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RAPE BY ANY OTHER NAME: MAPPING THE FEMINIST LEGAL DISCOURSE REGARDING RAPE IN CONFLICT ONTO TRANSITIONAL JUSTICE IN CAMBODIA

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> [W]omen had additional burdens to bear just because they were women . . . Women and girls were subjected to widespread and systematic sexual violence, including rape prior to execution; rape as an instrument of torture; rape through forced marriage; rape over an extended period of time; gang rapes with multiple perpetrators and mass rapes of multiple victims; sexual mutilation; forced nudity; and threat of rape . . . . It is also acknowledged that sexual crimes were most definitely also committed against men during this time.

Women's Hearing arranged by Cambodian NGOs[1]

> [T]he Co-Investigating Judges consider that the official [Communist Party of Kampuchea, or] CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose. That is not the case, however, in the context of forced marriage . . . . These acts of rape [the imposing of consummation of forced marriages], by their nature or consequences, in particular through the targeting of the physical and physiological integrity of the victim, were part of the attack against the civilian population. The perpetrators knew that there was an attack on the civilian population and that their acts were part of it.

Extraordinary Chambers in the Courts of Cambodia[2]

I. INTRODUCTION

Rape has long been a reality of conflict, be it internal conflict or international warfare.[3] In the past century, however, rape in conflict has often been presented as developing from being an inevitable by-

1. CAMBODIAN DEFENDERS PROJECT, REPORT ON THE PROCEEDINGS OF THE 2011 WOMEN'S HEARING ON SEXUAL VIOLENCE UNDER THE KHMER ROUGE REGIME 3-4 (Alison Barclay & Beini Ye eds., 2012) (reporting on a non-judicial hearing, set up by NGOs, for women subjected to rape and sexual violence under the Khmer Rouge to have their stories heard).

2. Case 002, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1428-31 (Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf.

3. *See e.g.*, Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, 54 B.C. L. REV. 1207, 1207-08 (2013) (referring to the Rwanda conflict in 1990 as an example of the use of rape in conflict).

product of such conflict, to an intentional and systematic means of perpetuating it.[4] Much debate, particularly among those keen to promote a more feminist understanding and application of the law, has centered on how international tribunals, and in turn the International Criminal Court ("ICC"), should prosecute rape.[5] This discourse went beyond the academic, having notable impact on the shaping of international law approaches to defining and prosecuting rape.[6] Yet, as this Article explores, despite being such a core component of conflict, rape is rarely adequately addressed as part of transitional justice.[7] Conceptions of rape and strategies for its prosecution became tied to the particular contexts of specific conflicts, namely Bosnia and Rwanda. But nevertheless went on to form the backdrop for the creation of the ICC's Statute of international and thus, more general application.[8] This resulted in subsequent tribunals, such as the Extraordinary Chambers in the Court of Cambodia (ECCC), struggling to adapt and apply these approaches and definitions to rape prosecution in ways that could the factual variations of rape in different conflicts. Beyond these contextual limitations of rape intertwined with ethnicity, there are also broader and perhaps more systemic constraints on the conceptualization of rape in international law.[9]

4. *See generally* Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 288 (2003) (discussing the development of rape in the context of war as gradually recognizing it as a tool of war).

5. *See e.g.*, Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 65-67 (1999) (discussing the treatment of women's rights within the context of the ICC); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 239 (2000); Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L. J. 5, 14-15 (1994) (discussing the intersection between women's rights and international law).

6. *See* Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 778-79, 815 (2005) (discussing feminism's role in the international criminalization of rape by drawing on examples within Bosnia and Herzegovina).

7. *See infra* Part IV.

8. *See* Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

9. *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of

The ECCC has come late in the day to try and provide transitional justice for some of the many crimes committed by leaders and senior members of the Khmer Rouge during the 1970s.[10] Hamstrung by its own problematic application of the principle of legality, the ECCC can apply the law only as it finds it to have stood at the time of the alleged crimes.[11] Unfortunately, however, according to the ECCC, rape was not yet a distinct crime against humanity. This, as will be explained, is not the only legal stumbling block in the prosecution of rape at the ECCC.[12] Despite being barred by the principle of *nellum crimen sin lege* from prosecuting rape *qua* rape, the ECCC is still able use acts of rape as the actus reus for other indictments, namely the crime against humanity of other inhumane acts.[13] But, once again, the ECCC construes such a narrow reading of the law as to impede itself from prosecuting a great number of rapes as other inhumane acts.[14]

This Article will begin by exploring why the ECCC has held that only rape in the context of forced marriage can be charged as the crime against humanity of other inhumane acts and in doing so, has created a problematic division among the many instances of rape that occurred under the Khmer Rouge regime.[15] More fundamentally, the ECCC's prosecutions of rape, or rather lack thereof, provide a useful lens through which to analyze and assess the transitional jurisprudence that has developed around rape in conflict in recent decades. Even with the offense of rape *qua* rape now recognized as a

Democratic Kampuchea, art. 5, Oct. 27, 2004, NS/RKM/1004/006 [hereinafter Law on the Establishment of the ECCC]; *see also* Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute]; *see also* Rome Statute, *supra* note 8, art. 7.

10. *See* Case 001, Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 1 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf (entering a judgment over thirty years later).

11. *See* Law on the Establishment of the ECCC, *supra* note 9, at arts. 2-3 (including amendments as promulgated on October 27, 2004).

12. *See infra* Part III.

13. *See* Case 001, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶¶ 207-08 (Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf (noting that the very act of rape brings about suffering that could constitute torture).

14. *See infra* Part IV.

15. *See infra* Part III.

crime against humanity at the ICC and the majority of tribunals, international criminal courts from the 1990s onwards have still opted, on many occasions, to prosecute the act of rape as another offense: rape as torture, rape as genocide, or rape as sexual slavery.[16] This Article will therefore use the Cambodian experience as a lens through which to explore how these approaches to prosecuting rape in conflict have led to "unintended consequences" in the treatment of rape in international law.[17] If transitional justice is to allow all people, including women, to move forward after conflict, then it must devise a new and more nuanced way to heal the wounds caused by rape in conflict. In order to pave the way for some preliminary steps in this direction, it is important to first understand how international jurisprudence, particularly that of the ECCC, came to reach the current impasse.

II. CAMBODIA'S LONG WAIT FOR TRANSITIONAL JUSTICE: ESTABLISHING THE ECCC

Over thirty years since the fall of the Khmer Rouge, the ECCC is only now prosecuting its second case, and may never get any further than that.[18] Any advancements are certain to be slow, and they must contend with the already muted belief in the tribunal's potential to deliver justice and improve public feeling in Cambodia at this point

16. *See infra* Part IV.

17. *See* Engle, *supra* note 6, at 807 (asserting that feminist positions reaffirmed by the ICTY created unintended consequences which affect how rape is dealt with on an international level, such as the minimization of women's sexual agency).

18. At the time of writing, Case 002/01 was still in (delayed) appellate hearings before the Supreme Court Chamber and Case 002/02 was in the early stages of trial hearings. With Case 002/02 not expected to have a final appeal judgment until 2019, it is a near certainty that Cases 003 and 004 will not be finalized by 2019. *See Completion Plan - Revision 4*, Extraordinary Chambers in the Courts of Cambodia, March 31, 2015, http://www.eccc.gov.kh/sites/default/files/Completion%20plan%20Rev%204%20Final.pdf [hereinafter *Completion Plan*]; *see also* OPEN SOC'Y JUSTICE INITIATIVE, THE FUTURE OF CASES 003/004 AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 33 (2012), https://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf (calling on the ECCC to ensure it does pursue cases 003 and 004, reflecting the fears that it may not do so).

in time.[19] Nevertheless, the declared purpose of the ECCC is to deliver justice and to aid national efforts at reconciliation, peace, security, and stability.[20] The ECCC also aims to bring to light the crimes of the Khmer Rouge as a learning moment for Cambodia's younger generations.[21] As to why the trials are only now taking place, there is no singular answer other than "politics" in the broadest sense of the word.[22] In the more immediate aftermath of the reign of the Khmer Rouge, there was only further conflict, lasting until the 1990s.[23] Even after a peace settlement was reached, which marked the end of a subsequent decade of war between Cambodia and Vietnam,[24] reasons for continued judicial inertia ranged from the political near-impossibility of a tribunal organized by the U.N. Security Council (as was done for Rwanda), to the inexistence of the ICC.[25] In short, no agreement could be reached as to the form and leadership of a tribunal. Finally, in 1997, when the Cambodian

19. *See* Kheang Un, *The Khmer Rouge Tribunal: A Politically Compromised Search for Justice*, 72 J. ASIAN STUD. 783, 787 (2013) (suggesting that Cambodian politicians have been critical of the tribunal as potentially endangering peace and stability and opening old wounds, while the majority of the Cambodian public would prefer efforts to be focused on more immediate social and economic concerns, such as healthcare, rather than on the Khmer Rouge trials, but also noting the rising levels of Cambodians who believe the tribunal will promote reconciliation and bring about justice for victims and their families); *see also Khmer Rouge Trials: Justice of a Kind*, ECONOMIST (June 30, 2011), http://www.economist.com/node/18898168 (stating that the Cambodian prime minister, Hun Sen, does not want the ECCC to continue beyond *Case 002*, ostensibly out of fears for continued reconciliation and peace).

20. *See* G.A. Res. 57/288/B at 2 (May 22, 2003) (alluding to the agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea).

21. *See Why are we Having Trials now? How will the Khmer Rouge Trials Benefit the People of Cambodia?*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, http://www.eccc.gov.kh/en/faq/why-are-we-having-trials-now-how-will-khmer-rouge-trials-benefit-people-cambodia (last visited Oct. 15, 2015).

22. *See Khmer Rouge Trials: Justice of a Kind*, *supra* note 19.

23. *See* Susan Dicklitch & Aditi Malik, *Justice, Human Rights, and Reconciliation in Postconflict Cambodia*, 11 HUM. RTS. REV. 515, 516-18 (2010) (noting that after the United Nations organized elections in 1993, the government in Cambodia was plagued by infighting, which ultimately resulted in a coup).

24. U.N. General Assembly, Final Act of the Paris Conference on Cambodia, U.N. Doc. A/46/608, Annex (Oct. 30, 1991).

25. *See* TOM FAWTHROP & HELEN JARVIS, GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 1, 2 (2004) (explaining the history that gave rise to the ICC).

Government reached out to the United Nations, there were further political roadblocks to be navigated, both for Cambodia internally[26] and in its tumultuous negotiations with the United Nations.[27] It was only in 2001 that the Laws of the ECCC were established, and it would be another six years until the court could be declared fully operational.[28] Now, after considerable delays, the ECCC is making slow progress in prosecuting crimes.[29]

The jurisdiction of the ECCC allows it to prosecute senior Khmer Rouge leaders and others deemed most responsible for a number of the crimes committed by the Khmer Rouge from 1975–1979, including crimes against humanity,[30] within which rape is explicitly listed.[31] Yet while rape, as explained below, formed a significant body of crimes perpetrated by the Khmer Rouge and is singled out as grounds for conviction in ECCC law, it has not been a sufficient focus of Cambodia's transitional justice.[32]

III. THE REALITIES OF RAPE UNDER THE KHMER ROUGE

Ruling over Cambodia from 1975–1979, the Khmer Rouge strived to reject modernity and enact their vision of an agrarian revolution.[33] This involved the killing of one quarter of the population, who were victims of overwork and malnutrition, by execution in the killing fields, in detention centers, and in their villages and homes.[34] Those who survived continued to endure forced movement, forced

26. *See generally id.* at 134-38 (detailing the developments within Cambodia in regard to the possibility of a tribunal in the 1990s and early 2000s).

27. *See generally id.* at 155-57 (discussing the initial contentions and issues between the United Nations and Cambodia).

28. *See* EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: ECCC AT A GLANCE (2014), http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf.

29. *See* Completion Plan, *supra* note 18.

30. *See* Law on the Establishment of the ECCC, *supra* note 9, at arts. 1-8.

31. *See id.* at art. 5.

32. *See infra* Part IV.C.

33. *See* Joel Brinkley, *Cambodia's Curse: Struggling to Shed the Khmer Rouge's Legacy*, 88 FOREIGN AFF. 111, 111 (2009) (describing Pol Pot's plan to bring the country to "year zero").

34. *See id.*; *see also* FAWTHROP & JARVIS, *supra* note 25, at 3 (describing that roughly two million people were killed under the Khmer Rouge's reign).

marriages, starvation, fear, and backbreaking agricultural work.[35] The Khmer Rouge controlled almost every element of life in Cambodia and this involved ensuring people's only loyalty was to the regime, to *Angkar*.[36] Part of Khmer Rouge policy included breaking family ties and weakening interpersonal affiliations, largely through forced labor and forced movement and perhaps most strikingly through forced marriages, in which refusal to engage in sex, according to numerous accounts, was a punishable offense.[37] Conversely, the formation of any emotional bond within these marriages appears to have been actively discouraged.[38] Forced marriages were systematically implemented[39] as part of the regime's move toward being a collectivity, to living in what survivors have called a "prison without walls."[40] Sex and marriage were only permissible under the strict terms of Khmer Rouge policy.[41] As such, forced marriage occasioned a large number of the rapes that happened during the time of the Khmer Rouge. But, forced marriage

35. *See generally* Brinkley, *supra* note 33, at 111; KARL D. JACKSON, CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH 3-4 (1989) (overviewing the impact of Khmer Rouge rule on the lives of Cambodians and the deleterious effect of its draconian policies).

36. *See* Dicklitch & Malik, *supra* note 23, at 516-18 (explaining that the Khmer Rouge's quest for the communist utopia resulted in rule by terror whereby no one was safe from extermination).

37. *See* Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013, 1024-25 (2008) (noting that by destroying family bonds through forced marriages, the Khmer Rouge sought to strengthen loyalty to the party). *See also* THERESA DE LANGIS ET AL., TRANSCULTURAL PSYCHOLOGICAL ASSOCIATION, LIKE GHOST CHANGES BODY: A STUDY ON THE IMPACT OF FORCED MARRIAGE UNDER THE KHMER ROUGE REGIME (October 2014), http://kh.boell.org/sites/default/files/forced_marriage_study_report_tpo_october_2014.pdf.

38. Couples report being brought together only for the purpose of procreation, and otherwise living apart. *See* DE LANGIS ET AL., *supra* note 37, at 28 ("Married couples stayed with each other a few days following the wedding, often with Khmer Rouge spies, or *chhlob*, making sure they consummated the marriage with sexual relations. Then, the pair went back to their respective workgroups, meeting for conjugal visits every seven to ten days—or as long as months apart. The main purpose of the marriages was not to form privatized families as in a traditional context, but to 'produce children to serve the revolution' [footnotes omitted]").

39. *See* Case 002, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 218-20 (Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf.

40. *See id.* at ¶ 158.

41. *See id.* at ¶ 217.

was certainly not the only context in which rape occurred under the regime.[42]

The ECCC has found that sexual relationships outside of marriage were deemed immoral by the regime, who included in the Communisty Party of Kampuchea's ("CPK") Party's Moral Code the order "[d]o not take liberties with women," and Armed Force's Moral Code provided "[w]e must not do anything detrimental to women."[43] Failure to conform with the Moral Codes often resulted in being labeled an "enemy" or "bad-element," carrying with it the fate of re-education or even death.[44] The Moral Code was not, however, consistently upheld, nor were transgressions always punished.[45] The ECCC has even acknowledged that the policy did not manage to stop rape . Nevertheless, the Court ultimately determined that rape, classified and sometimes punished as a moral offense, was neither ordered nor committed with the express intent of implementing the common purpose of the Khmer Rouge.[46] In other words, rape was not part of the policy, unless it happened within the context of forced marriage.[47] Given the court's stated understanding of the demands of the modes of liability through which the accused can be held responsible, this determination of policy serves as a barrier to prosecuting rapes outside of forced marriage.

However, there is much evidence to suggest that rape and other forms of sexual violence were very much part of the Khmer Rouge's systematic and widespread attack on civilians throughout

42. *See* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 3-4 (listing the multitudes of ways that perpetrators used rape against women and girls during the Khmer Rouge regime).

43. *Case 002*, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶ 191.

44. *See id.* ¶¶ at 1181, 1428-29 (noting that the Co-Investigating Judges satisfied themselves that "with regard to morality, the policy of the CPK was that perpetrators of rape were to be punished," yet acknowledged that such punishment did not always occur, and many soldiers committed rapes and faced no consequences from senior members); *see also* Jain, *supra* note 37, at 1025 (discussing how women that refused to marry men chosen for them were subjected to violence and that the fear of violence coerced other women into marriages).

45. *See Case 002*, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1181, 1428-29.

46. *See id.* at ¶ 1429.

47. *See id.* at ¶ 1429.

Kampuchea,[48] regardless of the Moral Codes. The wealth of testimony from both direct victims and witnesses evidences the ineffectiveness of these official policy prohibitions of rape.[49] One woman has recounted being the sole survivor from among thirty women, raped repeatedly by numerous soldiers in view of one another around the mass grave in which women were then interred.[50] Rape occurred not only before execution, but also as torture, as a

48. *See id.* at ¶¶ 1426-27 (declining to prosecute these rapes on principles of legality, the court acknowledges that "it is clearly established that under the Democratic Kampuchea regime crimes against humanity of rape were committed in diverse circumstances"); *see also* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 13-16 (describing the results of the testimonies presented by victims of and witnesses to rape and sexual violence under the Khmer Rouge).

49. *See* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 13; (stating perpetrators were rarely accused or convicted of rape); *see also* ROCHELLE BRAAF, SEXUAL VIOLENCE AGAINST ETHNIC MINORITIES DURING THE KHMER ROUGE REGIME (2014) (focusing on rape and sexual violence targeted at ethnic minorities); DUONG SAVORN, THE MYSTERY OF SEXUAL VIOLENCE UNDER THE KHMER ROUGE 1 (2011) (providing a compilation of survivor and witness accounts of rape and sexual violence by Khmer Rouge soldiers); *see also*, Transcript of hearing on the substance in Case 002/02, Extraordinary Chambers in the Courts of Cambodia, Jan. 13, 2016 (witness 2-TCW-928 described hearing the cries of women who were taken to be raped); KATRINA NATALE, "I COULD FEEL MY SOUL FLYING AWAY FROM MY BODY," A STUDY ON GENDER-BASED VIOLENCE DURING DEMOCRATIC KAMPUCHEA IN BATTAMBANG AND SVAY RIENG PROVINCES 1 (2011) ("Among respondents in this survey, 65.4% were aware of rape perpetrated by agents of the Khmer Rouge during Democratic Kampuchea. As well, 28.8% of all respondents were direct witnesses to acts of rape. . .[rape scenarios included] gang and mass rape, rapes in Khmer Rouge installations and cooperatives, rapes with foreign objects, rape through sexual exploitation and sexual slavery, attempted rape, rape of men. . .").

50. *See* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 8 (citing Net Savoen's personal experience with the atrocities committed by the Khmer Rouge). Notably, this account was before a non-judicial audience, discrete from the ECCC. However, examination of investigate requests evidences that many witnesses and victims have mentioned instances of rape when talking with staff from the Office of Co-Investigating Judges at the ECCC, only to have various bodies at the ECCC gloss over such matters, despite numerous efforts by the Co-Lead Lawyers for Civil Parties to have accounts of rape properly investigated. E.g., *Co-Lawyers for the Civil Parties' Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes*, Case File/Dossier No. 002/19-09-2007-ECCC-OCIJ Extraordinary Chambers in the Courts of Cambodia, December 4, 2009, at para. 3 ("Co-Lawyers for Civil Parties note that Forced Marriages and other sexually related crimes have been mentioned *propriu moto* by a number of witnesses . . . But they were never questioned about the circumstances and details of these crimes").

means of instilling fear.[51] Rapes were often committed by groups of soldiers and families were painfully aware of the rape of their loved ones—some even bore witness.[52] But, the ECCC remains adamant that such rapes were not committed in pursuit of the regime's "common purpose,"[53] were not part of the widespread or a systematic attack on the civilian population[54] and thus cannot be prosecuted as the crime against humanity of other inhumane acts.[55]

IV. ECCC LAW AND ITS LIMITATIONS REGARDING RAPE

There are two stages to the ECCC's self-defeat in the prosecution of rape. The first stage is the court's application of the principle of legality, from which it determined that to try rape as a distinct crime against humanity at the ECCC would be to impute customary international norms prohibiting rape onto acts of rape that pre-date such norms.[56] The court's application of the principle of legality leaves much room for criticism. However, to do this justice would be beyond the scope of this Article. Therefore, after briefly summarizing the shortcomings of the ECCC's analysis of the status of rape in customary international law at the time of the Khmer Rouge, this failing will nevertheless be accepted as the point from which further analysis of the ECCC's treatment of rape must stem. The second stage of the ECCC's stifling of rape prosecutions involves an understanding of how the court, left with the possibility of prosecuting rape as another inhumane act, came to rule that only rapes within forced marriage would qualify for such action.[57]

51. *See id.* at 3 (citing the expert testimony of Kasumi Nakagawa, who, in 2007, was one of the first researchers to conduct a study into gender-based violence during the rule of the Khmer Rouge).

52. *See id.* at 6 (referring to the testimony of Mr. Vana who witnessed the gang rape of his sister).

53. Closing Order Case 002, *supra* note 2, at paras. 1429, 1432.

54. Whereas forced marriages and rapes occurring therein were. *Id.* at paras. 156-157, 1428-1432, 1445-1446.

55. *See Case 002*, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶ 1429.

56. Appeal Judgment (Kaing Guek Eav alias Duch), Case File/Dossier No. 001/18-07-2007-ECCC/SC, Extraordinary Chambers in the Courts of Cambodia, Feb. 3, 2012, at para. 213 [hereinafter Case 001 Appeal].

57. *See id.* at ¶¶ 1429-30.

A. MISAPPLICATION OF THE PRINCIPLE OF LEGALITY: THE INHUMANITY OF RAPE UNDER THE KHMER ROUGE

Article 5 of the ECCC Statute provides for the prosecution of crimes against humanity. Within crimes against humanity, a number of distinct offenses are enumerated, including torture and rape, in addition to the residual offense of "other inhumane acts."[58] However, being enumerated as a discrete crime against humanity under article 5 does not by itself mean that a prosecution can be brought for the offense of rape as a crime against humanity as it currently stands in international law—article 5 merely sets out a priori jurisdiction. All prosecutions brought by the ECCC must be in accordance with the principle of legality,[59] meaning that prosecuted offenses must have constituted a criminal offense under international or Cambodian law at the time they were allegedly committed.[60] Thus, in reviewing the Trial Chamber's conviction of rape as the crime against humanity of torture, the Supreme Chamber sought to ostensibly assess of the status of rape as a distinct crime against humanity from 1975–1979.[61] This was particularly pertinent because the Trial Chamber, although opting to convict the act of rape as the crime against humanity of torture, held that the act of rape *could* have been prosecuted as the crime against humanity of rape *qua* rape,[62] but subsumed it within torture because the additional elements of torture were satisfied.[63]

58. Law on the Establishment of the ECCC, *supra* note 9, at art. 5.

59. *See id.* at art. 33 (setting out obligations under the principle of legality under articles 14 and 15 of the International Covenant on Civil and Political Rights).

60. *See* Case 001, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶¶ 91, 96 (Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf (granting great weight to the application of the principle of legality in delivering its Appeal Judgment in *Case 001*, incorporating an additional burden to the prosecution that the crime's illegality must have been sufficiently accessible and foreseeable to the accused "without reference to any specific provision [of law]").

61. *See Case 002*, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1426-29 (noting that because the official policy was to punish rape, its execution outside the context of marriage did not constitute a crime against humanity standing alone).

62. *See* Law on the Establishment of the ECCC, *supra* note 9, at art. 5.

63. *See Case 001*, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶171; *see also* Case 001, Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 361-62, 366 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf

On appeal, the Co-Prosecutors contested that the Trial Chamber should have cumulatively charged both rape and as distinct crimes against humanity, on the basis that failing to bring a rape-specific charge was a failure to "reflec[t] in full the gravity of the conduct."[64] But, the Supreme Chamber never reached the question of cumulative charging, and the hierarchy of harms therein, instead finding that rape, as a distinct crime against humanity, was never even a possible conviction.[65] Taking it upon itself to explore the legality of rape as a crime against humanity during the Court's temporal jurisdiction, the Supreme Chamber declared that prohibition of rape as a crime against humanity simply was not a legal reality in the 1970s. Therefore, the Trial Chamber erred in holding that rape in and of itself was a prosecutable offense and thus further erred in subsuming it under the conviction for torture as a crime against humanity.[66] The Supreme Chamber found that while rape had, albeit not always in such express terms, been a prohibited war crime since 1863,[67] it had "not yet crystalised [sic]"[68] as a crime against humanity by 1975.

The Co-Prosecutors had relied upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") as evidence of rape as a crime against humanity, and the Supreme Chamber believed this to be an inherently flawed approach.[69] First and foremost, the convictions and criminal acts of these tribunals came after the temporal jurisdiction of the ECCC, thus applying them to the ECCC cases would, the Supreme Chamber held, violate

("Rape has long been prohibited in customary international law," but, "consider[ed] this instance of rape to have comprised . . . an egregious component of the prolonged and brutal torture inflicted upon the victim prior to her execution and has characterized this conduct accordingly [as rape].").

64. *Case 001*, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶ 168 (noting that the Co-Prosecutors believed that rape is in some way distinct from torture, even where it meets all of the elements of the crime of torture).

65. *See id.* at ¶ 174.

66. *Id.* at ¶ 213.

67. *See id.* at ¶ 175 (referring to "General Order No. 100" issued by Abraham Lincoln). *See generally* Askin, *supra* note 4, at 299-300 (criticizing the Lieber Code and other early prohibitions of rape and their problematic terminology).

68. Case 001 Appeal, *supra* note 56, at ¶ 213.

69. *Case 001*, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶¶ 177-79.

the principle of legality.[70] Secondly, the decisions of the ad hoc tribunals are not binding, so even without the bar of legality, the tribunal jurisprudence would still need to be assessed as a representation of customary international law and general principles.[71] To this end, the Supreme Chamber noted the tribunal judgments relied upon by the Co-Prosecutors offered no support for the idea of rape being a crime against humanity in the 1970s,

> [t]o the contrary, the jurisprudence . . . indicates that by the era of the ad hoc tribunals, rape as a crime against humanity remained a nascent notion [which] did not begin to take shape until the 1990s, following reports of rape being used as a tool in carrying out widespread or systematic attacks on civilian populations in Haiti, Bosnia, and Rwanda.[72]

The Trial Chamber was therefore held to have erred in concluding that rape was prohibited as a crime against humanity under customary international law during the temporal jurisdiction of the ECCC.[73]

It is troubling that while the ICTY could identify rape as a crime against humanity as existent by the start of the atrocities in Bosnia, the ECCC determined that it could not declare such customary law to have been in existence less than twenty years earlier.[74] The ECCC, in

70. *Id.*
71. *Id.* at ¶ 179.
72. *Id.*
73. *Id.* at ¶ 183.
74. Detailed arguments as to why rape can and should be considered to have been established as a crime against humanity by the time of the ECCC's temporal jurisdiction can be found in the submissions of the Co-Prosecutors and Civil Party Co-Lead Lawyers in Case 002. While these submissions come in response to the Closing Order of Case 002 and thus could not change the Appeal Judgment of Case 001, they do set out the findings of the existence of rape as a crime against humanity that the Supreme Court Chamber should have been able to recognize in Case 001, had it done its own legal analysis, rather than simply relying on the work of tribunals from the 1990s, that were never tasked with prosecuting rapes occurring in the 1970s. *See* Co-Prosecutors' Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape Rather than the Crime Against Humanity of Other Inhumane Acts, Case File No. 002/19-09-2007-ECCC/TC, Doc. E99, (Extraordinary Chambers Cts. Cambodia, June 16, 2011); Civil Party Lead Co-Lawyers Response to the Co-Prosecutors Request to Recharacterize the Facts Establishing the Conduct of Rape as a Crime Against Humanity, Case File No. 002/19-09-2007-ECCC/TC, Doc. E99/1, (Extraordinary Chambers Cts. Cambodia, July 21, 2011).

its determination of rape's absence from customary international law in the period of 1975–1979, does not allude to when rape as a crime against humanity emerged between the Khmer Rouge and the temporal jurisdiction of the ICTY, which began in 1991.[75] Rather, the ECCC seems to accept that the criminality of rape somehow emerged within customary international law in tandem with its increasingly visible use as a tool of war, leaving the ECCC chasing its tail in its own justifications. Worryingly, the Supreme Court Chamber appears to have found the acceptance of rape's establishment as a crime against humanity in the 1990s at the ICTY to somehow preclude its existence as such prior to that date.[76] Even more worrying is the implication that had there been contemporaneous public outcry about sexual crimes committed by the Khmer Rouge, the ECCC may have been willing to find that rape was already crystalizing into a crime against humanity at that time.[77] Yet, as sexual crimes have a tendency to be less publicly discussed – and as this silence was compounded by the totalitarian nature of the Khmer Rouge and the global failure to expose the atrocities faced by Cambodian civilians under the regime – silence about rape in the 1970s is used by the ECCC to beget more deafening silence about rape in present day efforts for justice. The best thing to be said about the ECCC's deployment of the principle of legality is that it is lazy; the more concerning critique is that it is negligent and a particularly disappointing example of the gendered nature of international law, specifically that of *jus cogens norms*.[78]

B. "COMMON PURPOSE": DISTINGUISHING RAPE IN FORCED MARRIAGE FROM ALL OTHER RAPES

This leads to the second strand of ECCC jurisprudence, which ultimately signaled a dead-end for the prosecution of a vast majority

75. ICTY Statute, *supra* note 9, at arts. 5, 8.

76. Case 001 Appeal, *supra* note 56, at ¶ 178.

77. *Id.* ("In fact, recognition of rape as a crime against humanity did not begin to take shape until the 1990s, following reports of rape being used a tool in carrying out widespread or systematic attacks on civilian populations in Haiti, Bosnia, and Rwanda." This suggests that the news reports and recognition thereof played a significant role in establishing rapes as being crimes against humanity (provided they possessed the requisite chapeau elements) in the 1990s).

78. Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65 (1993) (explaining the gendered nature of international law).

of rapes within the court's jurisdiction. Having ruled on Appeal in Case 001 that rapes could not be prosecuted as rape *per* se, due to the principle of legality, the ECCC in Case 002/02 nevertheless retains the possibility of prosecuting acts of rape, albeit as different crimes against humanity than that of rape, such as other inhumane acts.[79] The Court, however, has greatly limited the number and types of acts of rape it can prosecute as other crimes against humanity.

All of the crimes listed within crimes against humanity must meet the chapeau requirements of being carried out as part of a widespread or systematic attack directed against a civilian population on national, political, ethnical, racial, or religious grounds.[80] Additionally, responsibility for commission of the crimes must lay with the accused, most notably through joint criminal enterprise – although other modes of responsibility are possible.[81] And it is here that the court determines that rape outside of forced marriage falls short of the legal elements necessary for prosecution in International Criminal Law.[82]

The juxtaposition of the treatment of rape within forced marriage as a crime against humanity and all other rape as simply something

79. The Office of the Co-Investigating Judges in producing the Closing Order for Case 002 does not, however, appear to have read the Appeal Judgment of Case 001, as the Co-Investigating Judges state that "the legal elements of the crime against humanity of rape have been established in the context of forced marriage," with no reference to the preclusion of rape as a crime against humanity at the ECCC due to the principal of legality, which is quite clearly stated at para. 213 of the Appeal Judgment of Case 001. However, by noting that "[t]he facts characterized as crimes against humanity in the form of rape can additionally be characterized as crimes against humanity in the form of sexual violence," the Co-Investigating Judges may be showing some sense that a rape charge may face difficulties, hence their provision of an alternate legal characterization. *See* Case 001 Appeal, *supra* note 56, at ¶ 178; Closing Order Case 002, *supra* note 2, at ¶¶ 1430-1433.

80. *See* Law on the Establishment of the ECCC, *supra* note 9, art. 5.

81. Closing Order Case 002, *supra* note 2, at ¶¶ 156-158, 1318, 1524-25, 1543-62 (Most notably, para. 1318 of the Closing Order states that ECCC law "provides that any suspect who committed (including by way of a joint criminal enterprise: JCE I or II); ordered; instigated; planned; or aided and abetted any of the crimes provided for in the ECCC Law shall be individually responsible for the crime.").

82. Case 002, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1428-30 (Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf.

that unfortunately happened is most starkly rendered in just a few paragraphs of the Closing Order for *Case 002*.[83] Conceding that rape occurred outside forced marriages, and that the official policy prohibition of sex outside marriage did not in fact prevent such rapes, the court nevertheless concluded that, "it cannot be considered that rape was one of the crimes used by the [Communist Party of Kampuchea, or] CPK leaders to implement the common purpose."[84] Then, within just a few lines, the court held that the acts of rape within forced marriage were part of an attack on the civilian population, one that the perpetrators were aware of, and one that attacked civilians particularly by "targeting . . . the physical and physiological integrity of the victim."[85] The implication is that those soldiers who raped civilians outside of forced marriages, and the leaders who allowed them to do so with impunity, did so not as an attack on the civilian population, but merely as something they *just* did. More worrying still is the implication that while all rape in forced marriage, "by its nature or consequences,"[86] was a targeted physical and psychological attack, all other rape was therefore not intended as, nor experienced as, a physical or psychological attack.

But as the overwhelming testimony from the Women's Hearing,[87] and the accounts put forth by the civil party lawyers, attest, rape outside forced marriage, "rapes . . . akin [to] torture, ill-treatment and killing," were not only committed by members of the Khmer Rouge, they were widespread and unpunished.[88] Furthermore, victims attest to experiencing the rapes as a physical and psychological attack.[89] Yet, this testimony has been excluded from proceedings at the ECCC, both by the ECCC's questionable application of the principle of legality and its arbitrary determination of which rapes do or do not

83. *Id.*
84. *Id.* at ¶ 1429.
85. *Id.* at ¶ 1431.
86. *See id.*
87. *See generally* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 6-10 (relating the stories of the testifiers at the Women's Hearing).
88. *See* Silke Studzinsky, Speech at the International Conference on Bangladesh Genocide and the Issue of Justice (July 4–5, 2013), http://www.civilparties.org/?p=1620, at 1, 5 (relating the experience of a civil party lawyer).
89. *See id.* at 6 (recognizing the courage it took for the victims to speak out); *see also* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 4 (noting how survivors still suffer physically and mentally).

satisfy the requirements of the applicable modes of responsibility.[90]

In the Closing Order for Case 002, the Office of the Co-Investigating Judges set out the *mens rea* requirement of joint criminal enterprise as "a shared intent to contribute to or participate in the implementation of a common purpose."[91] It is relatively uncontroversial that to be held responsible under joint criminal enterprise – the predominant mode of responsibility considered in Case 002 – the accused must have shared an intent to contribute or participate in the implementation of a common purpose, and that liability will be limited to crimes carried out in pursuit of said purpose. The controversy arises in regards to the ECCC's determination of just what is and is not part of the "common purpose," and thus of what crimes may be prosecuted under this mode of responsibility, and those that will be excluded. The Office of the Co-Investigating Judges decided that forced marriage, or "regulation of marriage," as it is described in the Closing Order, was one of five policies through which the accused attempted to achieve the common purpose. From this point, the Co-Investigating Judges determine that crimes commissioned in pursuit of this common purpose may be charged, as the mode of liability is thus established, but crimes that happened not in pursuit of the common purpose must be excluded from the charges, as they cannot be brought into this chain of responsibility.[92] Because rape outside of forced marriage was not committed in pursuit of the common purpose – that is to say, not in pursuit of one of the five policies identified by the Co-Investigating Judges[93] - the ECCC holds that charges related to such rapes cannot come in under Joint Criminal Enterprise. Under Joint Criminal Enterprise, the accused can be held responsible only for the crimes committed in pursuit of the common purpose, not crimes that

90. *See* Case 001, Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 26-34 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf (explaining each of the charged crimes and forms of responsibility must conform to the principle of legality and relating that the ECCC was established and conferred with jurisdiction over offenses after they were allegedly committed).

91. Closing Order Case 002 *supra* note 2, at ¶ 1521.

92. *Id.* at ¶¶ 1524-42.

93. *Id.* at ¶ 157 (policies of: forced movement; worksites and cooperatives; re-education of "bad elements" and killing of "enemies"; targeting of specific groups; regulation of marriage).

were carried out for some other purpose, e.g., rapes that could not be said to further one of the five policies. Under Superior Responsibility, however, there should be potential for prosecuting rapes that happened outside of forced marriage. Superior Responsibility "results from the breach of the duty to prevent the commission of, or punish participants of, the commission of a crime."[94] And thus, crimes charged under Superior Responsibility would not need to have been carried out as part of the common purpose, because the accused did not have to intend for such crimes to be carried out.[95] Rather, the superior would simply need to have known, or had reason to know, that subordinates were carrying out rapes while under his or her effective control, and have failed to prevent or punish such crimes.[96] While superiors punished some acts of rape, it is clear that many acts of rape were not punished – yet the Court fails to explain why it will not prosecute such crimes under the mode of Superior Responsibility.

It is disappointing that the Closing Order does not bring in charges for rapes outside of forced marriage under Superior Responsibility, instead continuing to specify that it refers to rapes only in the context of forced marriage.[97] It is even more disappointing that it provides no explanation as to why it continues to restrict itself to crimes

94. *Id.* at ¶¶ 1557 (notably, this is a form of *indirect* responsibility, thus it is only available where more direct modes of responsibility are not found: "Consequently, the *Charged Persons* cannot be sent for trial on the basis of this form of (indirect) responsibility and also on the basis of direct responsibility (such as to commit, plan, incite, aid and abet, or order)."). In the face of challenges from the defense, who argued that Superior Responsibility was precluded as a mode of responsibility at the ECCC by the principle of legality, the Pre-Trial Chamber held that Senior Responsibility was in fact an established mode of responsibility during the Court's temporal jurisdiction, and thus prosecutions could be brought against the accused under this mode. However, the Pre-Trial Chamber's reasoning for this decision has been criticized, even while the overall decision has been supported. *See generally* Rehan Abeyratne, *Superior Responsibility and the Principle of Legality at the ECCC*, 44 GEO. WASH. INT'L L. REV. 39 (2012).

95. ECCC Law, *supra* note 11, at art. 29.

96. For analysis of what Superior Responsibility does require, see Abeyratne, *supra* note 94, at 57 (Superior Responsibility requires the existence of a "superior-subordinate" relationship characterized by "effective control," wherein the superior "knew or had reason to know" that his subordinates had committed or were committing crimes, and the superior failed to take "necessary and reasonable measures" to prevent or punish the perpetrators of such crimes.)

97. *Id.* at ¶ 1559.

committed in pursuit of the common purpose, i.e., for the purposes of regulating marriage. This is particularly frustrating given that there should be no need for crimes charged under Superior Responsibility to fit within the five policies identified as being part of the common purpose. Ultimately, however, the ECCC's focus on the common purpose requirements of the direct modes of responsibility, and its apparent extension of this the indirect mode of Superior Responsibility, sees a great number of acts of rape excluded from prosecution because they, in the view of the Office of Co-Investigating Judges, served no higher purpose. Rape without loftier goals, rape against the rules, rape knowingly left unpunished, is thus knowingly excluded at the ECCC.

C. ASSESSING THE PROSECUTION OF RAPE AT THE ECCC

The ECCC's construction & zealous application of "common purpose" as requiring the express support of an act by Khmer Rouge official policy renders the court's approach troubling. It is even more disturbing that the court then quietly extended this "common purpose" requirement to Superior Responsibility. In its assessment of the development of rape as a crime against humanity in Case 001, the court acknowledged that the ostensible lack of visibility of rape prior to the 1990s stymied its crystallization as such.[98] Yet here, in Case 002, it is the ECCC itself that is obscuring rape, even from the recorded history of the atrocities of the Khmer Rouge. The ECCC has not only declined to avail itself of international law's condemnation of rape as a crime against humanity, but is in fact refusing to contribute, instead reverting to the longstanding tradition of international law denying public redress of violations of women's rights.[99] From this standpoint, the jurisprudence of the ECCC illustrates that the tribunals of the 1990s, and the feminist academics that influenced them, undoubtedly made progress in the prosecuting of rape in conflict. But this progress has not been wholly satisfactory, as will be explored.

98. *See Case 001*, Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 364 (indicating that the social stigma attached to rape victims might render any proof of rape difficult).

99. See Charlesworth & Chinkin, *supra* note 78, at 68-69 (asserting the gender bias in international human rights law).

V. HOW DID WE GET BACK HERE FROM THERE: INTERNATIONAL LEGAL RESPONSES TO RAPE IN TRANSITIONAL JUSTICE FROM WWII TO BOSNIA, RWANDA, AND BEYOND

Looking back over these arguments as to the prosecution of rape helps to map the terrain of prosecuting rape in conflict. Doing so, cognizant of the failings of the ECCC, throws into sharp relief how the systematic nature of rape is recognized only when rape is explicitly linked to a larger plan of attack. Doris E. Buss recalls how feminists made a concerted effort to bring prosecution of rape to the fore at the ICTY and ICTR, and then to build on this progress by setting out not only rape but also other forms of sexual violence as prohibited acts in the statute of the ICC.[100] Buss raises a number of pressing concerns with these developments, but most relevant here is her contention that the specific contexts of Bosnia and Rwanda and the prosecutions that follow may result in only a limited "visibility" of the sexual violence suffered by women.[101] Arguably, the tribunals have failed "in making visible, and treating as relevant, violence against women as a systemic gender issue *in and of itself.*"[102]

Yet, for all the valid fears that systematic rape of women may only be seen when it relates to genocide, to the community, or to something involving men, there is an equal fear that feminist efforts to elevate the status of rape in wartime to something that transcends all other crimes risks elevating the "badness" of rape. Considering rape as the worst possible crime may risk increasing the potency and efficacy of rape as a weapon, and might even essentialize women as their experiences of rape.[103] There is a difficult conceptual reconciliation to be made between rape and other crimes: crimes that

100. Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 WINDSOR Y.B. ACCESS JUST. 3, 12 (2007) (citing Rhonda Copelon, *Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 234 (2000) (advocating for "integration" of "gender justice" within the new ICC)).

101. *See id.* at 21-22 (noting the visibility of the patriarchy in the proceedings).

102. *See id.* at 12 (indicating that the results of the tribunal decisions are troubling).

103. *See* Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. INT'L L. 78, 80, 83-86 (2008) (implying that intensifying the criminality of rape in war may produce less rape or less violence, or even fewer crimes).

could subsume a charge of rape, crimes that may require rape plus additional elements, and instances of rape that may satisfy only the elements of the crime of rape and nothing more.[104]

At the ICTY, prosecution of rape ran the gamut of such varied conceptualizations and categorizations.[105] The ICTY statute recognized rape as a distinct crime against humanity[106]—perhaps its most important gain when compared to the ECCC—and indeed prosecuted it as such.[107] It also charged rape as a violation of customary international law.[108] Notably, the tribunal prosecuted certain instances of rape as both rape and torture,[109] as well as setting the precedent of sexual violence fulfilling the elements of enslavement.[110] Exactly what 'rape' is and is not in the eyes of international law is far from settled, and in exploring this multifaceted yet somewhat flat legal construction of rape, we can see how it has left many gaps in the prosecution of rapes committed during conflict.

104. Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 247 (2006–2007) ("Prosecuting rape as a subset of another crime may, in fact, seem to make the crime of rape less distinctive. However, including it as a subset of crimes against humanity, genocide, or war crimes draws attention to the heinous nature of the crime.").

105. *See generally* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement, ¶¶ 179, 228, 261, 448 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (citing several examples where rape has been prosecuted in various categorizations); Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement, ¶¶ 1, 86, 149 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (citing several examples where rape has been prosecuted in various categorizations).

106. ICTY Statute, *supra* note 9, art. 5.

107. Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 295 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (finding instances of rape as constituting a crime against humanity); *Furundžija*, Case No. IT-95-17/1-A, Judgement, 79 (affirming the conviction of torture as a violation of the laws or customs of war and for aiding and abetting outrages upon personal dignity, including rape, as a violation of the laws or customs of war).

108. *See Furundžija*, Case No. IT-95-17/1-A, Judgement, ¶ 210 (holding that rape was also a breach of customary international law as it applies to war, while the ICTY Statute only lists rape as a crime against humanity).

109. *See Delalic*, Case No. IT-96-21-A, Judgement, ¶¶ 488, 500 (stating that the rapes constituted the offense of torture).

110. *See Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 122 (holding that the required mens rea of enslavement consists of the intentional exercise of a power attaching to the right of ownership, and it is not a requirement to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts).

A. WHEN IS RAPE IN CONFLICT RAPE?

1. Rape as Torture

At the ECCC, torture, unlike rape, was found to be a distinct crime against humanity under customary international law by 1975.[111] But, the ECCC understands torture in a much more limited way than the ICTY and thus is unable to prosecute as torture many acts of rape that the ICTY would easily identify as such.[112] Finding that the instance of rape in *Case 001*[113] involved government participation and had as its purpose a nexus to extracting confessions or inflicting punishment,[114] the Supreme Chamber upheld the prosecution of the act of rape as torture, but overturned the subsuming of the distinct crime of rape within that conviction.[115] At the ECCC, rape may not be subsumed by,[116] but may be the actus reus of torture[117] when the other elements of torture as defined in customary international law of 1975 are present. Problematically, the ECCC's reading of the crime against humanity of torture as it existed in 1975 means that torture at the ECCC has a less expansive definition than it enjoys today under the Convention Against Torture.[118] The result is that opportunities for

111. Case 001, Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 353 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

112. *See id.* ¶ 357 (inferring that the ICTY has a broader definition of torture as it did not require the involvement of a state official whereas the ECCC did require the involvement of a state official).

113. *Id.*

114. *See id.* at ¶ 240.

115. *See id.* at ¶ 366 (concluding that rape constituted an element of rape).

116. Because rape has been held not to have been a crime against humanity in and of itself during the ECCC's temporal jurisdiction, there is no possibility for it to be subsumed within another crime against humanity. For that to happen, rape would need to have been an existent crime against humanity, and the Supreme Court Chamber in Case 001 explicitly ruled that it was not. Case 001 Appeal, *supra* note 56, at para. 213 ("The Supreme Court Chamber finds that the Trial Chamber erred in holding that rape was a distinct crime against humanity under customary international law from 1975-1979. Accordingly, the Trial Chamber erred in subsuming rape as a distinct crime against humanity under the crime against humanity of torture.").

117. *Id.* at ¶¶ 354-56, 366 (upholding that the act of rape by its very nature constitutes the *actus reus* of rape).

118. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 113 (stating that torture can be for the purpose of "intimidating or coercing him or a third person, or

prosecuting rape as torture at the ECCC are in effect restricted to situations in which rape was used as a means to inflict "severe physical or mental pain or suffering . . . for the specific purpose of either obtaining information from the prisoners (principally concerning military intelligence matters) or for extracting confessions (principally for the purpose of public propaganda)."[119] But before rushing to heap praise on the strides made in prosecuting rape as torture at the ICTY, the downsides of doing so should also be explored. Not everything that would have resulted in more prosecutions of rape at the ECCC would necessarily be understood by academics as a success for rape prosecutions in the grander scheme of things.

Before addressing the criticisms of prosecuting rape as torture, it is helpful to set out the advantages of such prosecutions and why they gained much support in the developing criminalization of wartime rape. Conceptions of rape as distinct from torture, just like those seen in the ECCC case law above, have given rise to calls from feminist academics to prosecute rape as torture, even, perhaps especially, where it falls outside more conservative ideas of what acts, and particularly which victims, constitute an act of torture.[120] Hannah Pearce contends that prosecuting rape as torture, and more fundamentally understanding the act of rape as inherently an act of torture, not merely torture by virtue of a legal re-categorization, will allow for rape, and the prohibition and punishment thereof, to be taken seriously[121]—to be treated as seriously as the arguably more

for any reason based on discrimination of any kind" as well as the more traditional conceptions of torture as being for the purpose of "obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed," with the former going beyond that covered by customary international law during the temporal jurisdiction of the ECCC).

119. Case 002, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1408-14 (Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf; *see also Case 001*, Case File No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 289, 353, 356 (repeatedly stressing that torture, in compliance with the principle of legality and thus the definition of torture held to be in effect in 1975, is for the purpose obtaining information or a confession).

120. *See* Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture*, 14 INT'L J. REFUGEE L. 534, 546 (2002) (indicating that forcible sexual acts can be elements of torture).

121. *See id.* at 559-60 (suggesting that rape is used as a form of torture and

dominant conception of torture as something typically as inflicted upon a male political prisoner of conscience.[122] Pearce's approach to the continued failure to prosecute rape is to build upon and realize in practice the burgeoning, yet constrained, prosecution of torture constituted by the rape of women.[123] This can be characterized as an assimilationist approach in which crimes largely characterized as specifically carried out against women, such as rape, can receive sufficient attention from the international legal regime by being elevated to the level of a crime already widely condemned in practice due to its predominant association with the suffering of men. Pearce molds her argument for the prosecution of rape as torture, cognizant of critiques that to do so could be seen as a trivialization of torture.[124] But, for many feminists, the continual fear in the prosecution of rape has been that prosecuting rape as anything other than rape *qua* rape could result in a trivializing of rape, or at least a failure to view rape as a distinct crime against humanity, a particular wrong recognized as such in and of itself.[125] To prosecute rape as anything other than rape results, for some, in sending a message that rape alone is not

advocating for change at the procedural level).

122. *Id.* at 537, 558 ("Despite the fact that the most significant bodies have stated that rape is torture, it is still maintained by some authorities that the experience of watching a mother or sister raped would constitute more of a bona fide form of torture than the rape itself.").

123. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement, 1 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (holding the conviction of torture "as a violation of the laws or customs of war and for aiding and abetting outrages upon personal dignity, including rape, as a violation of the laws or customs of war"); *see also* Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (finding that aspects of rape overlap with aspects of torture); Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement, ¶ 488 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (considering the first prosecution of an act of rape as the crime of torture as a violation of the laws or customs of war); Christine Strumpen-Darrie, Article, *Rape: A Survey of Current International Jurisprudence*, 7 HUM. RTS. BRIEF 12, 14-17 (2000) (furthering extrapolation of the ICTY's development of rape as torture).

124. *See* Pearce, *supra* note 120, at 540 (rebutting this notion and offering evidence that rape causes as much trauma as torture).

125. *See* Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, HASTINGS WOMEN'S L. J., 243, 263 [hereinafter Copelon, *Surfacing Gender*] (proposing that sexual violence against women must be its own crime against humanity).

necessarily bad, that rape per se does not harm.[126] While Pearce's project is also a fundamentally feminist one,[127] her assimilationist approach runs counter to the calls of Copelon, who focuses on the need to "surface gender," to make the gendered nature of rape explicit,[128] rather than to subsume it within a crime not normally associated with women as a type of pragmatic sacrifice.

The advantage of prosecuting rape as torture, however, is that it effectively side-steps the danger that comes with making the gendered nature of rape explicit, which is that doing so often results in a sexualization of the crime. Pearce explains rape as a "pseudo-sexual act, a pattern of sexual behavior that is concerned much more with status, aggression, control and dominance than with sensual pleasure or sexual satisfaction."[129] The connotations of torture allow for an envisioning of rape as an act carried out purely for its ability to inflict pain or suffering, enabled by an unequal power dynamic that need not be stereotypically male/female, and need not involve any act of a sexual nature.[130] As such, the "pseudo-sexual" nature of rape can be better understood when seen as torture: the sexual act is merely a means to an end, available due to the inequality at play. The end game is suffering and the use of a sexual act to obtain that end does not render the experience primarily a sexual one—it remains foremost an act of torture.

This very advantage of prosecuting rape as torture, however, further engenders the notion of a hierarchy of harms in which torture is sufficiently high enough to be taken seriously, while rape languishes lower down. The solution to this, which Pearce seems to

126. *See* Engle, *supra* note 6, at 782 (noting other commentators who believe that the ICTY and the ICTR have not done enough to make rape in armed conflict a war crime).

127. *See* Pearce, *supra* note 120, at 559 (focusing on addressing the patriarchal denial of women's experiences of sexual violence and rape being torture: "[i]t is indicative of the status of women that sexual violence against women has not yet become established as a principle of jus cogens despite the other developments in legal attitudes towards rape which have evolved dramatically in the last fifty years").

128. *See* Copelon, *Surfacing Gender*, *supra* note 125, at 264 (claiming the gender dimension of rape in war is critical).

129. Pearce, *supra* note 120, at 540.

130. *See id.* at 540 (asserting that a rapist is not always motivated by sexual reasons but can be motivated by power or anger).

venture, is to consider all rape *de facto* torture.[131] The ECCC and ICTY approach of requiring the distinct material elements of torture to be present in order to elevate the actus reus of rape into the prosecution torture would disappear. But, in so doing one would invariably have to succumb to an affirming of torture as being the worse crime, of being the common denominator of harm, and of rape as being merely elemental. This is particularly problematic given that rape would continue to exist as a criminal offense in domestic law, whilst disappearing from the international law stage—remaining only as an actus reus of other offenses, such as torture.[132] As such, the argument that all rape should be prosecuted is jeopardized—the focus on prosecuting rape in conflict risks losing sight of the harm in "everyday rape."[133]

2. Rape as Genocide

In consideration of fears of rape being lost within a hierarchy of harms, and the fear that rape might only be prosecuted when it is of a particularly heinous nature, the relationship between rape and genocide looms large on the horizon. Of the feminist legal theorists concerned with the gendered nature of rape inflicted on women, Catharine MacKinnon's voice carried further than many.[134] MacKinnon viewed the rape of Muslim and Croatian women in the Former Yugoslavia as genocide, while also characterizing rape of women by men as a part of daily life outside of genocide: in the Bosnian context, MacKinnon cast rape as existing both in its everyday form and as genocide.[135] She was exasperated by what she perceived as the West's inability to view rape as consisting of many

131. *See id.* at 559 (writing of the benefits of a "strong consensus of rape as torture").

132. *See* Copelon, *Surfacing Gender*, *supra* note 125, at 263 (asserting that it is not enough for rape to be a vehicle of some other form of persecution when gender is usually intertwined).

133. Jelke Boesten, *Women and Conflict: Why We Should Not Separate Rape in War from the Everyday Reality of Violence*, AFRICA AT LSE (June 13, 2014), http://blogs.lse.ac.uk/africaatlse/2014/06/13/women-and-conflict-why-we-should-not-separate-rape-in-war-from-the-everyday-reality-of-violence/ (advocating the importance of addressing both high rates of peacetime and war-related sexual violence).

134. *See generally* MacKinnon, *supra* note 5, at 9-10 (asserting that rape be viewed as genocide).

135. *Id.* at 9-10.

different attacks at once: as simultaneously both a genocidal attack and a gendered attack.[136] Ultimately, however, rape as genocide appears to be the dominant understanding in MacKinnon's analysis of the Bosnian conflict.[137]

MacKinnon's rather radical view of rape as genocide was largely confirmed in the ICTR's *Akayesu* judgment.[138] But for many feminist theorists, despite the immediate image of rape being moved up the imagined hierarchy to the ultimate harm of genocide, this is not a resounding success. Copelon, for example, writing prior to the *Akayesu* judgment, feared that much of the unprecedented attention given to rape as genocide in Bosnia was due not necessarily to a genocidal particularity of the rape suffered by women in Bosnia, but rather "the invisibility of the rape of women in history as well as in the present."[139] From Copelon's perspective, the connection between the mass rapes in Bosnia and genocide casts them as distinct from, and graver, than other rapes, and thus risks invisibilizing women and the specific violence and harms of rape whenever it occurs outside the context of genocide.[140] This need for rape to be something *else* in order to be systematic, in order to be sufficiently grave, is indicative of the sidelining of rape at the ECCC. Genocide is violence to destroy a people, whereas rape is sexualized violence intended to destroy individual women as women, not as their ethnicity.[141] From this standpoint, all rape in conflict is systematic, regardless of official policy. But Copelon's rejection of rape as genocide relies, explicitly, on rape only ever being about male/female subjugation, to the extent that where a man rapes a man, the harm is achieved by the raped man being "reduced" to existing as a woman.[142] Genocide, says Copelon,

136. *Id.* at 9-10.

137. *Id.* at 11-12.

138. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, 143 (June 1, 2001) (affirming a conviction of genocide); *cf.* Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 374 (2003) (noting that rape can be used to commit genocide).

139. Copelon, *Surfacing Gender*, *supra* note 125, at 244-45.

140. *See id.* at 245-46 (noting examples whereby rape went largely unreported or received little attention and argues that by associating rape only to genocide makes rape committed outside of the classic genocidal form invisible).

141. *Id.* at 246 ("Genocide involves the infliction of all forms of violence to destroy a people based on its identity as a people, while rape is sexualized violence that seeks to destroy a woman based on her identity as a woman.").

142. *Id.* at 246 n.12.

elides rape and gender.[143] Copelon fears genocidal rape exceptionalism and she sees the reiteration and even centering of gender as the way to counteract this. And while centering gender does risk overly gendering rape, Copelon remains cognizant of the hazards of echoing archaic ideas of the "badness" of rape stemming from it being an attack against honor.[144]

3. From Genocide to Gender

Russell-Brown is perhaps more willing than Copelon to see an intersection between rape and genocide; one that does not necessarily risk negating the inherent badness of rape.[145] For Russell-Brown, gender is not the sole focus because rape can be "a tool of war," its violence coming before its sexual nature.[146] Both gender and ethnicity are implicated in the use of rape as a tool of war in certain contexts, such as Rwanda.[147] Russell-Brown views the ICTR's treatment of genocidal rape in *Akayesu* as striking the correct balance, of viewing rape and its harm both as relative to its specific Rwandan context, and as an intersectional act able to happen in other contexts, "rape as a form of aggression . . . [i]t likened rape to torture and it characterized rape as a violation of personal dignity . . . [also] as a physical invasion of a sexual nature."[148] But others fear that ICTR has in fact created a vertical hierarchy of crimes, in which genocide occupies the highest rung.[149] This hierarchical conceptualization of offenses committed in times of conflict would encourage the "feminist vision . . . to *move sexual violence crimes up*

143. *See id*. at 246 (arguing that rape and genocide are different atrocities).

144. *See id*. at 249 (suggesting that rape is fundamentally violence against women).

145. See Russell-Brown, *supra* note 138, at 354, 374 (referring to *Akayesu* as an example of an intersection of genocide and rape).

146. *Id.* at 352 (alluding to the Rwandan tribunal's view that rape could be a tool of war).

147. *Id.* at 351-53.

148. *Id.* at 371; *see also* Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139, 1143 (1998) (explaining how the gendered nature of crimes should be accounted for without essentializing it or applying a reductionist approach).

149. *See* Attila Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 MELB. J. INT'L. L. 1, 32 (2002) (proposing that the ICTR's judgments demonstrate that genocide is "the crime of crimes").

the hierarchy of IHL and ICL criminality." This would be at odds with the alternative feminist approach of separating out sexual assaults against women in a horizontal fashion, to be prosecuted in their own right, even if that is in addition to prosecution as genocide.[150] In the starkest depiction, one which never seems to have quite been born out in the jurisprudence to date, this is an ideological feminist struggle between two feared extremes: one the one hand, the subsuming of rape, the invisibilizing of women; and on the other, the sequestration of women as victims, with their gender and sexuality as sites of particular, immutable harm. In this way, focusing on gender could lead to regression, rather than progress, in the conceptualizing of women and rape within international criminal law.

4. Rape as Gendered

Reviewing the jurisprudence of the ECCC revealed a dearth of consideration of how women in particular suffered under the Khmer Rouge, and this stood in stark contrast to the Women's Hearing, which was created to remedy this very deficit.[151] But, the ECCC's lack of engagement with the ways in which rape harms women in ostensibly particular ways, can be seen as a stimulus for reconsidering whether focusing on the gendered aspects of rape in conflict helps or hinders.[152] "Surfacing gender" risks being realized as a distinguishing of gender identity and sexual autonomy as a site for incomparable harm, reserved exclusively to women. In condemning sexual violence against women, there is a risk of elevating its significance. As Professor Janet Halley proposes, "the intensive and specific prohibition of rape can weaponise it."[153] The corollary of this is that rape becomes somehow graver than all other harms, or at the very least significantly distinct in the harm it causes. Treating rape as "inherently *comparative*," necessitates a certain experience of the harm of rape from all victims—for rape to be the worst harm.[154] But a person experiencing wartime rape may be more

150. Halley, *supra* note 103, at 83.

151. CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 1.

152. This is not to say that the ECCC intended to promote critical reflection on these issues. To the contrary, many parts of the ECCC appear quick to close down progressive work on gender and rape. *E.g.*, *supra* note 58.

153. Halley, *supra* note 103, at 115.

154. *See id.* at 112 (quoting the protagonist of the diary whom Halley employs to illustrate the rather more complex response women have toward rape in war:

angered by starvation, by displacement, by even the most mundane banalities of life, than by their personal experience of rape. This does not negate the wrongdoing of the rapist, but it does call into question, as Halley deftly explores, the understanding of the harm of rape that underlies the international legal response of recent decades.[155]

Another risk of treating sexual violence as inherently gendered is that it could result in a failure to understand such violence as anything other than a "reproduc[tion] [of] the dynamics of male-on-female (sexual) violence."[156] But is rape simply binary gender dynamics realized through physical violence? Is it a profoundly damaging psychological attack on a woman *as a woman*?[157] Outside of the ECCC, the Women's Hearing acknowledged that sexual crimes were most definitely also committed against men during this time. But the Women's Hearing also conceded that there is little research on the impact such violence had on men, and reports from the Hearing also note that the Khmer Rouge's Moral Codes made no attempt to regulate same-sex relationships or sexual violence..[158] More glaringly, the Cambodian experience wholly and seemingly willfully refuses to engage with the idea implicit in the outrage engendered my forced marriage—it forces a man to rape his wife.[159] In cases of sexual intercourse entered into on fear of death, it is at once far too simplistic and largely illogical to imply that women were victims while men were not.

Feminist concerns as to the gendering of rape and differentiating of women's experiences of harm[160] often relate to fears that this

"[i]t [rape] sounds like the absolute worst, the end of everything—but it's not.").

155. *See id.* (referring to the German rape victims' emotional side of rape who begged to be shot and committed suicide).

156. Engle, *supra* note 6, at 815.

157. *See* Copelon, *Surfacing Gender*, *supra* note 125, at 252 ("Rape attacks the integrity of the woman as a person as well as her identity as a woman . . . . [R]ape is both a profound physical attack and a particularly egregious form of psychological torture.").

158. CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 4.

159. *See* THERESA DE LANGIS ET AL., LIKE GHOST CHANGES BODY: A STUDY ON THE IMPACT OF FORCED MARRIAGE UNDER THE KHMER ROUGE REGIME 102 (2014) (asserting that the instituted policy of forced marriage perpetuates a culture of rape and abuse).

160. *See generally* Fionnuala Ní Aoláin, *Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies*, 35 QUEEN'S L.J. 219, 219 (2009) (arguing that a feminist theory of harm is necessary to respond effectively

portrays women as perpetual victims, lacking agency by virtue of the very presence of war. Additionally, feminists have expressed concerns that it furthers the same logic that cast women as men's property, as a means of attacking the male enemy in war, or of the concept of women as belonging, certainly in war, to the category of "women and children"[161]—unable to play an active role, even in terms of their own physicality and sexual acts, and dependent upon men for their role in the war, whichever side the men may come from. Karen Engle has suggested that this may in fact work to deprive women of any power they do have.[162] Yet it is not only women that the gendered vision of rape harms, as the absence of any redress for the specific harms experienced by men in forced marriage in Cambodia attests.[163] Feminist explanations of the women soldiers at Abu Ghraib sexually assaulting male prisoners as a furtherance of male/female subjugation, either by women acting as men and men being treated as women, or women being manipulated by the men who do retain power, is not only an injustice to the victims,[164] but relies on a denial of women's power, arguably rooted in the way in which rape has been addressed in the international legal system, influenced greatly by feminists.[165] Almost twenty years after feminism mobilized to prosecute rape, the feminist response to the sexual torture of male prisoners at Abu Ghraib, especially where it was at the hands of women soldiers, shows what Ahmed describes as the "blindspot" of feminism's desire to view all sexual violence as an

to the experiences of women).

161. *See generally* Engle, *supra* note 6, at 779-80, 810-16 (relaying the experiences of women in war to suggest women as being a distinct category from men).

162. *Id.* at 812.

163. For example, the ECCC has not (yet) considered the very particular suffering, and any subsequent PTSD, that may have been experienced by men who found themselves struggling as both victim and, to some extent, perpetrator, e.g., men who raped their new wives because if they did not they may both have been killed. *See generally* KASUMI NAKAGAWA, GENDER-BASED VIOLENCE DURING THE KHMER ROUGE REGIME (2d ed. 2008) (providing various accounts of forced marriage in which death was the threatened punishment for those forced marriage couples who did not engage in sex with one another).

164. Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 8-10 (2012).

165. *See* Engle, *supra* note 6, at 813 (suggesting that the success of feminists of calling international attention to rape relies on some denial of women's power).

incarnation of male/female subordination.[166] The need for feminism and international law to both recognize the gendered and the un-gendered nature of rape in conflict looms large on the horizon.

VI. CONCLUSION

In mapping some of the many strands of the diverse efforts to forefront prosecution of rape in international law, I hope to have cast some light on the ways in which the approach continues to fall short and perhaps has caused harm itself, albeit in unintended ways.[167] If the ECCC had availed of the jurisprudence of the ICTY and ICTR, and the hard won understanding of rape as a crime deserving prosecution as such, there may well have been some justice rendered for many victims of rape under the Khmer Rouge. But, as has been illustrated, the international law response to rape since the 1970s has not resulted in a panacea for rape prosecution and certainly not for rapes that occurred prior to the 1990s.

The principle of legality and the demands of chapeau elements and modes of responsibility remain is the technical bar to justice for women at the ECCC, and it will likely be recorded as the definitive reason for the notable absence of rape prosecutions at the Court. But, in truth, victims of rape and sexual violence under the Khmer Rouge are left without formal redress for a number of reasons far bigger than just a legal technicality.[168] Primarily, the international legal order has for too long failed to work for women, as the gendered nature of both peremptory norms and customary international law attests.[169] Secondly, the political will to achieve justice for Cambodia's victims of rape and sexual assault is lacking on both the immediate level, among a number of actors at the ECCC,[170] and

166. Ahmed, *supra* note 164, at 9-11.

167. *See, e.g.*, Askin, *supra* note 4, at 288-89 (emphasizing how the development of international law neglected to take women and girls into account).

168. *See* CAMBODIAN DEFENDERS PROJECT, *supra* note 1, at 5 (stressing that under ECCC law for sexual crimes to be prosecuted, they need to be subsumed under the crime of torture).

169. Charlesworth & Chinkin, *supra* note 78, at 75 (concluding that international human rights principles are male oriented and given a masculine interpretation).

170. Although the Co-Lawyers for Civil Parties have worked hard to foreground rape at the ECCC, and the prosecution have also made some efforts, the Supreme Court Chamber (Case 001 Appeal) and the Office of the Co-

seemingly the broader international community, and among so many of the feminist theorists who were so eager to influence the jurisprudence of the ICTY.[171] Finally, a firm understanding of the harm of rape, of the conceptual basis of its prosecution, especially in contexts of conflict remains absent, or at least too incoherent to be powerful.

The various constructions of rape to date—rape as genocide, rape as torture, gendered rape, sexualized rape, even rape simply as rape—have struggled to gain a conceptual foothold that can withstand the myriad realities of rape in conflict.[172] For every permutation of the definition and prosecution of rape in conflict in international law, there has been a plethora of responses—both positive and critical.[173] The cleaving of rape in the context of forced marriage from all other rapes at the ECCC is perhaps the latest in attempts to define and conceptualize not the particular harms of rape, but the particular rapes that harm. Jurisprudence from the Special Court for Sierra Leone[174] and the response to the ICC's *Katanaga*[175] ruling would certainly seem to suggest the intersection of rape and forced marriage as a burgeoning point of divergence,[176] further

Investigating Judges(Case 002 Closing Order) have been the source of significant challenges to the efforts of the aforementioned sections.

171. *See* Engle, *supra* note 6, at 778.

172. *See* Pearce, *supra* note 120, at 539 (advocating for rape as torture); Russell-Brown, *supra* note 138, at 350 (advocating for rape as a genocide).

173. *See also* Pearce, *supra* note 120, at 560 (showing that more needs to change at the procedural level to prosecute rape and sexual violence); Russell-Brown, *supra* note 138, at 373 (discussing the debate surrounding genocidal rape). *See generally* Engle, *supra* note 6, at 815 (responding to early disagreements over the treatment of rape in Bosnia and Herzegovina).

174. *See* Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, 105-06 (Feb. 22, 2008) (holding that forced marriage itself could constitute the crime against humanity of an other inhumane act and need not depend on classification as sexual slavery).

175. *See generally* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Order Instructing the Registry to Report on Applications for Reparations (Aug. 27, 2014).

176. Case 002/02 at the ECCC should see decisions made as to whether rape is or is not a required element of forced marriage. The Civil Party Co-Lead Lawyers have submitted Investigative Requests which argue, *inter alia*, that forced marriage may amount to the crimes against humanity of other inhumane acts, enslavement, forced pregnancy, and/or rape. This suggests that, from the point of view of the Civil Parties, not all forced marriages would need to involve rape, and that where rape was carried out within forced marriage, the rape amounts to a discrete crime against humanity, "[a]separate count falling under article 5 of the ECCC law, as

complicating the question of whether the prosecution of rape at the international level in recent decades has been progress enough, or even progress at all.[177]

What is needed is a revised conceptualization of rape, reconciliation between rape *qua* rape and rape as constitutive of crimes such as torture and genocide, and, crucially, a more theoretically secure understanding of the numerous harms it can inflict (and the ways in which it may not do the harm we expect).[178] MacKinnon's identifying of the difficulty in reconciling both the particular and the general in international law goes a long way to explaining the struggles inherent in trying to ensure that the law delivers justice for women,[179] requiring an understanding of women's experiences and of the harms they experience through rape. , But achieving this greatly risks essentializing women. Not all women's lives are the same, especially in the context of providing transitional justice for women post-conflict. While the law often neglects many of the ways in which women experience harm, it would also be a grave injustice to imply that all women must experience harm in certain, gendered ways. The challenge for International Criminal Law, and for the feminist legal scholars who seek to influence this field, is to legislate and prosecute acts of sexual violence while

crimes against humanity of rape." Co-Lawyers for Civil Parties, Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, Case File No. 002/19-09-2007-ECCC/OCIJ, Doc. D188, ¶ 25 (Extraordinary Chambers Cts. Cambodia, July 15, 2009). In addition to hashing out the elements of forced marriage, Case 002/02 will also be an opportunity to clarify the form forced marriage should take as a crime against humanity. For discussion of this issue outside of the ECCC's Case 002/02. *See generally* Frances Nguyen, *Emerging Voices: Taking Forced Marriage Out of the "Other Inhumane Acts" Box*, OPINIO JURIS (July 31, 2013, 9:30 AM), http://opiniojuris.org/2013/07/31/emerging-voices-taking-forced-marriage-out-of-the-other-inhumane-acts-box/ (demonstrating that even though the Special Court for Sierra Leone has upheld convictions of forced marriage as crimes against humanity in later cases, the general consensus remains that there is a lack of case law to support such prosecutions of forced marriage as distinct crimes against humanity in their own right).

177. *See* Engle, *supra* note 6, at 780 (arguing that the criminalization of rape is neither as path-breaking nor as progressive as recognition suggests).

178. *See id.*

179. MacKinnon, *supra* note 5, at 142 ("What happens to women is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human.").

allowing for a nuanced representation both of women and of sexual relations in times of conflict. Halley effectively, albeit uncomfortably for those seeking a presentation of women as uncomplicated perpetual victims, illustrates this point in *Rape in Berlin*, wherein consent and coercion are not as clear cut as most international lawyers would like to imagine.[180] The important fact of different realities and harms experienced by women is so often obscured by a failure to include the voices of feminists from outside the West, whose social, economic, and cultural particularities feminist academia so often glosses over in its effort to secure recognition of women as a uniform class in international law.[181]

Underlying this, however, is a need to address the role of gender both within rape, and within international law more generally, as well as the challenge of developing law that carries expressive force in the condemnation of rape[182] without essentializing and thus further perpetuating women's sexuality as a site of particular harm[183] and simultaneously occluding men's bodies as a site of sexual harm.[184] In focusing attention on women there is a danger to exclude, or even deny, the rape and sexual violence suffered by men in times of conflict. In her exploration of the proposition presented by queer theory, that "feminism's reliance on male/female subordination has the potential to not only obscure harm in times of war but also to perpetuate it," Ahmed brings to light both the sexual violence experienced by men at the hands of women and the disappointing ways in which dominant elements of legal feminism have sought to

180. *See* Halley, *supra* note 103, at 111 (relaying an account of a woman's experience of sexual violence).

181. *See* Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, *in* INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 47, 48 (Doris Buss & Ambreena Manji eds., 2005) (arguing against structural bias feminism, which obscures economic, social, and cultural differences between first and third world women).

182. *See* Fiona O'Regan, Prosecutor vs. Jean-Pierre Bemba Gombo*: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism*, 43 GEO. J. INT'L L. 1323, 1351-1360 (2012) (discussing the expressive force of international law in signaling ("expressing") the condemnation of rape).

183. *See id.* at 1357-59 (discussing the dangers of essentializing women's sexuality in prosecuting rape).

184. *See generally* Ruth Graham, *Male Rape and the Careful Construction of the Male Victim*, 15 SOC. & LEGAL STUD. 187, 188, 202 (2006) (reviewing the academic discourse of male rape).

mask it as a either women acting as men or men being treated as women.[185]

This ultimately sets the stage for a more fundamental questioning of our understanding of harm and how this is expressed through law. This more developed understanding of rape will not be easy to reach, and the jurisprudence may show that rape in conflict will always be somewhat tied to context[186] be that genocide in Rwanda, or forced marriage in Cambodia. But we must develop a more nuanced understanding of why rape harms at all, even before applying this theory in a more contextualized fashion. A more advanced conception of women, of gender, and of rape is essential if transitional justice is to be a comprehensive means of moving forwards, healing harms, and ensuring a lasting peace for not only a nation, but the individuals of which it consists.

185. Ahmed, *supra* note 164, at 3 (recounting the sexual violence experienced by men at the hands of women soldiers in the Abu Ghraib prison).

186. The Appeals Chamber in *Brima* seems cognizant of the limitation of context in International Criminal Law, as it caveats its ruling on the definition of forced marriage with, "the Appeals Chamber finds that *in the context of the Sierra Leone conflict*, forced marriage describes a situation in which. . . [emphasis added]." But generally in International Criminal Law, the limitations of context risk being forgotten, as tribunals seek to draw on the jurisprudence of one another, especially regarding developing or contentious issues, such as forced marriage. *See* Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 196 (Feb. 22, 2008).