

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE OFFICE OF THE CO-PROSECUTORS**

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**CIVIL PARTIES' CO-LAWYERS' REQUEST FOR SUPPLEMENTARY
PRELIMINARY INVESTIGATIONS**

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A. FACTUAL BACKGROUND

1. Although historians have previously told of mass weddings ordered by the Khmer Rouge earlier¹ these facts were not part of the investigations by the Co-Prosecutors and subsequently did not qualify as a crime. They were simply ignored.

Witnesses were not even asked about forced marriages. Thus the Introductory Submission which is binding for judicial investigations by the Office of the Co-Investigating Judges (“OCIJ”)² does not mention forced marriages or sexual crimes in the facts of the case.

2. Nevertheless the investigations uncovered accounts of forced marriages which demonstrate that ordered mass weddings took place in the entire country under the Khmer Rouge leadership.³
3. Likewise evidence in the case file indicates that at least one mass wedding was organized in [REDACTED] which was subordinated to the accused. The witness accounted that people from her group, medics, cadres and others were called out to be married. Twenty to thirty (20-30) couples were wedded.⁴
4. At least since early 1977 these weddings were ordered and organized by “Angkar” and in most cases sexual intercourse was proscribed.⁵
The Khmer Rouge abolished typical Cambodian ceremonies and rituals for weddings were abolished by the Khmer Rouge, for example the family was

¹ Ben Kiernan, *Cambodia: The Eastern Zone Massacres*, Documentation Series: No. 1, Center for the Studies of Human Rights, Columbia University, Stockholm (1987), p. 35; Elisabeth Becker, *When the War was over*, New York (1986), p. 257; Laura McGrew, *Cambodian Women at Year Zero*, 1999, <http://advocacynet.org/resource/530>, visited on 21 January 2009. McGrew estimates that around 200.000 women could have been forced to marry. If forced marriage in the Cambodian context is gender-neutral the same number of men could be considered as victims of forced marriage.

² See Rule 55 (2) of the Internal Rules

³ For example: Saom Mon, Statement on 15 January 2008, Court Doc.No. D28/11; Khamboly Dy, *A History of Democratic Kampuchea*, DC-Cam, Phnom Penh (2007), p. 32 et sequ., Ian Harris, *Buddhism under Pol Pot*, DC-Cam, Phnom Penh (2007), p. 19, 50, 53, 83, 127-129, 134, 226, 232.

⁴ [REDACTED].

⁵ Peg LeVine, *Love and Dread in Cambodia, Weddings and Births under the Khmer Rouge*, November 2008, not yet published. The author interviewed 192 persons, married in mass weddings under the Khmer Rouge. She stated that if sexual intercourse was prescribed it was addressed to the males. Among 88 males 76 (more than 86 %) received the prescription having sexual intercourse.

generally not allowed to attend the weddings because the Khmer Rouge considered “Angkar “ to be everyone’s parents.⁶

Monks could not bless the couple and the normal wedding celebration with music and many guests was suspended.

Often the new couple did not know each other previously, but had to comply with the orders by “Angkar”. Otherwise they were considered as traitors who did not abide by the rules set out by “Angkar” and risked punishment.⁷

The newly wedded couple was assigned a hut in which they had to spend on average three nights together that were controlled by spys (*chhlob*) or assumed to be controlled by “Angkar”.

The weddings were a mean of population policy to get new revolutionary children given the decreasing number of births.⁸

5. The evidence is clear that the phenomenon of forced marriages was ordered by the senior leaders and performed countrywide was widespread and directed against the civilian population.

B. SUMMARY OF ARGUMENTS

6. Given evidence shows that at least one group wedding was organized in [REDACTED] which was under the control of the accused. Such mass weddings shall be considered as rape, enslavement, forced pregnancy and the new crime of forced marriage under crimes against humanity because the genuine consent of the concerned people was lacking under general coercive circumstances.
7. These serious gender-related crimes have distinct elements and can be charged cumulatively. Although the evidence is on the case file and forced marriages were widespread during the DK period, these crimes were not properly investigated and not included in the Introductory Submission.
8. In order to ascertain the truth, supplementary investigations are requested with the aim of charging the accused person with these crimes. In view of the limited

⁶ Ratana C. Huy, *Khmer Rouge Wedding*, DC-Cam, *Searching for the Truth*, No. 25, January 2002, p. 26.

⁷ See *supra* note 6, p.28.

⁸ See *Khamboly Dy*, *supra* note 3, p. 35.

scope of the demanded investigations it is still manageable to indict the accused during the ongoing trial that will not be delayed.

C. FORCED MARRIAGE UNDER INTERNATIONAL LAW AND JURISPRUDENCE

9. In this request for supplementary investigations, the discussion on distinction between traditionally arranged marriages in the modern Cambodian context and forced marriages under the Khmer Rouge as new crime against humanity will be omitted.

Even if arranged marriages, where the consent of one or both parties is lacking, are a serious violation, arranged marriages do not amount to the level of a crime against humanity as forced marriage do because it is not an 'attack' against the civilian population.⁹

10. It is internationally acknowledged that the mutual consent of parties is a prerequisite for a marriage to be held valid.¹⁰

The UN Secretary-General defined a *forced* marriage as one that 'lacks free and valid consent of at least one of the parties'.¹¹ In its most extreme form, forced marriage can involve threatening behaviour, abduction, imprisonment, physical violence, rape and, in some cases, murder.¹²

11. The Trial Chamber of the Special Court of Sierra Leone ("SCSL") found that the evidence of forced marriage was completely subsumed by the crime of sexual slavery, and that no lacuna in the law necessitated a separate crime of forced marriage as an 'other inhumane act'.¹³

⁹ Michael P. Scharf and Suzanne Mattler, *Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime Against Humanity*, Case Research Paper Series in Legal Studies (2005), <http://ssrn.com/abstract=824291>, last visit on 5 February 2009, p.12.

¹⁰ Article 16 (2) of Universal Declaration of Human Rights, Art. 23 (3) International Covenant on Civil and Political Rights, and Article 1 (1) of the Convention on Consent to Marriage.

¹¹ Report of the Secretary General, *In-Depth Study on All Forms of Violence Against Women*, A/61/122/Add.1. 2006, para 122.

¹² See supra note 11, para 122.

¹³ *Prosecutor v. Alex Tamba Brima et al.*, (SCSL-04-16-T), Trial Chamber, 20 June 2007, Judgment, para 713.

Notably, the Trial Chamber held that logic required it to interpret the offence of ‘other inhumane acts’ as applying only to acts of a non-sexual nature because the Statute already contained an exhaustive category of sexual crimes.¹⁴ In addition, the Trial Chamber found that the evidence did not point to “even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery.”¹⁵ Moreover, had there been such evidence, it would not have amounted to an ‘other inhumane act’ because it would not have been of a similar gravity to the other enumerated crimes against humanity, as is required for conduct which qualifies as an ‘other inhumane act.’

12. Before the Appeal Chamber of the SCSL, forced marriage has therefore been recognized as a new crime against humanity for the first time in an international(ized) tribunal.¹⁶

The Appeals Chamber made three noteworthy findings. First, the Appeals Chamber held that the exhaustive listing of sexual crimes in Article 2(g) of the Statute does not foreclose the possibility of charging ‘other inhumane acts’ that have a sexual or gender-based component under Article 2(i).¹⁷ Second, the Appeals Chamber found that forced marriage is not subsumed by the crime of sexual slavery.¹⁸ Although forced marriage, like sexual slavery, involves non-consensual sex and a deprivation of liberty, it also has distinguishing features such as a “forced conjugal association” that, unlike sexual slavery, involves exclusivity between ‘husband’ and ‘wife.’¹⁹ Finally, the Appeals Chamber found that instances of forced marriage during the conflict in Sierra Leone were of a similar gravity to the other crimes against humanity enumerated in the Statute of the Court.²⁰

¹⁴ See supra note 13, para 697.

¹⁵ See supra note 13, para 710.

¹⁶ *Prosecutor v. Alex Tamba Brima et al.*, (SCSL-04-16-A), Appeals Chamber, 22 February 2008, Judgment, para 175-202.

¹⁷ See supra note 16, para. 186.

¹⁸ See supra note 16, para 195.

¹⁹ See supra note 16, para 195.

²⁰ See supra note 16, para 200.

13. In the context of Rwanda it has been discussed and suggested to include 'forced marriage' as a specific crime under crimes against humanity.²¹

D. FORCED MARRIAGE AS A CRIME AGAINST HUMANITY IN THE CAMBODIAN CONTEXT

I. Forced marriage as a widespread or systematic attack directed against any civilian population

14. Forced marriages during the DK period were organized all over the country and from early 1977 systematic and widespread. The entire population that was not yet married and over 18 years old was a target of the attack.

Among the target group were often cadres and soldiers and it is questionable if they fall under the term of civilian population.

15. The gradual disappearance in customary international law of the nexus between crimes against humanity and armed conflict has led to a weakening emphasis on civilians as the sole target group.

The category of persons safeguarded has been broadened towards the protection of the basic values of human dignity, regardless of the legal status of those entitled to such protection. There no longer exists any substantial reason for refusing to apply the notion of crimes against humanity to vicious and inhumane actions undertaken on a large scale by governments against the human dignity of their own military.²²

Moreover, if the concerned persons are not protected by International Humanitarian Law serious violations against them fall under crimes against humanity.

16. Thus, military staff and cadres who were forced to marry fall under the category of victims of crimes against humanity.

²¹ Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed* (2001) 7 U.C. Davis Journal of International Law and Policy 197 (2001).

²² Antonio Cassese, *International Criminal Law*, Oxford (2008), p. 122.

II. Forced marriage and the discriminatory intent

17. According to Article 5 of the Law on the Establishment of the Extraordinary Chambers²³ (“*ECCC Law*”) the prerequisite of discriminatory intent is not limited to the crime of persecution but is included as an additional element for all enumerated crimes. Furthermore, pursuant to the ECCC Law the attack against any civilian population must be based on ‘national, political, ethnical, racial or religious grounds’.
- By contrast, Article 12 of the Agreement²⁴ between the United Nations and Cambodia refers to the 1998 Rome Statute of the International Criminal Court (“*ICC*”) which does not require discriminatory grounds for any attack in general. Furthermore, for the crime ‘persecution’, the elements ‘gender’ and ‘cultural’ are included.
18. The lack of consistency between the Agreement and the ECCC Law raises the question about the relationship between the two documents, which both apply as law within the Kingdom of Cambodia. Pursuant to Article 31 of the Agreement it applies as *law* following its ratification.²⁵ This indicates that the Agreement has direct effect in Cambodia and that the given provisions are directly applicable.²⁶ In line with the Vienna Convention on the Law of Treaties²⁷ it prevails over inconsistent and contradicting norms of the ECCC Law.²⁸
- However, bearing in mind the historical origin of the draft ECCC Law from 2001, it seems clear that the discrepancies between the ECCC Law and the

²³ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended, and promulgated on 27 October 2004 with inclusion of amendments as promulgated on 27 October 2004.

²⁴ 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, dated June 2003; entered into force on April 29, 2005.

²⁵ This happened on 4 October 2004. See U.N. Daily News, Issue DH/4283, December 3, 2004, <http://www.un.org/news/dh/pdf/english/03122004.pdf>, visited on 21 January 2009.

²⁶ See Cesare P.R. Romano/André Nollkaemper/Jann K. Kleffner, *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford (2004), p. 210.

²⁷ See Article 2(2) of the Agreement.

²⁸ See *supra* note 26; see also Susanne Dyrchs, *Das hybride Khmer Rouge-Tribunal – Entstehung, Entwicklung und rechtliche Grundlagen*, Frankfurt am Main (2008), p. 120 ff.

Agreement are the result of an oversight.²⁹ Hence, regarding crimes against humanity the principal definition to apply before the ECCC is the one in the Rome Statute as referred to in Article 9 of the Agreement.

19. According to the Rome Statute the attack against the civilian population by organizing mass weddings does not need any discriminatory ground. Subsumed under the crime of ‘persecution’, it was based on the ground of ‘gender’.

E. LEGAL CHARACTERIZATION OF FORCED MARRIAGE IN THE CAMBODIAN CONTEXT

I. Forced marriage as rape and enslavement under crimes against humanity, Article 5 ECCC Law, and forced pregnancy under Article 9 of the Agreement

1. Forced Marriage as rape under Article 5 ECCC Law

20. After the wedding ceremony, husband and wife were usually obliged to spend one night or at most one week together before they were separated into work units. In some cases this was controlled by spys (*chhlob*) or assumed to be controlled by “Angkar”.³⁰ After that, they were allowed to see each other once every seven to ten days to spend one night together.³¹ In all cases, it was not only expected³² by “Angkar” that the individuals would have sexual intercourse, sexual intercourse was also expressively ordered by superiors. Research shows that out of 88 men,

²⁹ The original draft of the Law was a law on which the UN has not agreed upon. It is based on negotiations before the adoption of the Rome Statute, to which Cambodia is a party, and it includes the definition of Crimes Against Humanity like in the Statute of the International Criminal Court for Rwanda. The purpose of the Agreement was to amend the existing ECCC Law dated from 2001, but the changes dictated by the Agreement have not been amended; see Craig Etcheson, A “Fair and Public Trial”: A Political History of the Extraordinary Chambers, Justice Initiative (2006), http://www.justiceinitiative.org/db/resource2?res_id=103182, visited on 21 January 2009.

³⁰ See Kalyanee Mam, *Democratic Kampuchea (1975-1979): Women as Tools for Social Change*, New Haven, (2000), p. 70.

³¹ See Kamboly Dy, *supra* note 3, p. 34; *supra* note 30, p. 56.

³² At the wedding ceremony the couples had to promise that they will have a child within a year; see statement by Phen Hang in: Kamboly Dy, *supra* note 3, p. 34.

76 were explicitly ordered to have sexual intercourse with their new wedded wife.³³ This means, that a significant number of men were commanded to have sex with a woman against her will, as well as against his own. In fact, the forced sexual penetration of the women appears as rape not only against the female, but also against the male party.

Even if not directly ordered, the new couple understood that sexual intercourse was a significant part of a wedding and that they were obliged to have sexual intercourse to produce children.

21. In this unique constellation, the directly ordered as well as the indirectly expected sexual intercourse as part of forced marriage should be charged as rape as a separate count falling under article 5 of the ECCC Law, crimes against humanity.

2. Enslavement under Article 5 of the ECCC Law

22. Enslavement as a crime against humanity requires that ‘the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty’.³⁴
23. The couples were convened, married and then assigned to spend night(s) together and to have conjugal visits later on. People were controlled and ordered how, where and when to conduct their conjugal life as a wedded couple with their new partner.

This practice should be considered as enslavement as a crime against humanity.

3. Forced Pregnancies under the Agreement (alternatively “other inhumane acts” or “such as” under the ECCC Law)

³³ See supra note 5.

³⁴ Elements of Crimes under the Rome Statute, Article 7 (1) (c), para 1.

Factors which indicate the existence of enslavement include: “the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality (...), Final Submission of the Office of the Co-Prosecutors, Court Doc. No. D96, para 195.

24. The crime of forced pregnancy is not included in the ECCC Law but appears in the Agreement by reference to the 1998 Rome Statute where forced pregnancy is included as a specific form of a crime against humanity.³⁵
25. As outlined above³⁶ the Agreement includes the crime ‘forced pregnancy’ as directly and explicitly applicable.
- Alternatively, the crime of forced pregnancy falls under “such as“, or “other inhumane acts” of Article 5 of the ECCC Law, as the subject matter of forced pregnancy is recognized as crime in international criminal law. Furthermore, the list of crimes in Article 5 of the ECCC Law is not exhaustive³⁷ and has to be interpreted in light of the Agreement.
26. Pursuant to Article 7(1)(g)-4 the Rome Statute defines forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population **or**³⁸ carrying out other grave violations of international law”.³⁹
27. In the light of the Khmer Rouge’s intent to form a new society, one of the main purposes of the organized marriages and the repetition of forced acts of sexual intercourse was the intention of DK to have forced pregnancies. According to researchers, “[t]he leader of DK wanted to make sure that children were born who could continue the revolution. The main purpose of weddings, for the Khmer Rouge, was not to form family units, but to produce children who could serve the revolution”.⁴⁰ As result of this Khmer Rouge policy, several women were made pregnant against their will. The women regularly had to continue their work on the rice fields during and after their pregnancy. “Angkar’s” intent to force pregnancies in order to establish an “efficient workforce dedicated to working

³⁵ Article 7 of the ICC – Statute stipulates purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; [...].

³⁶ See para 18.

³⁷ See supra note 26, p.213.

³⁸ Emphasis added.

³⁹ Elements of Crimes under the Rome Statute Article 7 (1) (g)-4.

⁴⁰ See Khamboly Dy, supra note 3, p. 35.

towards a level of maximum productivity”⁴¹ is a serious abuse of Cambodian civilians.⁴²

It therefore meets all required elements of the underlying crime of forced pregnancy as a Crime against Humanity.

II. Forced marriage as a new crime against humanity under Article 5 of the ECCC Law

28. The fulfilled crimes established as crimes against humanity (rape, enslavement, forced pregnancy) do not cover the whole gravity of the conduct of forced marriage. Far more, forced marriage fulfills additional elements, which form a distinct category of crimes against humanity falling under “other inhumane acts” of Article 5 of the ECCC Law. In the light of the recent decision of the SCSL this is already recognized at the international level.⁴³ However, regarding forced marriages in the Cambodian context, it differs from the one in Sierra Leone and therefore shows a unique approach.
29. As in the case of Sierra Leone, forced marriages appear to be mainly acts of violence perpetrated by individual rebels against women; in Cambodia forced marriages were carried out as a matter of state policy.⁴⁴ They were used as methods to weaken the traditional family structure and to guarantee the loyalty of the people to the Regime. By forcing people into random marriages the Khmer Rouge intended to obtain control over people’s sexuality and to ensure that the reproductive function was managed by the state to produce more workers for the revolution.⁴⁵ The Khmer Rouge enforced strict limits on how often husbands and wives could meet; their relationship was under permanent observation by “the

⁴¹ See supra note 30, p. 59.

⁴² According to Boon the required “intent of carrying out other grave violations of international law” applies regardless of race, culture, or religion, and captures the frequent situations in which members of the military abuse their own civilians (See Kristen Boon, Rape and forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent, *Columbia Human Rights Law Review* (2001), pp. 625-675; p. 665.

⁴³ See supra note 16.

⁴⁴ See Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 2008 (not yet published), p. 14.

⁴⁵ See supra note 44, p. 13.

Party”.⁴⁶ The couples were forced to conduct sexual interaction on behalf of the Party’s order and were determined to give birth. More than a severe violation of the victims’ sexual integrity, forced marriages in Cambodia appear as an almost complete deprivation of the people’s autonomy and the right to self-determination.

30. Constitutive elements of the crime of forced marriage are⁴⁷:
- That the perpetrator conferred a status of marriage, through words or conduct by force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment or such person’s incapacity to give genuine consent;⁴⁸
 - That the perpetrator caused such person to engage in conduct similar to that arising out of a marriage relationship, including prolonged association, acts of sexual nature, child bearing and the rendering of other conjugal duties;
 - That the perpetrator caused the lost of virginity and disqualified the marriage to a freely chosen person and hindered the person from separation because he or she had to promise to stay together forever.
31. Generally, forced marriage is an unlawful intervention into the integrity of a person which causes serious mental and physical suffering and constitutes a grave attack on human dignity.⁴⁹
32. While in Sierra Leone the victims of the crimes were mainly women, in Cambodia both parties were forced to marry each other. Hence, under the Khmer Rouge regime both men and women are victims of the crime of forced marriage.

⁴⁶ See supra note 30, p. 59, 70.

⁴⁷ Para 1 and 2 according to Neha Jain, see supra note 44, p.19.

⁴⁸ It is understood that remaining in the forced marriage or its transformation into a consensual situation does not affect the original criminal act.

⁴⁹ *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, 21 May 1999, Judgment, para 149-151; *Prosecutor v. Bagilishema* (ICTR 95-1A-T), Trial Chamber, 7 June 2001, Judgment, para 91-92.

III. Cumulative crimes

33. On 5 December 2008 the Pre-Trial Chamber (“PTC”) ruled that it is possible to charge different legal offences in relation to the same facts.⁵⁰ On the basis of national (in particular French law) and international law and jurisprudence, the Co-Lawyers for the Civil Parties reaffirm, that it is acceptable to convict the accused person of several offences in relation to the same set of facts, where the offences have different elements or where the offences protect different interests.⁵¹
34. The crimes of rape, enslavement, forced pregnancy and forced marriage have different degrees of lawfulness and can be charged cumulatively. The legally protected interest of rape is the sexual self-determination of a person. The crime of forced pregnancy that can be committed exclusively against women represents harm distinct from rape and other forms of sexual assaults-the forcible impregnation and confinement of women. Forced pregnancy involves reproductive freedom and sexual autonomy.⁵² Unplanned and unwanted

⁵⁰ *Case of Kaing Guek Eav*, 001/18-07-2007/ECCC/OCIJ, Decision on Appeal against Closing Order Indicting Kaing Guek Eav Alias “Duch”, 8 December 2008, D99/3/42, para 86 ff: The PTC stated that “neither the Internal Rules nor Cambodian law contains provisions related to the possibility to set out different legal offences for the same acts in an indictment. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek guidance in procedural rules established at the international level. The jurisprudence of the ad hoc international tribunals holds that it is permissible in international criminal proceedings to include in indictment different legal offences in relation to the same acts. Both the ICTY and ICTR have considerable jurisprudence supporting the use of cumulative charging. The Special Court for Sierra Leone (SCSL) has also upheld this practice. The Pre-Trial further notes that including more than one legal offence in relation to the same acts in an indictment does not inherently threaten the ne bis in idem principle because it does not involve the actual assignment of liability or punishment.”

⁵¹ See *Prosecutor v. Akayesu*, (ICTR-96-4-T), Trial Chamber, 2 September 1998, Judgment para 468; *Prosecutor v. Kayishema and Ruzindana*, (ICTR-95-1-T), Trial Chamber, 21 May 1999, Judgment, para 627; since the ICTR adopted the French influenced approach this seems to be the approach to apply in the Cambodian Law System. The French principle, called “*concoure d’Infractions*”, has two applications, where the court cannot find the accused responsible for more than one crime: “firstly, when the same set of facts gives rise to the application of multiple criminal provisions; and secondly (concoure ideal d’infraction), when the facts could be subject to multiple provisions which differ in nature, but are predicated on the same material element”; see Attila Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the former Yugoslavia and Rwanda*, Melbourne Journal of International Law, 2002, <http://www.austlii.edu.au/au/journals/MelbJIL/2002/1.html>; visited on 27 January 2009, p.6 and 7.

⁵² See supra note 42, p. 655

pregnancies have the additional and longer-term implications of motherhood, financial responsibility, and potential health difficulties.⁵³

Enslavement includes the interest of moving freely without any control by third parties.

Constitutive elements of forced marriage are distinct from the other crimes and and focus less on the sexual aspect but more on the conscription into conjugal relationships as well as the loss of virginity and the exclusion of separation and remarrying. Furthermore, the position and reputation of the female victim in the society is coined forever being considered as a married person.

IV. The notion of consent within the framework of international criminal law

35. Acts of sexual violence as international crimes which are part of a widespread or systematic attack (crimes against humanity) or directed against a protected group (genocide) or committed within an armed conflict are more than a single act against an individual person.

Therefore, the standard of consent, as is the case in national law must include for the international crimes the specific circumstances of these crimes and is different.

Although proof of non-consent is not required for other crimes like torture, persecution or enslavement, it is illogical to demand this element for sexual crimes.⁵⁴

36. Being qualified as a crime against humanity, the single act must objectively form part of a widespread or systematic attack and the perpetrator must know that the population is under attack and that this act is part of it.

Such widespread and systematic attack against a civilian population generates highly coercive circumstances that rule out the possibility of genuine consent.⁵⁵

⁵³ See supra note 42, p.658.

⁵⁴ Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence under International Criminal Law*, 101 *American Journal of International Law* (2007), p. 121, 126.

⁵⁵ See supra note 54, p. 130. Furthermore the authors suggest considering sexual acts between individuals in unequal positions of power, irrespective of the consent of the victim. This approach would lead to a standard of strict liability that not only removes nonconsent from the element of the crime, but also in principle rules out the possibility of arguing consent as an affirmative defense, p.138, 139.

37. Consent must be free, fair, and beneficial in order to be ethically valid. When consent is obtained under circumstances of coercion or force, then that apparent consent is negated.⁵⁶
38. The circumstances in the DK under which marriages as group weddings were organized were generally coercive given that not abiding by the orders led to punishment, re-education and death.
- Under such circumstances, a voluntary and genuine consent to the marriage itself, the associated marital status, prescribed sexual intercourse and a conjugal relationship is impossible to be given.⁵⁷

F. NECESSITY OF SUPPLEMENTARY INVESTIGATION

39. Since at least early 1977 the weddings and prescription of sexual intercourses of couples were ordered and organized by the senior leaders all over the country.⁵⁸ Even if there is no written order by the Standing Committee available it must be deduced from the practice everywhere in the country that this order existed.
- As already shown, forced marriages clearly were carried out as a matter of state policy. They were used statewide as a measure to weaken and attack Cambodian families, to produce more children to join “Angkar’s” revolution and to control sexuality and reproductive power.
- Hence, the crimes were committed as part of a widespread and systematic attack directed against the civilian population.
40. Evidence demonstrates that at least one group wedding took place among cadres and medics at [REDACTED],⁵⁹ which was [REDACTED] and under direct control of the accused, in his role as Chairman. He admitted his criminal responsibility for crimes committed there.⁶⁰ He ordered the organization of the

⁵⁶ See supra note 42, p. 672.

⁵⁷ See *Gacumbitsi v. Prosecutor*, (ICTR-2001-64-A), Appeals Chamber, Judgment, para 155, where the Chamber stated that nonconsent can be proved by proving the existence of coercive circumstances.

⁵⁸ See supra note 3.

⁵⁹ See supra note 4.

⁶⁰ *Case of Kaing Guek Eav*, 001/18-07-2007/ECCC/OCIJ, Statement 29 November 2007, Doc.No. D30; Statement 27 March 2008, Doc.No. D63; 23 August 2007, Doc.No. D13.

group wedding in [REDACTED] and knew about their coercive and forced character.

Hence, there are strong reasons to believe that the accused knew of the widespread arranged marriages in the entire country as being an attack against the civilian population and that the ordered wedding in [REDACTED] was part of this widespread attack.

41. The investigations do not yet focus on sexual crimes, i.e. forced marriage, although evidence is on the case file to start further investigations and to submit a supplementary introductory submission.
42. McGrew⁶¹ estimates that there were around 400.000 men and women married under the Khmer Rouge regime under the above-mentioned circumstances.⁶²
In view of the extent of this widespread crime, the Co-Lawyers for the Civil Parties request the Office of the Co-Prosecutor to conduct new investigations and to include the crime of forced marriage into a supplementary Introductory Submission.
43. In order to fulfill the ECCC mandate, to ascertain the (full) truth and to bring justice to the victims, forced marriages as rape, enslavement, forced pregnancy and the new crime forced marriage under crimes against humanity must be included. Given the large number of victims and the negative impact that this practice had and has on the Cambodian society it is justified and more than necessary to start investigations.
44. The necessary investigations should cover the interview of [REDACTED] witnesses on the circumstances of forced marriages and investigations should ensue if victims can be identified.
If the witnesses are expeditiously interviewed, a supplementary introductory submission can be rapidly finalized and sent to the Office of the Co-Investigating Judges to make a supplementary closing order.
Hence, it is possible to add new charges so that the accused can also be held liable for the forced marriages in [REDACTED].

⁶¹ See supra note 1. See also Peg LeVine (supra note 5) who counted in her research about 1720 couples while collecting the accounts of her 192 interview partners. Thus at least 3440 persons were concerned.

⁶² See supra note 3 and 5.

45. In light of the development in other international and internationalized tribunals of including gender-related crimes in their jurisdictions, the ECCC should follow other Courts and recognize the dimension of such crimes and their impact on society.

The Office of the Co-Prosecutors should have no discretion regarding the widespread practice during the Democratic Kampuchea period and the limited scale of the manageable investigations.

Therefore, the Co-Lawyers for Civil Parties request the Officer of the
Co-Prosecutors in accordance with Rule 49 IR

To conduct supplementary investigation on forced marriages at
[REDACTED],

To file a supplementary Introductory Submission on the basis of the
evidence to be adduced.

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Signed in Phnom Penh on 9 February 2009.