rape in the Balkans conflict and during the Rwandan genocide, the record is quite mixed with respect to the ability of

member states investigated and prosecuted these crimes nearly 70 years ago, holding both direct and indirect perpetrators responsible for such crimes and offering some level of protection to witnesses participating in these cases, is incredibly significant in light of this history.

In addition to the value of the UNWCC archives for tribunals prosecuting conflict-related SGBV cases today, the jurisprudence emerging from UNWCC-supported cases may also be quite relevant to contemporary policy debates. Indeed, the active role of states in pursuing crimes of sexual violence in the 1940s provides them with a stronger foundation for pursuing such crimes today than they may realize. Indeed, four permanent members of the UN Security Council – China, France, the United Kingdom and the United States – were members of the UNWCC. They, and Russia, were also party to the Hague Conventions, which were relied upon by many states to prosecute rape and forced prostitution. Similarly, a number of states that are members of the European Union – including Belgium, France, Greece, Italy, Poland, and the United Kingdom – endorsed rape and forced prostitution as war crimes in the 1940s. To the extent that the issue of sexual violence committed in the context of conflict or mass violence continues to be the subject of debate before UN and European Union forums, the valuable work carried out in the 1940s could be incredibly useful.

Footnote 149 continued
the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to successfully prosecute sexual violence. For example, despite the widely acknowledged use of rape and sexual violence as an integral part of the genocide in Rwanda, ten years into the Rwanda tribunal's history, only 10% of completed cases resulting in a sentence contained rape convictions and "[n]o rape charges were even brought by the Prosecutor's office in 70 per cent of … adjudicated cases". B. Nowrojee, "'Your Justice Is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?' (2005) 3 U.N. Research Institiute for Social Development.