

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME

ACKNOWLEDGING FORCED PREGNANCY AS A
DISTINCT CRIME IN THE ECCC PROCEEDINGS



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The Cambodian Human Rights Action Coalition (CHRAC) was created in August 1994 by a group of local non-governmental organizations and associations for the purpose of joint cooperation in the promotion of human rights, democracy and development in the Kingdom of Cambodia. Since its establishment, new members have successively joined CHRAC. Today, CHRAC has

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Since 2008, CHRAC and its members have been actively involved with the trials at the Extraordinary Chambers in the Courts of Cambodia by monitoring the Court's work, engaging in a number of outreach activities, and assisting Khmer Rouge victims to become admitted as civil parties at the Tribunal. Currently, CHRAC's Khmer Rouge Tribunal Project is focusing on three main fields: (1) outreach (2) promotion of the legacy of the Tribunal, and (3) judicial reparation projects for civil parties.

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TABLE OF CONTENTS

I	ACRONYMS	1
II	EXECUTIVE SUMMARY	3
III	INTRODUCTION	5
IV	FORCED PREGNANCY UNDER INTERNATIONAL CRIMINAL LAW	7
	A. DEFINITION	
	B. FORCED PREGNANCY BEFORE INTERNATIONAL CRIMINAL COURTS	
V	FORCED PREGNANCY DURING THE KHMER ROUGE REGIME	11
	A. TRANSFORMATION OF FAMILY LIFE DURING DEMOCRATIC KAMPUCHEA	
	1. Dismantling the Family	
	2. Forced Marriages	
	3. Reproduction of the Population	
	B. RAPE WITHIN FORCED MARRIAGES	
	C. FORCED PREGNANCIES	
VI	ACKNOWLEDGING FORCED PREGNANCY AS A DISTINCT CRIME IN THE ECCC PROCEEDINGS	23
	A. FORCED PREGNANCY AS AN INHUMANE ACT	
	B. ELEMENTS OF THE CRIME	
	1. Forcible impregnation	
	2. Unlawful confinement	
	3. Specific intent	
	4. <i>Chapeau</i> requirements	
	C. FORCED PREGNANCY BEFORE THE ECCC	
	1. Case 002	
	(i) Investigative stage	
	(ii) Trial stage: recharacterisation and cumulative convictions	
	2. Cases 003 and 004	
VII	CONCLUSIONS	35
VIII	RECOMMENDATIONS	37
IX	BIBLIOGRAPHY	39

I

ACRONYMS

CPK	COMMUNIST PARTY OF KAMPUCHEA
CPL	CIVIL PARTY LAWYERS
CPLCL	CIVIL PARTY LEAD CO-LAWYERS
DK	DEMOCRATIC KAMPUCHEA
ECCC	EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
OCIJ	OFFICE OF THE CO-INVESTIGATING JUDGES
OCP	OFFICE OF THE CO-PROSECUTORS
TC	TRIAL CHAMBER
TPO	TRANSCULTURAL PSYCHOSOCIAL ORGANISATION
SCSL	SPECIAL COURT OF SIERRA LEONE
SPSC	SPECIAL PANEL FOR SERIOUS CRIMES IN EAST TIMOR
VSS	VICTIMS SUPPORT SECTION

II

EXECUTIVE SUMMARY

Forced pregnancy in international law

- Forced pregnancy has been long employed as a tool of warfare.
- In spite of this prevalence, forced pregnancy has only emerged as a distinct international crime after the adoption of the Rome Statute of the International Criminal Court in 1998.
- No international or mixed criminal tribunal has prosecuted the crime of forced pregnancy thus far.

Forced pregnancy during the Khmer Rouge regime

- As the Communist Party of Kampuchea (CPK) progressively took control over parts of Cambodian territory, couples were systematically forced into marriages in alignment with party ideology.
- One of the main objectives of forced marriages was the production of children, who would become vital additions to the regime's workforce and revolutionary ranks.
- Newly-wed couples were usually compelled to have sex and consummate their marriages under the threat of punishment.
- An alarmingly high number of forced marriages ended up in forced pregnancies.

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME

- Women victims of forced pregnancy suffered bodily and mental harm as a consequence of the crime, enduring:
 - physical pain as a result of being forced to bear a child during times of starvation and forced labour, without access to health care and being forced to work immediately after delivering their babies;
 - mental suffering, derived from their inability to perform traditional rituals during and after birth work and conflicted feeling arising from loving a child conceived in traumatic circumstances;
 - socio-economic consequences derived from having to raise a child.

Forced pregnancy before the Extraordinary Chambers in the Courts of Cambodia (ECCC)

- The suffering endured by victims of forced pregnancy can only be adequately represented through the application of a specific legal category.
- The crime of forced pregnancy may be prosecuted before the ECCC through the provision that codifies 'other inhumane acts' as a crime against humanity under Article 5 of the ECCC Law.
- The facts incorporated into the Closing Order in Case 002 establish the elements of the crime of forced pregnancy: the forced impregnation and unlawful confinement of women during the Democratic Kampuchea (DK) regime. This sets the basis for a legal recharacterisation of the facts under ECCC Internal Rule 98 (2).
- Forced pregnancy should be further acknowledged as a distinct crime against humanity in the ongoing investigations in Cases 003 and 004.
- The recognition of forced pregnancy as a distinct crime against humanity would reflect the totality of the criminal conduct, the dimension of the crime and its impact on society.

III INTRODUCTION

During the last decade, there has been growing awareness of the issue of sexual and gender-based violence during the Democratic Kampuchea (DK) regime. Research on the topic has demonstrated that a policy was implemented, which aimed to control and regulate the institution of the family through forced marriage. Evidence in Case 002 before the Extraordinary Chambers in the Courts of Cambodia (ECCC) has revealed that couples were often forced to consummate these marriages with the clear objective of producing children for the regime. Women who fell pregnant as a consequence of this policy were forced to bear children under dreadful conditions. This report proposes that these forced pregnancies produce a distinct form of harm, which should be treated as a distinct crime against humanity before the ECCC, both in the ongoing trial in Case 002/02 and in the Cases 003 and 004 under investigation.

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME



IV

FORCED PREGNANCY UNDER INTERNATIONAL LAW

Forcibly impregnating women and compelling them to carry the pregnancies to term has been long employed as a tool of warfare. From the Athenian campaign to kill Melian men and assimilate women into sexual slavery and forced pregnancy, to the use of rape and forced impregnation by the British to break the Scottish clan system, forced pregnancy has been deliberately utilised to disrupt the unity of a cultural group.¹ Forced pregnancy campaigns have also pursued ulterior forms of control over the reproduction of life. This has included the kidnapping of Sabin women by Romans to procreate and augment the population, the raping of slave women in the United States to produce new slaves for their patrons and the forced impregnation of Jewish women during the World War II to obtain foetuses for medical experimentation.² Reports indicate that children were also born as a consequence of rape in Bosnia, Sudan, East Timor, Sierra Leone, Rwanda, Bangladesh and Cambodia.³

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- 1 Robyn Charli Carpenter, 'Forced Maternity: Children's Rights and the Genocide Convention' (2000) 2 *Journal of Genocide Research* 213, footnote 36.
 - 2 Adrien Katherine Wing and Sylke Merchan, 'Rape, ethnicity and culture: spirit injury from Bosnia to black America' (1993-1994) 25 (1) *Columbia Human Rights Law Review* 1, 35; Barbara Bedont and Katherine Hall-Martinez, 'Gender Crimes Under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65, 74; Livy, *The Early History of Rome* (Harmondsworth, 1960) Vol 1, 1.9.
 - 3 R. Charli Carpenter, *Forgetting children born of war: setting the human rights agenda in Bosnia and beyond* (Columbia University Press, 2010); Lydia Polgreen, 'Darfur's Babies of Rape Are on Trial From Birth', *The New York Times* (New York) 11 February 2005; Susan Gail Harris Rimmer, *Transitional Justice and the Women of East Timor* (PhD Thesis, Australian National University, 2008) 298; Miranda Sissons, (East Timor Human Rights Centre Incorporated, 1997); Chris Coulter, *Bush Wives and Girl Soldiers. Women's Lives Through War and Peace in Sierra Leone* (Cornell University Press, 2009); James McKinley Jr, 'Legacy of Rwanda Violence: The Thousands Born of Rape', *The New York Times* (New York)

In spite of this prevalence, forced pregnancy has only emerged as a distinct international crime after the adoption of the Rome Statute of the International Criminal Court in 1998.⁴ Distinct provisions criminalising the discrete crime of forced pregnancy have later been incorporated into the Regulation of the Special Panels for Serious Crimes in East Timor (SPSC) and the Special Court for Sierra Leone (SCSL).⁵

A. Definition

The only existing definition of forced pregnancy in international criminal law is found in the Rome Statute, where the crime is codified both as a crime against humanity and a war crime.⁶ During the negotiations of the Rome Statute, discussions on the issue proved to be one of the most controversial topics.⁷ Some delegations advocated against its inclusion, arguing that it was only a consequence of rape aggravated by the circumstances of the resulting pregnancy, rather than a crime in its own right.⁸

Article 7(2) defines forced pregnancy as the ‘unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other

23 September 1996; Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (1996); Alexandra Takai, ‘Rape and Forced Pregnancy as Genocide before the Bangladesh Tribunal’ (2011) 25 (2) *Temple International Law and Comparative Law Journal* 393.

4 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (‘Rome Statute’); Kirsten Boon, ‘Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent’ (2000-2001) 32 *Columbia Human Rights Law Review* 625, 656; Bedont and Hall-Martinez, above n 2, 66-67.

5 Section 5.1(g) of the Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, UNTAET/REG/2000/15 (6 June 2000) (‘UNTAET Regulation’); Article 2 (g) Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) (‘Statute of the Special Court of Sierra Leone’).

6 Rome Statute art 7 (1) (g) and art 8 (2) (b) (xxii).

7 Bedont and Hall-Martinez, above n 2, 73-74.

8 Alyson M. Drake, ‘Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute’ (2012) 18 (3) *William & Mary Journal of Women and the Law* 595, 619.

grave violations of international law.’⁹ The Elements of Crimes do not further expound this provision.¹⁰

The crime of forced pregnancy includes two separate acts:

- forcible impregnation: falling pregnant as a result of a rape or an illegal medical procedure;
- unlawful confinement: forcibly compelling a woman to carry a pregnancy to term.¹¹

The *actus reus*, however, is not the forced impregnation, but the unlawful confinement of a forcibly impregnated woman.¹² Forced pregnancy under the Rome Statute further requires the additional motivation of ‘affecting the ethnic composition of any population or carrying out other grave violations of international law.’ Such restriction in the scope of the crime was a consequence of the opposition from the delegations of certain states and the lobby of anti-choice groups during the negotiations of the Rome Statute.¹³ No other statutory provision establishes a specific intent for an offence to configure a crime against humanity.¹⁴ This requirement has been the object of strong criticisms for shaping the offence as a crime against a particular ethnic group, rather than focusing on the suffering of women.¹⁵

B. Forced Pregnancy before International Criminal Courts.

No international or mixed criminal tribunal has prosecuted the crime of forced pregnancy thus far.¹⁶ In the *Brima* case before

⁹ Rome Statute art 7 (2).

¹⁰ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford Commentaries on International Law, 2010) 174; International Criminal Court, *Elements of Crimes* (2011).

¹¹ Kai Ambos, *Treatise on International Criminal Law. Volume II: The Crimes and Sentencing* (2014) 102.

¹² Milan Markovic, ‘Vessels of Reproduction: Forced Pregnancy and the ICC’ (2007) 16 *Michigan State Journal of International Law* 439, 442; Boon, above n 4, 660.

¹³ Bedont and Hall-Martinez, above n 2, 74.

¹⁴ Christine Chinkin, ‘Fundamentals of International Criminal Law, Gender-related Violence and International Criminal Law and Justice’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 75, 77.

¹⁵ Drake, above n 8, 617.

¹⁶ Harris Rimmer, above n 3, 298; Schabas, above n 10, 174.

the SCSL, the trial incorporated evidence proving that women victims of forced marriage – known as ‘bush wives’ – were forced to give birth and rear children.¹⁷ However, charges on forced pregnancy did not form part of the indictment.¹⁸

Practitioners in international criminal law continue to perceive this offence as a consequence of other crimes of sexual violence rather than violations of international criminal law in its own right. This still rings true in Cambodia, where forced pregnancy as a distinct crime has yet to be adequately addressed, despite increasing attention to gender crimes.

17 Prosecutor v Brima et al (*Judgment*) (Special Court for Sierra Leone, Trial Chamber II, SCSL-2004-14-16-T, 20 June 2007) (*‘AFRC Trial Judgment’*) [991] [1080] [1082] [1091] [1113] [1184]; *AFRC Trial Judgment* (Justice Teresa Doherty) [30]; Prosecutor vs Brima et al (*Judgment*) (Special Court for Sierra Leone, Appeals Chamber, SCSL-2004-17-A, 22 February 2008) (*‘AFRC Appeals Judgment’*) [190].

18 Prosecutor v Brima et al (*Amended Consolidated Indictment*) (Special Court for Sierra Leone, Prosecutor, SCSL-2004-16-PT, 13 May 2004). The SCSL Appeals Chamber was the first international criminal tribunal to recognise forced marriage as a crime against humanity in its own right. Paradoxically, this entailed a concealment of other types of gender-based violence under the label of a marriage. See *AFRC Appeals Judgment* [197] - [203]; Bridgette A Troy Cronin, ‘What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity’ (2010) 19 (2) *Columbia Journal of Gender and Law* 539, 577-579.

V FORCED PREGNANCY DURING THE KHMER ROUGE REGIME

The main objective of the Communist Party of Kampuchea (CPK) was to transform Khmer society and culture into a new revolutionary order. This new order would be based on the collectivisation of private property and be free from any colonialist or capitalist influence.¹⁹ Accordingly, certain institutions regarded as feudal, such as the village, the pagoda and the family, were to be either dissolved or modified.²⁰ As a powerful institution and the most respected of all relationships in Cambodian traditional society, family was subject to radical changes during this period.²¹ This section analyses the transformation of the family structure during the DK regime to pursue CPK's revolutionary goals.

A. Transformation of Family Life during Democratic Kampuchea

1. *Dismantling the Family*

Family life and individualism were seen as a threat to people's loyalty to the revolution under CPK's ideology.²² In order to ensure

19 For a complete account of the period see David Chandler, *A History of Cambodia* (Westview Press, 3rd ed, 2000) and Elizabeth Becker, *When the War Was Over* (Public Affairs, 1st ed, 1998).

20 Chandler, above n 19, 209; May Mayko Ebihara, 'Revolution and Reformation in Kampuchean Village Culture' in David A. Ablin and Marlowe Hood (eds), *The Cambodian Agony* (Armonk, 2nd ed, 1990) 16, 23.

21 Becker, above n 19, 211; Kalyanee Mam, 'An Oral History of Family Life under the Khmer Rouge' (Working Paper GS 10, Yale Center for International and Area Studies, 1998) 2; Ebihara, 'Revolution and Reformation in Kampuchean Village Culture', above n 20, 28.

22 Chandler above n 19, 209; Ebihara, 'Revolution and Reformation in

individuals' commitment to the revolutionary cause, the CPK attempted to restructure society in the image of one collective family headed by Angkar – literally, 'the Organisation', a term used to describe the Party and its leaders at different levels.²³

Familial relationships were therefore carefully decided by the collective, under the directives of Angkar.²⁴ Since family matters were regarded as key to the success of the revolution, they were strictly monitored and controlled.²⁵ Guidelines were developed to regulate how individuals could choose their spouses and when the appropriate age was to do so.²⁶

Family life, however, was not meant to absorb any of the time required by the revolution.²⁷ Both existing and new families were usually separated through the collectivisation of the work and living arrangements in order to ensure absolute fidelity to the revolutionary cause.²⁸ The effectiveness of terror relied heavily on the destruction of meaningful interpersonal bonds.²⁹

2. Forced Marriages

As the CPK progressively took control over parts of Cambodian territory, couples were systematically forced into marriages

Kampuchean Village Culture', above n 20, 23; Kalyanee Mam, 'An Oral History of Family Life under the Khmer Rouge', above n 21, 3.

23 Becker, above n 19, 225 - 226; Kalyanee Mam, *Democratic Kampuchea (1975-1979): Women as Instruments for Social Change* (Documentation Center of Cambodia, 2000) 33-46; François Ponchaud, 'Social Change in the Vortex of Revolution' in Karl D. Jackson (ed), *Cambodia 1975-1978. Rendezvous with Death* (Princeton University Press, 1989) 151, 164. For a definition of Angkar see Case 002 (*Closing Order*) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case File No.: 002/19-09-2007-ECCC-OCIJ, 15 September 2010), as per amended by the Pre-Trial Chamber on 13 January 2011 ('Case 002 Closing Order') [18].

24 Case 002 (*Revolutionary and Non-Revolutionary: World Views Regarding the Matters of Family Building: An accurate re-print of the Youth issue dated 2 February 1974, CPK East Zone Political-Military Ministry, 2 June 1975*) (Extraordinary Chambers in the Courts of Cambodia, Case File No E3/775).

25 Ibid 3.

26 Ibid 4-5.

27 Becker, above n 19, 211.

28 Phillip Short, *Pol Pol. The History of a Nightmare* (2004) 325-326; Kalyanee Mam, 'An Oral History of Family Life under the Khmer Rouge', above n 21, 3; Becker, above n 19, 211.

29 Hannah Arendt, *On Violence*, cited by Becker, above n 19, 205.

in alignment with party ideology.³⁰ In the majority of cases, couples were contacted shortly before the marriage ceremony and informed that they were to be married.³¹ On certain occasions, the couples had not even seen each other's faces before the wedding.³² Some male cadres asked permission to wed someone of their own choice, while in other cases chiefs of the work camps acted as matchmakers, coupling individuals from the same region.³³ Ceremonies were organised en masse by Khmer Rouge cadres, involving anywhere from two to 300 couples.³⁴ Some victims of forced marriage were forced to include the promise to produce children for Angkar into their marriage vows.³⁵ Refusal to accept the marriage proposed by Angkar often

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- 30 Case 002 Closing Order [216]. For a thorough analysis of forced marriages during the Khmer Rouge regime see Theresa de Langis, Judith Strasser, Thida Kim, Sopheap Taing, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime* (Transcultural Psychosocial Organisation, 2014). TPO's report offers some limitations to the understanding of forced marriage, as all respondents are Civil Party plaintiffs to the ECCC, the ratio of female respondents to male respondents is imbalanced and the research was undertaken with a small sample of respondents. Findings cannot be extrapolated to the total population or to other victims of forced marriage. See also Kasumi Nakagawa, *Gender-based violence during the Khmer Rouge Regime. Stories of survivors from the Democratic Kampuchea* (Phnom Penh, 2nd ed, 2008) 13-18; Beini Ye, 'Forced Marriages as Mirrors of Conflict Transformation' (2011) 23 (4) *Peace Review: A Journal of Social Justice* 469.
- 31 De Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 54.
- 32 The 2000 Cambodia Demographic and Health Survey reported a 59.7 % of women married during the DK regime who met their husbands the day of the wedding. See Patrick Heuveline and Bunnak Poch, 'Do Marriages Forget their Past? Marital Stability in Post-Khmer Rouge Cambodia' (2006) 43 (1) *Demography* 99, 110.
- 33 Peg LeVine, *Love and Dread in Cambodia. Weddings, Births and Ritual Harm under the Khmer Rouge* (NUS Press, 2010) 16. LeVine performs an extensive analysis of cultural disruption in marriages and births during the DK regime. She discards the term 'forced marriages' and suggests instead 'conscripted marriages' as a more accurate term from an anthropological perspective. Nonetheless, LeVine acknowledges that married couples during the DK regime were 'forced out of courtship, forced out of spirit protection; and forced into makeshift extended families.' Her work is illustrative of the harm suffered by couples during the Khmer Rouge regime in the context of what international law defines as forced marriage and forced pregnancy.
- 34 Case 002 Closing Order [844]; LeVine, above n 33, 88.
- 35 Case 002 (Co-Prosecutor's Rule 66 Final Submission) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Prosecutors, Case No: 002/19-09-2007-ECCC/OCIJ, 16 August 2010) ('Case 002 OCP Final Submission') [320]-[322]; de

resulted in rape, imprisonment, torture or death.³⁶

Paradoxically, the main purpose of forced marriages was not to form family units, but to serve as a fundamental means to achieve ‘whatever can be done that is a gain for the revolution.’³⁷ May Mayko Ebihara, who studied a Cambodian village between 1959 and 1960 and returned after the fall of DK, argues that this policy:

- served to control sexuality;
- ensured couples would not be emotionally bonded and safeguarded individuals’ loyalty to the revolution;
- guaranteed an increase in the reproduction.³⁸

3. Reproduction of the Population

The CPK required an increased birth rate to support the agrarian revolution. An estimated 1.3 million Cambodians died between 1970 and 1975, and around two million people deceased due to a lack of medicines and medical services, starvation, execution, or exhaustion from overwork.³⁹ In DK’s propaganda magazine, ‘The Revolutionary Flag,’ the required increase in the population was explained in terms of meeting the needs of Cambodia’s agricultural production.⁴⁰

Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 28, 74, 82; LeVine, above n 33, 199.

36 de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 84-86; Ye, above n 30, 470; Nakagawa, above n 30, 14-15; Case 002 Closing Order [849- [850].

37 Case 002 (CPK Magazine entitled: ‘The Revolutionary Flag’, Issue 11, November 1976) (Extraordinary Chambers in the Courts of Cambodia, Case File no E3/139).

38 Ebihara, ‘Revolution and Reformation in Kampuchean Village Culture’, above n 20, 30.

39 Meng Try Ea identifies 1.3 million people deceased during the Civil War between 1970-1975, and 1 million during the Khmer Rouge regime. See Meng-Try Ea, ‘Recent Population Trends in Kampuchea’ in David A. Ablin and Marlowe Hood (eds), *The Cambodian Agony* (Armonk, 2nd ed, 1990) 3, 6-7. Estimates of the number of people deceased during the DK regime diverge, ranging from 740,000 to 3.3 million people. See Dy Kambohy, *A History of Democratic Kampuchea* (Documentation Center of Cambodia, 2007) 3, footnote 1.

40 Case 002 (CPK Magazine entitled: ‘The Revolutionary Flag’, Special Issue, September 1977) (Extraordinary Chambers in the Courts of Cambodia, Case File no E3/11); Case

In September 1977, Pol Pot, prime minister and highest DK leader, enunciated CPK's goal to increase the population to 20 million within ten to fifteen years.⁴¹ This policy was reiterated by the leader at a national medical conference, and later before the UN by DK's Deputy Minister for Foreign Affairs Ieng Sary.⁴² A witness to Case 002, former member of the revolutionary forces, stated that Pol Pot reaffirmed this policy agenda during a meeting in June 1978.⁴³ This vision drove DK's highest leader to instruct lower level cadres to 'arrange' marriages in order to increase the population.⁴⁴

Forced marriages were designed to play a crucial role in the production of children, who would become vital additions to the regime's workforce and revolutionary ranks.⁴⁵ Individuals whose marriages were 'arranged by Angkar' did not generally enjoy a normal married life. Couples were separated into different work camps a few days after the wedding ceremony, with regular visitations for the husband and wife organised to ensure that they would procreate.⁴⁶ It has been shown that couples were regularly instructed to meet again, usually during the time when women were believed to be fertile.⁴⁷ This further supports the argument for the reproductive purpose of these marriages.

002 (CPK Magazine entitled: 'The Revolutionary Flag', Special Issue, October-November 1975) (Extraordinary Chambers in the Courts of Cambodia, Case File no E3/748); Case 002 (CPK Magazine entitled: 'The Revolutionary Flag', Special Issue, December 1976 - January 1977) (Extraordinary Chambers in the Courts of Cambodia, Case File no E3/25).

41 Case 002 Closing Order [218].

42 Case 002 Closing Order [218]; UN GAOR, 22nd sess, 28th mtg, UN Doc A 32/PV.28 (11 October 1977) [60].

43 Case 002 (Written Record of Witness Interview) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, Case File No E3/4593, 25 February 2010) Answer 4.

44 Ibid.

45 Ebihara, 'Revolution and Reformation in Kampuchean Village Culture', above n 20, 30; Becker, above n 19, 224; Mam, 'An Oral History of Family Life Under the Khmer Rouge', above n 21, 35-36; Ye, above n 30, 470; Case 002/01 (Transcript of Trial Proceedings, Trial Day 179) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 002/19-09-2007-ECCC/TC, 9 May 2013) 119.

46 Kalyanee Mam, *Women as Instruments for Social Change*, above n 23, 35; Becker, above n 19, 257.

47 Case 002 OCP Final Submission [321]; Becker, above n 19, 257.

B. Rape within Forced Marriages

Subsequent to the wedding ceremony, newly-wed couples were usually compelled to have sex and consummate forced marriages under the threat of punishment.⁴⁸ To ensure that couples would have sexual relations after the weddings, Khmer Rouge cadres often spied on couples during the night.⁴⁹

A participant to a study on forced marriages during DK conducted by Transcultural Psychosocial Organisation (TPO) explained how she was coerced into a forced marriage and forced to have sexual relations in order to survive during the regime:

I just accepted the marriage and had sexual relations to save my life. Then I had children with my husband, and that is the reason I continued to live with him.⁵⁰

In her systematic study of weddings and births during the DK regime, Peg LeVine found that 40% of the couples ‘married by Angkar’ were told to have sex by Khmer Rouge cadres.⁵¹ In most cases, it was men who were approached by cadres and told to have sex, while women were not informed.⁵² Most of these couples thought they were being monitored during the night.⁵³

LeVine reports an increase in this practice between January 1977 and the end of the regime, with 60% of the couples being coerced into consummating their marriages.⁵⁴ Respondents within that period accounted for a practise of post-wedding huts being built with the specific purpose of serving as a space

48 Theresa de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 22; Theresa de Langis and Silke Studzinsky, *Briefing Paper on the ECCC, the Cambodian Women's Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime* (2012) [39]; Case 002 Closing Order [1447].

49 de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 54, 78; Theresa de Langis and Silke Studzinsky, *Briefing Paper on the ECCC, the Cambodian Women's Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime* (2012) [39]; LeVine, above n 33, 89.

50 de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 89.

51 LeVine, above n 33, 88.

52 Ibid 89.

53 Ibid 89.

54 Ibid 89.

for the consummation of marriages.⁵⁵ This is consistent with an increase in the birth rate in Cambodia from 1977.⁵⁶

Rape within forced marriages was encouraged and perpetrated with impunity.⁵⁷ Nearly one-quarter (24.5%) of the respondents for TPOs report on forced marriages have been victims of spousal abuse, 21.4% of whom experienced rape and sexual abuse.⁵⁸ A participant to TPO's study on forced marriages reported that two cadres assisted her husband in raping her:

People who were married at that time were treated like animals. We could not protect our bodies [genitals], like our parents had protected our bodies. I was raped and they stayed there to watch... We were forced to mate like dogs and cats.⁵⁹

A respondent to Kasumi Nagakawa's study on sexual and gender-based violence during the DK regime described her ordeal after having been forced to marry:

At the first day after the wedding, he beat me because I did not love him and refused to have sex ... he hit me on the thighs with his hands so I couldn't struggle and it made it easier for him to have sex with me.⁶⁰

DK's mission certainly contemplated gender roles in Cambodian traditional society. Women have been traditionally subordinated to men and expected to comply with a husband's sexual requests. Ebihara notes with regards to conjugal sexual relations that 'married women come to accept it with at least resignation or

55 Ibid 89.

56 According to Meng-Try Ea, the fall in the birth rate deepened after 1973, ranging between 20 and 25 births per 1000 inhabitants from 1976-1978. She reports an increase in the birth rate from mid-1977 to mid-1978 to 50 per inhabitants, which she sees as an indication of a trend depicting 'policies encouraging marriage.' See Meng-Try Ea, above n 39; 6-7.

57 de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 102.

58 Ibid 56.

59 Ibid 98.

60 Nakagawa, above n 30, 13.

equanimity.’⁶¹ It was habitual for a female elder or the accha (lay priest) to inform the new bride of her husband’s prospects during intercourse.⁶² Elder women who were interviewed for a study on sexual beliefs in Cambodia viewed pregnancy as a natural and inevitable consequence of the marriage.⁶³ This is illustrated by the testimony of a woman victim of forced marriage:

We had nothing to eat, so I did not want children but what else could I do? ... I knew we would have children if we had sex but I didn’t know what to do. I have three children with him.⁶⁴

Through forced marriages, the DK regime enacted a state-enforced culture of rape.⁶⁵ Women in forced marriages were forcibly impregnated not only as a consequence of strategic survival choices but also as a result of traditional patriarchal structures that vitiated consent to sexual relations. An alarmingly high number of rapes within forced marriages ended up in forced pregnancies.⁶⁶

3. Forced Pregnancies⁶⁷

The harm that women went through when forced into pregnancies was broader than visible acts of violence. Lack of access to sufficient food and health care facilities was a permanent threat to the health of pregnant women.⁶⁸ A participant to Theresa de Langis’ Oral History Project describes the ordeal that pregnant women went through:

61 May Mayko Ebihara, *Svay. A Khmer Village in Cambodia* (PhD Thesis, Columbia University, 1968) 491.

62 Judith C. Kulig, ‘Sexuality beliefs among Cambodians: Implications for health care professionals’ (1994) 15 (1) *Health Care for Women International* 69, 71.

63 Ibid.

64 Theresa de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 80.

65 Ibid 104.

66 Ibid 14.

67 After this report was sent to the printers, the author became aware of the paper by Kasumi Nakagawa, *Motherhood at War. Pregnancy during the Khmer Rouge Regime* (2015), which should be consulted for a fuller understanding of the harm suffered by pregnant women during the DK regime.

68 LeVine, above n 33, 72.

Some of the pregnant women were swelling because of lack of basic nutrition, like salt and sugar. Khmer Rouge did not care about the health of pregnant women; they focused only on forcing everyone to work, to follow the rule.⁶⁹

A respondent to LeVine's survey recounts:

After the wedding, Mrs Om, was pregnant within a year, though her pregnancy was at a time when she had sketchy access to food. She delivered her son in a trench that was dug alongside this building as protection from bombs.⁷⁰

Women were forced to do gruelling work during their pregnancies.⁷¹ Most of them were expected to return to perform hard work after delivering their children.⁷² A woman who fell pregnant in the context of a forced marriage recounts:

It was about three or four months into my pregnancy, I was ordered to collect cow dung to use as fertilisers in the rice fields. And they would weigh the cow dung that I collected, and if there was not enough, then I would be criticised. And, due to morning sickness, I could not eat well. I became very emaciated and I was criticised very often during the meetings that I was actually pretending to be sick. And I was forced to carry dirt again. And I couldn't eat soup. I only ate rice with some pieces of salt. ... I would be scolded by the unit's chief that I was psychologically sick.⁷³

LeVine offers a detailed narrative of the dreadful journeys undertaken by women who fell pregnant in the context of marriages 'arranged by Angkar'. She identifies appalling effects in the wellbeing of victims produced as a result of the lack of

69 Theresa de Langis, Interview with Sok Samith (Cambodian Women's Oral History Project, Phnom Penh, 26 January 2013).

70 LeVine, above n 33, 77.

71 LeVine, above n 33, 72; Transcultural Psychosocial Organisation, *MyTestimony: Life Stories of Cambodian Survivors of the Khmer Rouge Regime* (2015) 82.

72 LeVine, above n 33, 72; Case 002 OCP Final Submission [1474].

73 Case 002/02 (*Transcript of Trial Proceedings, Trial Day 235*) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 002/19-09-2007-ECCC/TC, 29 January 2015) 38.

rituals traditionally performed during and after birth work.⁷⁴ This cultural disruption has been accounted for a type of ‘spirit-based anxiety’ and developmental setbacks.⁷⁵

Abortion was not a safe option for women who did not wish to carry these pregnancies to term. Procedures were performed by perilous means, often resulting in the illness or death of the woman.⁷⁶ Women undergoing abortions endured dangerous procedures, such as using a branch of palm tree to open the stomach, or jumping down from heights.⁷⁷ A victim of forced marriage who fell pregnant in the context of that marriage narrates:

If I wanted to have an abortion, how could I do it? I was worried that *Angkar* would find out, and there was no doctor, no medicine for birth control.⁷⁸

Death rates of women during childbirth were reportedly high when forced to bear a child under such harsh circumstances.⁷⁹ As a consequence of the dreadful living conditions, the rate of stillbirths and spontaneous abortions was astonishingly high, imposing further trauma on pregnant women.⁸⁰ Most of these women had no support whatsoever during such traumatic episodes.⁸¹ For some women who carried forced pregnancies to term, conflicted feeling arose from loving a child conceived in traumatic circumstances.⁸²

⁷⁴ LeVine, above n 33, 33, 57, 75, 110, 119.

⁷⁵ Ibid 33, 57.

⁷⁶ Judith Strasser, Thida Kim, Silke Studzinsky, Sopheap Taing, *A Study about Victims' articulation at the Extraordinary Chambers in the Courts of Cambodia and Gender-Based Violence under the Khmer Rouge Regime* (Transcultural Psychosocial Organization Cambodia, 2015) 78.

⁷⁷ Judith Strasser et al, above n 75, 78; Theresa de Langis, *Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict – Report on the Proceedings 2012* (Cambodian Defenders Project, 2012) 16.

⁷⁸ de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 80.

⁷⁹ LeVine, above n 33, 77.

⁸⁰ LeVine reports 11 dead births and 6 spontaneous abortions among the 70 women who fell pregnant in the context of ‘conscripted marriages.’ See LeVine, above n 33, 77.

⁸¹ Ibid 88, 130.

⁸² Interview with Silke Studzinsky, former ECCC Civil Party Lawyer (Phnom Penh, 5 December 2015).

Additionally, women's responsibility to raise children imposes financial implications and places unbalanced burdens on housework.⁸³ This directly affects women's right of access to education and other activities related to their personal development.⁸⁴ For those women who were widowed or went through a divorce, raising children by themselves entailed additional challenges. Female-headed households have faced extra burdens related to social and economic hardships, particularly regarding:

- the lack of capacity women had to perform farming duties;
- the evident difficulties of managing a household while playing the role of both mother and father.⁸⁵

Falling pregnant under DK rule was a continuous fear for women.⁸⁶ Forced pregnancy had specific consequences on victims that are different to those produced by the crimes of forced marriage and rape. This harm can only be adequately reflected through the application of a specific legal category before the ECCC.

83 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21. Equality in Marriage and Family Relations*, 13th sess, UN Doc A/49/38 (1994).

84 Ibid.

85 Theresa de Langis et al, *Like Ghost Changes Body: A Study on the Impact of Forced Marriage During the Khmer Rouge Regime*, above n 30, 16, 61.

86 Ibid 80.

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME



VI

ACKNOWLEDGING FORCED PREGNANCY AS A DISTINCT CRIME IN THE ECCC PROCEEDINGS

Forced pregnancy may be prosecuted before the ECCC through the provision that codifies ‘other inhumane acts’ as a crime against humanity under Article 5 of the ECCC Law.⁸⁷ This residual provision criminalises a conduct that is similar in character to the other crimes against humanity listed in Article 5 of the ECCC Law but does not fit within one of the other specified underlying crimes.⁸⁸ The present section puts forward the claim that forced pregnancy constitutes a distinct crime against humanity, which should be acknowledged in the ongoing trial and investigations before the Court.

A. Forced pregnancy as an Inhumane Act

ECCC jurisprudence recognises ‘other inhumane acts’ as a crime against humanity in its own right established under customary international law before 1975.⁸⁹ This provision has already been employed by the ECCC in Cases 001 and 002/01 to criminalise a range of acts, including the deplorable conditions of detention

87 *Law on the Establishment of the Extraordinary Chambers with inclusion of amendments as promulgated on 27 October 2004* (‘ECCC Law’); Case 002 (*Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations*) (Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigative Judges, Case File no 268/2, 18 December 2009) (‘Case 002 Investigative Order on Forced Marriages and Forced Sexual Relations’) [11].

88 Case 001 (*Judgment*) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 26 July 2010, Case File No E188) (‘Case 001 Judgment’) [367], Case 002/01 (*Judgment*) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, 7 August 2014, E313) (‘Case 002/01 Judgment’) [437]; Prosecutor vs Kordić & Čerkez (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004) [117].

89 Case 002 (*Decision on Ieng Sary’s Appeal Against the Closing Order*) (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, 13 January 2011) (‘Case 002 Decision on Ieng Sary’s Appeal Against the Closing Order’); Case 002/01 Judgment [435]–[436].

of detainees of S-21 prison, enforced disappearances, forced transfers, attacks against human dignity such as deprivation of adequate food, shelter, medical assistance and minimum sanitary conditions.⁹⁰

In order to determine whether forced pregnancy constitutes an inhumane act under Article 5 of the ECCC Law, the Court must assess:

- if the conduct entails the infliction of great suffering and serious injury to mental and physical health of the victims;
- if it is of similar character to the other acts that constitute crimes against humanity under Article 5 of the ECCC.⁹¹

As explained above, victims of forced pregnancy suffered bodily and mental harm as a consequence of the crime, enduring:

- physical pain as a result of being forced to bear a child during times of starvation and forced labour, without access to health care and being forced to work immediately after delivering their babies.
- mental suffering, derived from their inability to perform traditional rituals during and after birth work and conflicted feeling arising from loving a child conceived in traumatic circumstances,
- socio-economic consequences derived from having to raise a child.⁹²

The specific harm of the crime also extends to forcible impregnated women who endured miscarriages or stillbirths without access to medical and emotional support; and to women who suffered bodily harm as a consequence of performing unsafe abortion procedures.

By drawing upon the standards established under international human rights law it is possible to determine whether forced pregnancy is of a character similar to other crimes against

90 Case 001 Judgment [372]-[373]; Case 002/01 Judgment [441] - [458].

91 Case 001 Judgment [367]-[368]; Case 002/01 Judgment [437]-[438].

92 See *supra* Section V.

humanity.⁹³ International human rights treaty law and other rights deriving documents recognise reproductive rights as a set of civil, political, economic, social and cultural rights affecting the sexual and reproductive life of individuals and couples.⁹⁴

Already in 1968, the Teheran International Conference on Human Rights explicitly acknowledged the basic right to determine freely and responsibly the number and spacing of children.⁹⁵ This right has been later incorporated under treaty law:

- Article 10.1 of the International Covenant on Economic, Social and Cultural Rights accords the ‘widest possible protection and assistance’ to the family.⁹⁶
- Article 17 of the International Covenant on Civil and Political Rights establishes the right of individuals to be free from interferences in their private lives and family.⁹⁷
- Article 16 (e) of the Convention on the Elimination of all Forms of Discrimination Against Women recognises the right of women to decide freely and responsibly on the number and spacing of their children, and to have access to the information, education and means to enable them to exercise these rights.⁹⁸

In the last two decades, several international instruments have specifically recognised forced pregnancy as a violation to international humanitarian and human rights law. Examples of this are the 1993 Vienna Conference’s Programme of Action,

93 *Prosecutor vs Zoran Kupreškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [566].

94 UN Population Fund, *Report of the International Conference on Population and Development*, Cairo, 5-13 September 1994, Un Doc A/CONF.171/13/Rev.1 (1995).

95 *Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran*, U.N. Doc. A/CONF. 32/41 (22 April to 13 May 1968) 3.

96 *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, 993 UNTS 3 (entered into force on 3 January 1976) (‘ICESCR’).

97 *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) (‘ICCPR’).

98 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature on 18 December 1979 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’).

the 1995 Beijing Conference's Platform for Action, and the UN Commission on Human Rights' Resolution on the Elimination of Violence against Women.⁹⁹ Notably, forced pregnancy has been incorporated as a distinct criminal conduct in the Rome Statute, the Statute of the SCSL and the Regulation of the SPSC.¹⁰⁰

Taking into account the dreadful conditions under which women were forced to bear children during DK and the great harm on the physical and mental health that this conduct has produced on victims, it stands to reason that forced pregnancy is similar in character to other underlying crimes against humanity.¹⁰¹ Therefore, it must be considered as a distinct crime against humanity under the residual provision of other inhumane acts.

B. Elements of the Crime

In order to prove the crime against humanity of forced pregnancy under Article 5 of the ECCC Law, it is necessary to assess whether the elements of the crime are met. For these purposes and in absence of any other definition of the crime of forced pregnancy under international criminal law, the following analysis relies on the Elements of Crimes under the Rome Statute.¹⁰²

1. Forcible impregnation

Forcible impregnation requires evidence that the sexual act that led to the forced pregnancy was not consensual.¹⁰³ The person who forcibly impregnates a woman needs not to be the perpetrator of the crime of forced pregnancy.¹⁰⁴ Further, forcibly impregnating a woman 'does not necessarily require the use of violence, but

99 *Vienna Declaration and Programme of Action of the World's Conference on Human Rights*, UN Doc A/CONF.157/23 (25 June 1993) [38]; *Platform for Action of the Fourth World Conference on Women*, UN Doc A/CONF.177/20 (17 October 1995) ('Beijing Declaration') [114]; United Nations Commission on Human Rights, *The Elimination of Violence Against Women*, 52nd mtg, UN Doc E/CN.4/1998/52 (17 April 1998).

100 See *supra* Section IV.

101 Case 001 Judgment [369]; Case 002/01 Judgment [438].

102 See *supra* Section IV.

103 Milan Markovic, above n 12, 444.

104 Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (Oxford University Press, 3rd ed, 2014) 371.

includes any form of coercion.’¹⁰⁵ As previously noted, forced impregnation during DK occurred in two different manners:

- by compelling forcibly married couples to consummate their unions in order to produce children; which is a fact incorporated into the ongoing trial in Case 002/02.¹⁰⁶
- through marital rape within forced marriage, encouraged by the regime as part of their strategy to increase the population.¹⁰⁷

2. Unlawful confinement

The *actus reus* of the crime of forced pregnancy is the unlawful confinement, involves the illegal deprivation of liberty and denial of access to abortion.¹⁰⁸ *Angkar* confined most people into living in cooperatives and worksites in accordance with the CPK’s instructions.¹⁰⁹ Individuals were constantly monitored by the *Chhlop*, a surveillance programme by CPK militia members established at all levels of the regime.¹¹⁰

Virtually all decisions relating to the victims’ physical environment were made by the local CPK authorities.¹¹¹ Citizens under DK rule were living in permanent confinement, in a ‘prison without walls’, deprived of their physical liberty and fundamental rights, including their right to access health services.¹¹² As previously noted, forcibly impregnated women had no safe means to terminate unwanted pregnancies within forced marriages, which resulted in an unlawful confinement.¹¹³

105 Machteld Boot, ‘Article 7’ in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck/Hart, 2nd ed, 2008).

106 Case 002 Closing Order [858] - [860].

107 See *supra* Section V.

108 Chinkin, above n 14, 77. See also Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005, Intersentia Publishers) 145 - 146.

109 Case 002 Closing Order [1356].

110 Case 002 Closing Order [1356].

111 Case 002 Closing Order [158] [1393].

112 Case 002 Closing Order [158] [177] [222 [313].

113 See *supra* Section V.

3. *Specific intent*

Under the Rome Statute, forced pregnancy requires the additional intent of ‘affecting the ethnic composition of any population or carrying out other grave violations of international law.’ While this additional motivation has been construed as a ‘special intent’, such an understanding is not entirely persuasive.¹¹⁴ Kai Ambos suggests that ‘intent’ is an ambiguous term and that if the drafters had sought to require a specific intent in a strong volitional sense, this should have been explicitly stated.¹¹⁵

International crimes such as genocide, crimes against humanity and war crimes are, by definition, grave violations to international law.¹¹⁶ In particular, the crime against humanity of forced pregnancy entails the widespread and systematic violation of women’s reproductive rights under international law. Therefore, the added intent of carrying out other grave violations of international law is self-referential, as it does not establish an ulterior motivation that goes beyond the normal intent regarding the *actus reus*.

4. *Chapeau requirements*

For forced pregnancy to satisfy the general chapeau requirements required for crimes against humanity, it must be proved:

- (i) the existence of an attack;
- (ii) that is widespread or systematic;
- (iii) directed against any civilian population;
- (iv) on national, political, ethnical, racial or religious grounds;
- (v) a nexus between the acts of the direct perpetrator and the attack; and
- (vi) that the accused or the perpetrator has the requisite knowledge.¹¹⁷

¹¹⁴ Ambos, above n 11, 102.

¹¹⁵ Ibid.

¹¹⁶ Ambos, above n 11, 102; Boot, above n 105.

¹¹⁷ Case 002/01 Judgment [177].

The Trial Chamber (TC) already acknowledged in Case 002/01 that the so called ‘regulation of marriage’ was among the policies through which the CPK carried out a widespread and systematic attack on political grounds against millions of civilians throughout Cambodia, pursuant to the Party’s objective to build socialism.¹¹⁸

C. Forced pregnancy in the ECCC proceedings

Initially, gender crimes were outside the original prosecutorial strategy before the ECCC.¹¹⁹ In October 2008, four victims filed a complaint to become the first civil parties victims of forced marriage in the ECCC proceedings.¹²⁰ Since then, gender crimes have increasingly become a focus of attention before the Court. In this context, the ECCC represents an opportune forum to acknowledge the crime of forced pregnancy as a distinct offence during the rule of DK and to contribute to the development of gender sensitive jurisprudence in international criminal law.

1. Case 002

On 7 August 2014, DK senior leaders Khieu Samphan and Nuon Chea were convicted in the first stage of Case 002 (‘Case 002/1’) for the perpetration of crimes against humanity of murder, political persecution, extermination and other inhumane acts between the 17th April 1975 and December 1977.¹²¹ In the second stage of the trial (Case 002/02), the ECCC is trying both accused for the criminal acts committed in what the Office of the Co-Investigating Judges (OCIJ) has defined as the ‘regulation of marriage’, which encompasses the crimes of forced marriage, rape and forced pregnancy.¹²²

¹¹⁸ Case 002/01 Judgment [193-198]. It has been noted that the term ‘regulation of marriages’ downplays the impact and gravity of the crime of forced marriage and connected crimes. See de Langis, Theresa and Silke Studzinsky, *Briefing Paper on the ECCC, the Cambodian Women’s Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime* (2012) [38].

¹¹⁹ Silke Studzinsky, *One Eye Blind? Is the ICC a Model of How Sexual Violence Crimes Should Be Investigated and Treated?* (2012) <<http://bit.ly/1LUpZyu>>.

¹²⁰ Ny Chandy and Silke Studzinsky, ‘Press Release: Four victims of forced marriage under the Khmer Rouge regime file their complaint to the ECCC’ (16 October 2008) <<http://www.civilparties.org/?p=295>>.

¹²¹ Case 002 Judgment.

¹²² Case 002 Closing Order; Case 002 (*Decision on Additional Severance of Case 002 and*

(i) Investigative stage

Specific charges of forced pregnancy as a crime against humanity of other inhumane acts have been requested in Case 002/02 by the Office of the Co-Prosecutors (OCP) and Civil Party Lawyers (CPL).¹²³ On 18 December 2009, the OCIJ granted the request to conduct investigations into the crime of forced marriage throughout Cambodia.¹²⁴ It was noted that the fact that individuals may have been forced to consummate their marriages could also amount to the crime against humanity of other inhumane acts on the basis of forced pregnancy.¹²⁵

In the Closing Order for Case 002, the OCIJ referred to the policy on forced marriage, rape and forced pregnancy as ‘the regulation of marriage.’¹²⁶ In the view of the OCIJ, forced marriages and the imposition of sexual relations aimed at ‘enforced procreation’ were part of the same common criminal plan to increase the population.¹²⁷ Among the evidence considered in the trial, it was noted the fact that children had been born as a consequence of the forced consummation of forced marriages.¹²⁸

The term ‘enforced procreation’ had not been previously employed in international criminal law. However, the criminal conduct in question has been referred to through a number of other terms, such as forced impregnation, forced maternity, forced

Scope of Case 002/02; (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File no E301/9/1, 4 April 2014).

123 Case 002 (*Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations*) (Extraordinary Chambers in the Courts of Cambodia, Co-Lawyers for the Civil Parties, Case File no D188, 15 July 2009) (‘Case 002 Second Request’) [28]–[29]; Case 002 (*Co-Lawyers for the Civil Parties Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes*) (Extraordinary Chambers in the Courts of Cambodia, Co-Lawyers for the Civil Parties, Case File no D268, 4 December 2009); Case 002 (*Civil Parties Closing Brief to Case 002/01*) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File no E295/6/2, 26 September 2013) [204] [214] [215]; Case 002 OCP Final Submission [322].

124 Case 002 Investigative Order on Forced Marriages and Forced Sexual Relations [11].

125 Ibid.

126 Case 002 Closing Order [216].

127 Case 002 Closing Order [217] [1445] – [1447].

128 Case 002 Closing Order [860].

motherhood and enforced pregnancy.¹²⁹ ‘Enforced procreation’, thus, is certainly the description of a conduct currently criminalised as forced pregnancy.

(ii) Trial stage: recharacterisation and cumulative convictions

Internal Rule 98(2) permits changes to the legal characterisation of facts contained in the Closing Order.¹³⁰ It has been already recognised in Case 001 that the TC is not bound by the characterisation performed by OCIJ.¹³¹ In order to recharacterise the facts in the trial, the new legal characterisation must not go beyond the facts established in the Closing Order. Both the forced impregnation and the unlawful confinement of women during DK rule are incorporated in Case 002 Closing Order.¹³² This set the basis for a legal recharacterisation of the criminal acts committed in connection to forced marriage.

The ECCC has asserted that a change in the legal characterisation of the facts is not inherently in breach of an accused’s right to a fair trial.¹³³ In Case 002/02, the accused were made aware of the possibility that the charges of forced pregnancy might be held against them. As previously noted, both the OCP and the

129 Robyn Charli Carpenter refers to it as ‘forced maternity’ in ‘Forced Maternity: Children’s Rights and the Genocide Convention’ (2000) 2 *Journal of Genocide Research* 213. Anne Tierney Goldstein and Siobhán K. Fisher use the term of ‘forced impregnation’, see Anne Tierney Goldstein *Recognizing Forced Impregnation as a War Crime Under International Law* (1993) and Siobhán K. Fisher, ‘Occupation of the Womb: Forced Impregnation as Genocide’ (1996) 46 *Duke Law Journal* 91. Ann E. Cudd uses the term ‘enforced pregnancy’ in Ann E. Cudd, ‘Enforced Pregnancy, Rape and the Image of Women’ (1990) 1 (2) *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 47. Brook Sari Moshan talks about forced motherhood in Brook Sari Moshan ‘Women, War, and Words: The Gender Component in the Permanent International Criminal Court’s Definition of Crimes Against Humanity’ (1998) 22 (1) *Fordham International Law Journal* 154.

130 Extraordinary Chambers in the Courts of Cambodia, *Internal Rules* (at 16 January 2015).

131 Case 001 Judgment [496].

132 Case 002 Closing Order [158] [177] [222] [313] [858] [859] [860] [1393].

133 Case 001 Judgment [500]; Prosecutor vs Thomas Lubanga Dyilo (*Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*) (International Criminal Court, Appeals Chamber, Case File no ICC-01/04-01/06, 8 December 2009).

CPL have consistently requested the inclusion of charges on forced pregnancy at all the relevant legal procedural stages. The OCIJ acknowledged that the fact that couples were forced to consummate their marriages could also constitute the crime against humanity of forced pregnancy, and referred to this as 'enforced procreation'. Nonetheless, the TC should notify the accused that the facts in the Closing Order may be subject to change in the legal characterisation so as to ensure that their rights to a fair trial are respected.¹³⁴

Acknowledging that the facts related to the 'regulation of marriage' may be subject to change in the legal characterisation would enable the OCP, the Civil Party Lead Co-Lawyers (CPLCL) and the TC to question the accused on the facts related to pregnancies within forced marriages. This would further enable the CPLCL and the Victims Support Section (VSS) to develop moral and collective reparation projects and non-judicial measures specifically in relation to the crime of forced pregnancy.

If sufficient evidence is found, the TC would be able to cumulatively convict the accused on the grounds of forced pregnancy, rape and forced marriage. Cumulative criminal convictions are permissible when they are based on the same conduct if each statutory provision involves a materially distinct element not contained in the other.¹³⁵ The forced impregnation and unlawful confinement required by the crime of forced pregnancy are not required by the crimes of forced marriage and rape. Multiple convictions will thus serve to reflect the full culpability of the accused and the distinct suffering of victims.¹³⁶

2. Cases 003 and 004

Cases 003 and 004 are currently under investigation and the proceedings are confidential. On April 2014, the OCP publicly

¹³⁴ Case 001 (*Judgment*) [496].

¹³⁵ Case 001 (*Judgment*) [560] -[561]; *The Prosecutor vs Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić (Appeals Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. I IT-96-21-A, 20 February 2001) (Čelebići Case) [412] -[413].

¹³⁶ Čelebići Case [429] -[430].

announced that gender crimes are being investigated in the context of Case 004.¹³⁷ In December 2015, the OCIJ released public statements noting that accused Meas Muth and Yim Tith were respectively charged in Cases 003 and 004 with the crimes of forced marriage and rape as crimes against humanity of other inhumane acts.¹³⁸

In order to accurately acknowledge the totality of the criminal acts committed in connection to forced marriages, the OCP and the CPL should request specific charges on forced pregnancy in the ongoing investigations. Further, the OCIJ must acknowledge forced pregnancy as a distinct crime and inquiry witnesses on the specific circumstances of pregnancies within forced marriages.

¹³⁷ Nicholas Koumjian, 'International Co-Prosecutor requests investigation of alleged sexual and gender-based violence in Case 004' (Press Release, 24 April 2014).

¹³⁸ Extraordinary Chambers in the Courts of Cambodia, 'Statement of the International Co-Investigating Judge regarding Case 003' (Press Release, 15 December 2015); Extraordinary Chambers in the Courts of Cambodia, 'Statement of the International Co-Investigating Judge regarding Case 004' (Press Release, 9 December 2015).

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME

VII

CONCLUSIONS

This paper examines the critical need to acknowledge the crime of forced pregnancy as a distinct crime against humanity under the ‘other inhumane acts’ provision contained in Article 5 of the ECCC Law. To frame forced pregnancy as a consequence of other criminal conduct invisibilises the distinct effects that the crime has had on victims, concealing the nature of their experience. This is significant in an environment in which women have been traditionally subordinated to men.

The ECCC has an opportunity to properly address the policy of forced pregnancies implemented during the DK regime, which resulted in physical and psychological harm for women. If the ECCC achieves such a goal, victims will be provided with a gender-sensitive, historical explanation to some of the horrors that they endured during the DK regime. This would entail a proper recognition of DK’s policy, the dimension of the crime and its ongoing impact on society. It would further be milestone for international criminal law.

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME



VIII

RECOMMENDATIONS

To the ECCC

- To the TC:
 - to give notice to the accused in Case 002/02 that the facts might be subject to legal recharacterisation with regards to the policy of forced marriage and rape in the context of forced marriage;
 - to question the accused on the facts related to pregnancies within forced marriages.
- To the OCP:
 - in Case 002/02: to question the accused on the facts related to pregnancies within forced marriages;
 - in Cases 003 and 004: to request the investigation of forced pregnancy as a distinct crime.
- To the OCIJ:
 - to acknowledge forced pregnancy as a distinct crime in the ongoing investigations in Cases 003 and 004;
 - to inquiry witnesses on the facts related to pregnancies within forced marriages.
- To the CPL: to request the investigation of forced pregnancy as a distinct crime in Cases 003 and 004.
- To the CPLCL: to question the accused in Case 002 on the facts related to the pregnancies within forced marriages.

FORCED PREGNANCY DURING THE KHMER ROUGE REGIME

- To the CPLCL and the Victims Support Section: to develop and implement moral and collective reparation projects and non-judicial measures in relation to the crime of forced pregnancy.
- To the Public Affairs Office: to mainstream and inform the public about the crime of forced pregnancy.

To the Royal Government of Cambodia:

- Cooperate with the ECCC to ensure the continuation of the investigations in Case 003 and 004.
- Advance in the elimination of negative stereotypes that have strongly disadvantaged Cambodian women in exercising their reproductive rights.

To non-governmental organisations and civil society:

- Engage on the analysis, understanding and debate of gender dynamics in Cambodia that have served to invisibilise the crime of forced pregnancy in Cambodia's transitional justice process.
- Bring attention to the issue of reproductive rights during peacetime.

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