

Briefing Paper on the ECCC, the Cambodian Women’s Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime¹

I. Executive Summary

1. A growing body of evidence suggests sexual crimes under the Khmer Rouge were a daily reality for many women; such acts were seldom punished and implicitly endorsed by an “enemy policy;” and victim-survivors continue to suffer from trauma, discrimination and social stigma even until today.
2. Despite this, the current Khmer Rouge tribunal (the Extraordinary Chambers in the Courts of Cambodia, or ECCC) has consistently resisted taking up sexual crimes for full deliberation, missing opportunities to incorporate and advance lessons learned from past tribunals (such as the ICTY, ICTR or SCSL) in both judiciary and non-judiciary approaches.
3. The ECCC has aligned itself with a long-perpetuated thesis that sexual violence under the Khmer Rouge did not exist; if and when it did occur, such crimes were harshly punished. Consequently, the ECCC held that the leadership of the Khmer Rouge could not held liable for these crimes. As a result, the ECCC has not prioritized an integrated and comprehensive investigation into sexual violence, and evidence brought forward has been primarily the consequence of efforts of the civil parties and their lawyers in calling attention to the gravity of gender-based crimes.
4. The implicit message is that impunity for sexual violence is protected by the highest legal institutions in Cambodia. Women’s specific experiences of the atrocities of the Khmer Rouge regime have not been accounted for and, therefore, will not make up part of the official historical record of the period as determined by the proceedings of the ECCC. This has implications on women’s access to justice, as well as for the possibility of achieving reconciliation, peace and security for all Cambodians under respect for rule of law and human rights. Today, survivors of rampant sexual violence in Cambodia suffer in a culture of impunity that blames and stigmatizes the victim and allows perpetrators to go free.
5. On 7-8 December 2011, the Cambodian Defenders Project convened the Cambodian Women’s Hearing on Sexual Violence under the Khmer Rouge, in Phnom Penh, Cambodia, to acknowledge, recognize, and validate the experiences of witnesses and survivors of sexual violence under the Khmer Rouge. A panel of experts closed the Hearing with recommendations to the ECCC, the United Nations and the Royal Government of the Kingdom of Cambodia to meet accountability for addressing sexual crimes as part of the Khmer Rouge regime.
6. In the context of the findings and the recommendations of the Women’s Hearing, as well as the proceedings of the ECCC thus far in regards to sexual and gender-based violence, this paper presents a three-prong approach with specific steps for concrete results. The three priority approaches presented in this brief call for:
 - A. **Full investigations, and prosecution as warranted, of sexual violence perpetrated by the Khmer Rouge as per the mandate of the ECCC;**
 - B. **Mechanisms for appropriate recognition and reparations for victims of sexual violence under the Khmer Rouge regime; and**
 - C. **Enhanced gender competence and improved gender balance within the ECCC.**
7. The briefing paper provides an overview as to the background of the ECCC and its procedures and approaches to sexual violence. It highlights the findings of the Cambodian Women’s Hearing and the evidence it presents to suggest that sexual violence under the Khmer Rouge was widespread, and that such crimes require the full benefit of the ECCC’s resources and attention as afforded other crimes against humanity before ECCC. The paper concludes with providing

specific, concrete actionable steps in advancing sexual crimes on the agenda of the ECCC, in both its judicial and non-judicial transitional justice processes.

II. Background to the ECCC

8. In 1997 the Cambodian government requested the United Nations' (UN) assistance in establishing a court to prosecute serious crimes committed under the Khmer Rouge regime. After lengthy negotiations, the United Nations and the Royal Government of the Kingdom of Cambodia (RGC) agreed to establish a hybrid court, which, although situated within the Cambodian court system, would include mixed panels of international and national judges, prosecutors and officers. Established under Cambodian law in 2004, the resulting court is called the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC).
9. The mandate of the ECCC is to bring senior leaders and those most responsible to trial for crimes allegedly committed between 17 April 1975 and 6 January 1979. The number of victims who died during the Khmer Rouge period is estimated to be between 1.7 and 2.2 million Cambodians, or a full quarter of the total population. This is generally agreed to be the largest death toll resulting from mass atrocity since the Holocaust, and therefore the largest trial since the Nuremberg Trial. The vast majority of those who died and who survived were subjected to forced labor, forced transfer, starvation, forced marriage, religious persecution, arbitrary detention, torture or summary execution. Potential crime sites cover an estimated 189 prisons, 380 killing fields and some 19,400 mass graves.²
10. The ECCC Law implementing the Agreement between the UN and the Kingdom of Cambodia permits application of both national and international law at the ECCC, listing the following:
 - a) Crimes set forth in the 1956 Cambodian Penal Code of homicide, torture and religious persecution
 - b) Genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948
 - c) Crimes against humanity
 - d) Crimes (either committed or ordered) of grave breaches of the Geneva Conventions of 1949
 - e) The destruction of cultural property during armed conflict pursuant to 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict
 - f) Crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations³
11. While rape and sexual violence are codified as crimes under the 1956 Penal Code of Cambodia, sexual crimes other than rape as a crime against humanity were not specifically included under the ECCC Law.
12. The prosecutorial and judicial arms of the ECCC comprise two investigative offices and three chambers. The two investigative offices – namely, that of the Office of the Prosecutors (OCP) and the Office of the Co-Investigating Judges (OCIJ)—conduct investigations and prepare an initial submission (via the OCP) and a final Closing Order (via the OCIJ), the latter of which forms the indictment for the trial. The Pre-Trial Chamber (PTC) hears decisions on appeal from the investigation phase; the Trial Chamber (TC) hears the evidence at trial (in addition to interlocutory submissions on contested issues); and the Supreme Court Chamber (SCC) hears all appeals from the Trial Chamber's decisions.
13. In both the offices and chambers, there is a prevailing gender imbalance, at the time of writing this briefing. Not a single woman has been appointed by the RGC to serve as a Trial Chamber judge within the ECCC. H.E. Chea Leang, the National Co-prosecutor (and technically a 'magistrate' in the French system), is the only Cambodian woman in a leadership position at the ECCC. Additionally, both the national and international staff working on the conduct of investigations is overwhelmingly male, with only two female prosecutors and no female investigators currently working at the ECCC, and less than 20 percent of females comprising the entire UN staff.⁴ A lack of female staff may contribute to a severe deficit

in gender competence within the ECCC, with detrimental impact on the capacities of ECCC offices to thoroughly investigate gender-based crimes and adopt a gender-sensitive approach to international criminal law. This includes the capacity of investigators to interview victims alleging sexual and gender-based crimes (who are predominantly female), as well as a comprehensive understanding of psycho-social stigmatization associated with these crimes by investigators, interpreters, translators, lawyers, judges and outreach staff.⁵

14. The ECCC is the first internationalized court dealing with mass crimes to allow victims as civil parties to participate in the court's proceedings and to claim moral and collective reparation. This unique aspect of the ECCC has been indispensable in bringing forward sexual crimes committed by the Khmer Rouge, serving to dispel the widely held belief that sexual violence did not exist under the regime. Often times, civil parties and victims came forward at great risk to themselves, an especially severe burden in regards to sexual violence given the continued stigmatization of victims. Because the ECCC is unique in that trials are conducted in Cambodia, the proceedings of the ECCC have a direct and immediate impact on the survivors and witnesses. The ECCC, additionally, is in the position to leave a profound legacy to Cambodian national courts as well as to set precedent for other war crimes tribunals in the future.⁶

The Cases before the ECCC:

15. Four cases are currently before the ECCC (referred to as Case 001; Case 002; Case 003; and Case 004).ⁱ It is worth noting that, among other charges, the accused in Case 001 (Kaing Guek Eav, alias *Duch*) has been convicted on one count of rape as an element of torture in the notorious S-21 prison he oversaw. However, on appeal by the Prosecution, aiming for a cumulative conviction, the Supreme Court Chamber in February 2012 overturned the judgment of the Trial Chamber and ruled that 'rape' was not a distinct crime under crimes against humanity in April 1975 to January 1979.⁷
16. Case 002 commenced proceedings in November 2011 against three accused⁸, representing the most senior leadership of the Khmer Rouge government. Case 002 is considered a landmark in international law given the gravity of the alleged crimes and the level of defendants, and it has been referred to by Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, as "the most important trial in the world."⁹ The indictments cover war crimes, crimes against humanity, genocide, torture, religious persecution, forced transfer, and forced marriage.
17. In order to expedite the proceedings, the ECCC Trial Chamber has severed Case 002 hoping to achieve at least one final judgment before the accused pass away. Like many witnesses and civil parties, the three accused are in their 70s and 80s. Indeed, a fourth accused has been determined unfit to stand trial due to health reasons.
18. The First Trial of Case 002 (the 'First Trial') is exclusively focused on the factual allegations described in the first and second phases of forced population movement in the Case 002 Closing Order. The Chamber anticipates additional trials in the severance of Case 002 to take up the separate crimes of genocide, religious persecution, forced marriage, and security centers and work sites, although it is unclear how many more trials will occur or on what timeline they will take place.
19. Due to the age of the defendants and waning donor interest, the 'First Trial' is widely held to be the only trial in Case 002 to be heard before the ECCC. Case 001, largely perceived as an uncomplicated trial, took almost three years to complete. The First Trial of Case 002 includes three separate accused, none of whom have admitted guilt and all of whom have extremely rigorous defense counsel.
20. Additionally, although the ECCC statute allows for the prosecution of suspects in Case 003 and Case 004, the cases have been mired in allegations of political interference and judicial misconduct. This has included repeated and insistent public statements by Cambodian Prime Minister Hun Sen—including directly to UN Secretary-General Ban Ki Moon—that Cases 003 and 004 are "not allowed" and will not be permitted to go to trial.¹⁰

III. ECCC and Crimes of Sexual Violence in Conflict

21. Sexual violence committed between 17 April 1975 and 6 January 1979 by the Khmer Rouge can be characterized as an other inhumane act or rape, both being *crimes against humanity*, as the evidence suggests that the violence was committed against the civilian population and not in the context of war against Vietnam.
22. The ECCC has aligned itself with a long-perpetuated view that sexual violence under the Khmer Rouge did not exist, and if and when it did occur it was harshly punished. As such, thorough and explicit investigations on sexual violence have not been conducted by the ECCC. Indeed, international Trial Chamber Judge Silvia Cartwright has commented in a public forum that, based on the evidence she had seen thus far, the Khmer Rouge regime was one of the few criminal regimes in which gender-based violence did not comprise a major part of its criminal activity.¹¹
23. The prevailing belief has impacted accountability for these crimes. Crimes involving sexual and gender-based violence were not the focus of the original prosecutorial strategy for Case 001. However, after lengthy awareness-raising and advocacy during the investigations stage by Civil Party lawyers, along with discovery of evidence for the charge, the factual allegations of forced marriages were included into the investigations through a supplementary submission by the OCP. Accordingly, these crimes appear in the indictment against the accused in Case 002 under the Fifth policy of the Khmer Rouge as “Regulation of Marriage.” The crime of forced marriage, a form of gender-based violence, was a central element of control under the Khmer Rouge regime, and its use was widespread and systematic.
24. Outside of forced marriage, the Closing Order for Case 002 also points to instances of other forms of sexual violence, including rape. Yet, the OCIJ has determined that the accused cannot be held liable because the few sexual crimes reviewed were punished. Thus, the OCIJ concludes, the Khmer Rouge aimed to prevent such crimes, and it was not a Khmer Rouge policy to use sexual violence against victims.¹² Hence, although forced marriage as a form of gender-based violence has been included in the indictment of Case 002 and although factual allegations of a few cases of sexual violence outside of forced marriage are included in the indictment, the senior leaders are not held liable for the more generalized occurrence of sexualized violence. It is the prerogative of the Trial Chamber to reconsider the liability findings of the OCIJ around these sexualized crimes. The two examples in the Closing Order from which the OCIJ derives its conclusion do not fully reflect the evidence according to witness statements. One case of rape by a Khmer Rouge cadre was investigated by authorities, but the outcome was to pardon the perpetrator due to his revolutionary merits.¹³
25. There are three main arguments that clearly suggest that sexual crimes should and must be considered by the ECCC, due to the frequency, severity and impunity associated with the acts. They are as follows:

A. *The Khmer Rouge Policy against “abuse of women” (so-called policy against “moral offenses”) was not strictly or uniformly enforced.*

26. Khmer Rouge leaders promulgated the policy “Code Number Six” of the “Twelve Codes of Conduct of the Combatants.” Code Number Six as translated by the Documentation Center of Cambodia (DC-CAM) reads:

Do not abuse women (forcing a woman to have consensual sex or having sex with a woman who is not your wife).¹⁴

27. The existence of Code Number Six, often referred to as the rule on “moral offenses,” has led some to suggest the policy was routinely enforced with punishment, and that the prohibition on immoral acts prevented or significantly limited the occurrence of sexual violence under the Khmer Rouge regime.
28. Yet, it is doubtful the Code was indeed directed towards, or even a deterrent against, sexual abuse by Khmer Rouge cadre. It seems more likely that Code Number Six was intended to prohibit *any* sexual relation outside of state-

sanctioned marriage—be it consensual or forced—with both parties subjected to punishment. In the instances of nonconsensual relations, such as rape, *both* the victim and the perpetrator were punished.¹⁵ As such, the rule on “moral offenses” should be understood as less concerned with protection against sexual violence by state actors, and more with the regulation of sexual activity as part of subordinating all human relations to the aims of the revolution.

29. When Code Number Six is interpreted as primarily a means through which to regulate sexual activity and ensure that it conformed with revolutionary aims, the policy which it supported can be interpreted in accordance with the following three lines of argument:
- a. Sexual relations were perceived as subversive, threatening to distract people from working toward the total revolution;
 - b. Code Six is part of the quest to create a “pure” Khmer nation, which was further implemented via a policy of forced marriages; and
 - c. Forced marriages as organized by *Angkar* (literally “Organization”, the Standing Committee as the highest body of Khmer Rouge) were motivated to increasing the revolutionary population of a pure nation by four-fold within 15-20 years.¹⁶
30. **Assumption that rape was punished:** It has been erroneously yet widely assumed among scholars—and reflected in the Closing Order of Case 002¹⁷—that, due to Code Number Six, rape rarely occurred under the Khmer Rouge, and when it did occur it was harshly punished. Yet, there are at least two scenarios in which Code Number Six may not have been enforced:
- a. If the violence was committed against individuals determined to be an “enemy” of the revolution, hence meaning the victim was not protected by the policy;
 - b. If the perpetrators could demonstrate a “good revolutionary” background, hence meaning they could be pardoned and exempted from punishment.¹⁸
31. This evidence suggests that, on the scale of offenses committed against the revolution, sexual violence, in particular rape, was considered a light offense by the Khmer Rouge. Likewise, no formal or informal body existed (in the form of courts, police, etc.) for victims to seek redress or accountability for crimes of sexual violence. This is despite the fact that, with or without Code Number Six, “rape” was considered universally a crime during the 1975 to 1979 period of the Khmer Rouge, and, indeed, is included in the 1956 Cambodian Penal Code, which was known to Khmer Rouge leaders and to the entire population.
32. **Assumption of a lack of Evidence:** Additionally, the preliminary evidence collected by the OCP led that office to conclude, because Code Number Six was strictly enforced, there was no case to be brought forward around of sexual crimes. Thus, the OCIJ was not seized with any investigations on sexual violence as the ECCC began its proceedings. Indeed, investigations immediately after the fall of the Khmer Rouge did not include sexual crimes and lacked forensic approaches to establish that these crimes had occurred.¹⁹
33. While most victims may have been killed after the act of rape occurred (or subsequently died from other causes such as illness, starvation, etc.), a growing body of research demonstrates that sexual violence was pervasive during the Khmer Rouge period, and that survivors and witnesses of sexual violence do exist and are willing to come forward to share their stories. Cumulatively, recent studies into sexual violence during the period suggest that the policy against “moral offenses” did not prevent the occurrence of widespread sexual violence and that many instances of such crimes were left unpunished despite the knowledge of authorities.²⁰

B. *The Khmer Rouge Policy on eliminating “Bad-Elements” and the “Enemy” allowed for rape and sexual violence to occur against perceived enemies with impunity.*

34. In the Closing Order for Case 002, the OCIJ alleges the Khmer Rouge instituted a policy of re-educating “bad-elements” and killing “enemies,” both inside and outside the party ranks, by “whatever means necessary.” The Closing Order further includes “arrest, interrogate, torture and execute” in its definition of “whatever means necessary.” The Closing Order is silent on sexual violence as a part of this policy, despite the fact that there is evidence to suggest that sexual violence was used as a demonstration of power over and/or punishment for those who were deemed or closely associated with enemies or bad-elements.

35. The OCIJ’s exclusion of sexual violence offenses from the Closing Order in Case 002 fails to consider the following important elements of Khmer Rouge policy which may have implicitly allowed for sexual violence to occur:

- a. If the prohibition against abuse of women, Code Number Six, did not apply to those determined as “bad-elements” or “enemies,” then those who were targeted for arrest, re-education, imprisonment, torture, or execution were *de facto* dehumanized and therefore could be subjected to sexual violence without risk of punishment to the perpetrator.
- b. Sexual violence used against the enemy was neither prohibited nor punished. In Case 001, the accused, who headed the notorious S-21 prison, was indicted on one charge of rape. The accused testified that he had informed a member of the Standing Committee, the highest decision making body of the Khmer Rouge, of the rape. Yet, he did not order any sanction against the perpetrator, which was in accordance with the non-sanctioning of the Standing Committee when the event had been reported.²¹

This example confirms that, in at least one instance, if a person was considered as an “enemy”—which included all detainee of S-21—sexual violence could be used against the prisoner with impunity for the perpetrator. It further suggests that senior members of the Khmer Rouge regime would have reason to have known about additional acts of sexual violence committed against “enemies” and may have failed to prevent or punish them once they had occurred.

- c. State actors at the highest levels of Khmer Rouge leadership were aware, or had reason to be aware, that sexual violence was committed with impunity against the “enemy” and “bad elements.” The OCIJ has determined that the accused in Case 002 created and promulgated the policy against “bad-elements” and “enemies.”²² By creating this policy, the alleged senior leaders opened the door to a culture of impunity for the most inhumane treatment against the enemy. In addition, in order to eliminate the “enemy” by the “roots,” family and close associates were implicated in the punishment of the enemy. As such, women were often targeted for sexual violence when husbands were accused as spies or for other enemy activity.²³
- d. Evidence exists—including evidence currently before the Trial Chamber and in the hundreds of pages of the Case File for Case 002—that sexual violence was widespread and an integral component in the Khmer Rouge policy against the enemy, that authorities were aware of its occurrence and that such violence was carried out with impunity.

C. *The Khmer Rouge policy on Forced Marriage clearly amounted to sexual violence, despite the fact that its legal characterization remains unclear.*

36. The policy of forced marriage under the Khmer Rouge—whereby individuals were assigned to spouses and married in group weddings of up to hundreds of couples—is well known to historians

and researchers. Yet, investigating this practice was not part of the original prosecutorial strategy of the ECCC, as it was not considered to be a crime. Civil party applications to the court have raised awareness on the gravity and severity of the crime, and civil party lawyers have submitted several legal submissions to the Trial Chamber requesting that forced marriage be legally qualified as rape, enslavement, torture, as well as a separate crime of forced marriage and forced pregnancy as other inhumane acts of crimes against humanity.²⁴

37. As a result of these efforts, the OCP seized the OCIJ with forced marriage in 2009, and forced marriage was included as part of the Closing Order in Case 002. Additionally, the court has admitted 780 civil parties who allege harm suffered as a result of this charge, making it the second largest group of civil parties. The only group larger than that of the civil parties who allege forced marriage are the 781 admitted civil parties on the grounds of the first forced transfer of the entire population of Phnom Penh in April 1975.
38. Forced marriage appears in the Closing Order as one of five policies of the Khmer Rouge, under the heading “Regulation of Marriages”. This term minimizes the multi-dimensional impact and serious gravity of the crime. It is estimated that several hundreds of thousands of individuals, males and females, were subjected to this policy and coerced into conjugal relationships against their will. Refusal led to punishment, imprisonment, sometimes death, and designation as a “bad element” or “enemy.”
39. The situation of forced marriage in Cambodia is without legal precedent in international criminal law. As the newly-wedded couple was compelled to consummate the marriage or face punishment, the state can be considered to have ordered rape, with both males and females victim to the policy.
40. Perhaps due to this lack of a legal precedent, the legal qualification of the factual allegations of forced marriage is still highly contested at the ECCC. While indicted as “rape” and as a crime under crimes against humanity, the Supreme Court Chamber ruled in February 2012 that “rape” was not a distinct crime under crimes against humanity through 1975-79. As a result, the factual allegations of forced marriage can only be qualified as rape as another inhumane act under crimes against humanity, affording less recognition of the gravity and sexual basis of the crime. It remains the prerogative of the Trial Chamber to uphold its characterization that rape existed in 1975-79 as a distinct crime under crimes against humanity. Indeed, the OCP has petitioned the Trial Chamber to consider rape as a listed crime as part of customary international law in 1975-1979. Civil Party Lawyers added the precedent of post World-War II war crimes trials in China, where convictions for rape as a crime against humanity supported the position that rape as a listed crime was already customary international law. The motion is yet to be determined.
41. The inclusion of factual allegations of forced marriage as a form of sexual violence in the Case 002 indictment, despite the initial inaction of the ECCC, amounts to a huge moral and legal victory. Yet this victory may not be enough to ensure justice for the civil parties who have been admitted to this case, and even less for rape victims from the Khmer Rouge period: as discussed earlier in this briefing note, the severance of Case 002 into separate smaller trials increases the chances that the crime of forced marriage will never be taken up against the accused. In addition, the fact that the indictment does not hold the accused liable for rapes outside of the context of forced marriage means that rape as a crime against humanity will never be prosecuted outside of the one incident which occurred at S-21 for which the accused was convicted in Case 001—and, in this case, only as

an other inhumane act. As such, an opportunity will be lost to send a message on ending impunity for sexual crimes, in the past, present and future.

IV. The Cambodian Women's Hearing of Sexual Violence under the Khmer Rouge

42. The Cambodian Women's Hearing on Sexual Violence under the Khmer Rouge took place on 7-8 December 2011, in Phnom Penh, Cambodia, and included participants from throughout the country, along with global experts on sexual violence in conflict. Margot Wallstrom, Special Representative of the Secretary-General on Sexual Violence in Conflict, presented an opening message by video, and her Chief of Staff, Nancee Oku Bright, presented the Keynote Address and observed the totality of the Hearing.²⁵
43. The Hearing was conducted as a non-judicial truth-telling event, complementing the formal proceedings of the ECCC, and was hosted by the national human rights organization, the Cambodian Defenders Project (CDP). Its aim was to provide opportunity for victims and witnesses to break decades-long silence on sexual violence crimes under the Khmer Rouge, especially as these crimes will not be considered by the ECCC outside the context of forced marriage.
44. The Hearing featured four testimonies of witnesses/survivors of alleged sexual crimes. It is worth noting that a fifth testifier died just days before the Hearing.
45. When viewed as a whole, the testimonies at the Hearing demonstrated that sexual violence was part of the "daily life" of the Khmer Rouge period; that it occurred within the context of broader human rights violations against the victims, including murder, torture, arrests, forced labor, enforced disappearance, forced marriage, forcible transfer and severe forms of ill-treatment; that the violence included victims who were minors; and that perpetrators either killed or attempted to kill the victim or victims.
46. The acts of sexual violence committed by the Khmer Rouge as described in the testimony of the Women's Hearing include:
 - a. Systematic rape prior to execution;
 - b. Sexual violence and rape as an instrument of torture, to obtain information or confession, to intimidate, coerce or punish;
 - c. Sexual violence involving repeated rape over an extended period of time, gang rapes with multiple perpetrators and mass rapes of multiple victims;
 - d. Sexual assault resulting in injury, sometimes indicative of an object used in the rape;
 - e. Sexual mutilation;
 - f. Exchange of sex for medicine or food as a means of fulfilling traditional obligations of daughters to provide for parents; and
 - g. Forced nudity and threat of rape.
47. Testimony supported the conclusion that sexual violence against "enemies" occurred with impunity. For example, one testifier at the Women's Hearing reported that she was among 30 women targeted for execution, with each woman methodically raped before being killed. She was the only victim who survived. Testimony also supported the finding that individuals associated with "enemy" elements were subjected to sexual violence with impunity. For example, one testifier reported she

was targeted for sexual violence because her husband was accused of being a CIA spy. Due to this association, she was subject to forced nudity and rape.

48. The perpetrators, as identified in the testimony, were of all levels within the Khmer Rouge, including senior, middle, and lower level cadres, as well as soldiers. None of the perpetrators as described in the testimonies appear to have been held accountable for their crimes. At the same time, testifiers described decades of stigma, shame and blame for the victims of sexual violence.
49. Based on the testimonies presented, the expert panelists had reason to believe that the acts described in the testimonies could constitute violations under numerous international agreements and are crimes under international law, including:
 - a. Rape, torture and enslavement as crimes against humanity;
 - b. Sexual violence as other inhumane acts as crimes against humanity; and
 - c. Sexual violence as a means of genocide, being the most aggravated type of crimes against humanity and included in the ECCC law, which makes direct reference to the Genocide Convention (ratified by Cambodia 1950).
50. Additionally, in dealing with these alleged crimes, the ECCC has recourse to guidance provided by human rights conventions such as the Convention on the Elimination of All Forms of Violence against Women (CEDAW) and the Convention on the Rights of the Child (CRC) (both ratified by Cambodia in 1992), the Optional Protocol to CEDAW (ratified by Cambodia in 2011) as well as the Security Council agenda on Women, Peace, Security via SCRs 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009) and 1960 (2010).
51. Based on the testimonies provided during the Women's Hearing, and the evidence to which they gave rise, the expert panel comprised of Cambodian and international experts made recommendations for action to the ECCC, the Government of Cambodia, the United Nations, and civil society actors.
52. Priority Recommendations for immediate action are per the mandate of the ECCC to seek justice for crimes committed between 17 April 1975 and 6 January 1979 under Khmer Rouge rule. They stress the investigation of sexual crimes as part of the conflict; establishing accountability for violations under international criminal law, in particular as crimes against humanity, as war crimes and as genocide; and the provision of reparations as warranted.²⁶

V. Suggested Actionable Next Steps for Concrete Results in Addressing SGBV within the ECCC

53. Taking into consideration the findings and recommendations of the Cambodian Women's Hearing, and taking into account the ECCC in its approach to SGBV thus far, the following steps are presented as priority actionable items for implementation and concrete results.

A. Investigate and prosecute sexual violence perpetrated by the Khmer Rouge.

To the Trial Chamber:

- 1.) ***Expand the First Trial of Case 002 to include the charge of forced marriage*** as a means of drawing attention to the gravity of gender-based crimes during the Khmer

Rouge period and providing a legal remedy to the second-largest pool of admitted civil parties before the ECCC.

- 2.) **Consider factual allegations of forced marriage cumulatively** as rape, sexual enslavement, torture, as well as a separate crime of forced marriage and forced pregnancy as other inhuman acts of crimes against humanity.
- 3.) **Reconsider the legal characterization and liability of the factual findings relating to rape and sexual violence in the indictment of Case 002** and subsume sexual violence as a means of implementing the “Enemy Policy” for which the accused are accountable.
- 4.) **Legally re-characterize rape as a separate listed crime** under crimes against humanity to afford justice for past crimes and to serve as a deterrent for current and future sexual violence. Use as precedent post-World War II war crimes tribunals in China, Korea and Indonesia, which characterized rape as a distinct crime under crimes against humanity as part of customary law.

To the Office of the Co-Investigating Judges:

- 5.) **Thoroughly investigate with the same rigor as afforded other crimes before the ECCC** the full extent of the circumstances and actors of sexual violence in Case 003 and Case 004.
- 6.) **Include into current investigations for Cases 003 and 004 specific questions in regards to sexual violence** (forced marriage under the authority of the suspects in Case 003 and 004; sexual mutilation, sexual intimidation, rape and other violations as used against those determined “enemies”).

B. Establish mechanisms for appropriate recognition and reparations for victims of sexual violence under the Khmer Rouge regime

To the ECCC as a body:

- 1.) **Develop and implement alternative, non-judicial mechanisms** for transitional justice, as mandated in the Victim Support Section under ECCC Internal Rules, including but not limited to reconciliation, memorialization and truth-seeking, to promote and support the validation, recognition and inclusion of the experiences of witnesses and survivors of sexual violence under the Khmer Rouge period.
- 2.) **Ensure the needs of victims are a central part of gender-sensitive reparations**, including provisions for healthcare, education, training, and school curriculums about the history of Khmer Rouge atrocities, including sexual violence.

To the Royal Government of Kingdom of Cambodia, the ECCC and the United Nations:

- 3.) **Work jointly to establish a national trust-fund for reparations for victims of sexual violence** during the Khmer Rouge in order to comply with obligations as stipulated in Article 16 of the UN Basic Principles and Guidelines on the Right to a Remedy and

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

- C. Enhance gender competence and improve gender balance within the ECCC** including by establishing temporary special measures and affirmative action as developed by the UN Secretariat to support women's promotion.

The Government of Cambodia and the United Nations:

1. **Appoint qualified women to decision-making roles within the ECCC** with sufficient background knowledge about the nature of sexual crimes, how these crimes are most appropriately investigated and prosecuted, and how best to provide for the psycho-social support of victim-witnesses.

To the United Nations:

2. **Fund and assign a senior-level gender expert advisor to the ECCC with a national counterpart** to advocate from within the court for the inclusion of a gender perspective and attention to gender-based and sexual violence as central to all aspects of the proceedings, and to ensure these matters are part of the legacy of the ECCC to the national rule of law.

To the ECCC as a body:

3. **Recruit and retain adequately trained female staff for gender-responsive investigations, questioning and translation on the topic of sexual violence**, and to establish specific measures to provide for victims' security, dignity, confidentiality and trauma. Use affirmative action and special temporary measures as warranted.

54. A growing body of evidence suggests sexual crimes under the Khmer Rouge were widespread, and that such acts were seldom punished and implicitly endorsed by an "enemy policy." Victim-survivors are willing and ready to come forward to tell their stories, even as they continue to suffer from trauma, discrimination and social stigma until today.

55. This briefing paper provides an overview of the ECCC and its procedures and approaches to sexual violence as it works to establish an official record of accountability for those most senior leaders and those most responsible under the Khmer Rouge regime. It highlights the findings of the Cambodian Women's Hearing and the evidence it presents to suggest that sexual violence under the Khmer Rouge was widespread, and that such crimes require the full benefit of the ECCC's resources and attention as afforded other crimes against humanity before ECCC. The paper concludes with providing specific, concrete, actionable steps in advancing sexual crimes on the agenda of the ECCC, in both its judicial and non-judicial transitional justice processes in order to ensure that the experience of sexual violence is fully included in the official reckoning of the atrocities committed against the Cambodian people between April 1975 and January 1979.

¹ (Copyright 2012) This brief was originally prepared for the office SRS Wallstrom on Conflict-Related Sexual Violence as part of follow-up advocacy efforts to the 2011 Cambodian Women’s Hearing on Sexual Violence under the Khmer Rouge. Theresa de Langis, Ph.D., served as lead author, and the paper is co-authored with Silke Studzinsky, Esquire, credentialed as a civil party lawyer before the ECCC since 2008. Acknowledgement is made to Clair Duffy, Khmer Rouge Trial Observer for the Open Society Justice Initiative, for her careful review and thoughtful response to the arguments as presented.

² For a full background to the ECCC, see Ciorciari, J.D. (Ed.) (2006). *The Khmer Rouge tribunal* (Documentation Series No. 10). Phnom Penh: Cambodia: Documentation Center of Cambodia.

³ Extraordinary Chambers in the Courts of Cambodia (2004). *Law on the establishment of the Extraordinary Chambers as amended*. Page: 1-2. Retrieved from http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

⁴ Personal interview with United Nations staff based on UN data and with a non-UN lawyer working with the ECCC. For information on judges, prosecutors and support staff, see the ECCC website, retrieved from <http://www.eccc.gov.kh/en>.

⁵ Anderson, K. (2005). Turning reconciliation on its head: Responding to sexual violence under the Khmer Rouge. *Seattle Journal for Social Justice* (3:2). Pages: 785-832. Anderson warns of predictable outcomes from lack of competence on sexual violence in the ECCC, along with potential investigative failures, while the ECCC was still in formation.

⁶ For more on the unique impact of civil parties, including bringing sexual violence to attention of the ECCC, see the Closing Arguments for Case 001 of the Civil Party Lawyers, as reported by Scheffer, D (November 2009), *Cambodia Tribunal Monitor*, retrieved from http://www.cambodiatribunal.org/sites/default/files/ctm_blog_11-23-2009.pdf). For an analysis of the shrinking rights and role of civil parties to participate in the ECCC, see Wallace, J. (18 January 2012), Losing civil parties in Cambodia, Radio Netherlands Worldwide, retrieved from <http://www.cambodiatribunal.org/sites/default/files/news/Losing%20Civil%20Parties%20in%20Cambodia.pdf>. See also *Cambodia’s Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge*. Talbot, A., Van Schaack, B., Reicherter, D., and Chhang, Y. (Eds.). (2001). Phnom Penh, Cambodia: Documentation Center of Cambodia. See especially Part II: The impact of trauma of the Extraordinary Chambers in the Courts of Cambodia, pages: 92-190. Though not specifically discussing trauma related to sexual violence, the finding that the ECCC proceedings may contribute to additional trauma—as well as opportunities for healing—remains relevant.

⁷ Appeal judgment (3 February 2012). Paragraphs 174- 183. Retrieved from <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>.

⁸ The case against IENG Thirith was severed for health reasons and she is determined unfit to stand trial due to health reasons.

⁹ Office of War Crimes Issues, U.S. Department of State. (14 October 2011). Press release: U.S. announces contribution to the Khmer Rouge tribunal. Retrieved from http://www.state.gov/j/gcj/us_releases/other/175540.htm.

¹⁰ See for example Open Society Institute (1 November 2011), Recent developments at the Extraordinary Chambers in the Courts of Cambodia, retrieved from <http://www.unhcr.org/refworld/docid/4ed781272.html>. See also Human Rights Watch (3 October 2011), Cambodia: Judges investigating Khmer Rouge Crimes should resign, retrieved from <http://www.unhcr.org/refworld/docid/4e8ab2a52.html>. See also Ellis, M. (September 2011). Safeguarding judicial independence in mixed tribunals: Lessons from the ECCC and best practices for the future. London, United Kingdom: International Bar Association.

¹¹ KR regime an anomaly on gender-based violence (12-14 September 2011). *Cambodia Daily*. Page: 11. Judge Cartwright is quoted as saying that “this particular conflict is unusual [in that] it does not contain allegations of widespread violence against women because they are women.” In a response letter to the editor of the same newspaper, Sin Soworn and Silke Studzinsky, national and international civil party lawyers respectively, rebutted that the “Khmer Rouge policy of forced marriages—a gendered form of violence—was practiced widely and systematically.” The crime was eventually included in the indictment of Case 002 as a result of the efforts of civil party lawyers and “victims who had the courage to talk about this crime and the harm that they suffered.”

¹² See Closing Order for Case 002 (15 February 2010). Paragraphs 1426-1429. Retrieved from <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>. “It is clearly established that under the Democratic Kampuchea [Khmer Rouge] regime crimes against humanity of rape were committed in diverse circumstances, notably in the security centres” (para. 1426); yet, the Co-Investigating Judges conclude, “the official CPK [Khmer Rouge] 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” (para 1429).

¹³ Personal interview of lead author with Civil Party Lawyer Silke Studzinsky, 5 February 2012, Phnom Penh, Cambodia.

¹⁴ Youk, C. (2001). The 6th code of conduct. *Searching for the Truth (Issue 15)*. Retrieved from <http://d.dccam.org/Projects/Magazines/Previous%20Englis/Issue15.pdf>. The English translation from Khmer, widely in circulation, is extremely unclear, as it assumes “consensual” acts can be “forced.” While this translation is only a sentence long, in the original Khmer, Code Number Six comprises a few paragraphs. It has been unofficially translated by a senior interpreter in the ECCC as:

6. Never commit any moral misconduct toward women.

In short, never commit any moral misconduct toward women and men. Our honor, revolutionary influence, the clean and dignified culture of our people would be affected if such act were committed. On the one hand it would affect our people. On the other hand, and most importantly, if we committed such moral misconduct toward women and men, which is an acutely corrupt element believed to be possessed by enemy of all sorts, we would be easily lured by the enemy. This act is therefore dangerous to us and to the revolution movement.

There is no obstacle concerning the present arrangement of marriages, so long as the following principles are abided:

First: Each to-be-married individual consents to the marriage; and
Second: It is approved by the collective.

When these principles are followed, there is no reason for anyone to commit moral misconduct toward women and men.

While the term “moral misconduct” can be interpreted as immoral acts including non-consensual sexual relationships, it is commonly understood that even consensual sexual relationships between a woman and a man whose marriage was not arranged or sanctioned by *Angkar* was viewed by the Khmer Rouge as moral misconduct or an immoral act. It is also interesting to note how Code Number Six uses sexual activity to differentiate the “enemy,” and as such could be considered integral—rather than divorced from, as the ECCC has determined—to the “Enemy Policy” itself.

¹⁵ Anderson, K. (2005). Turning reconciliation on its head: Responding to sexual violence under the Khmer Rouge. *Seattle Journal for Social Justice* (3:2). Page: 789. See also Natale, K. (2012). *I could feel my soul flying away from my body: A study on gender-based violence in Democratic Kampuchea in Battambang and Svay Rieng provinces*. Phnom Penh, Cambodia: Cambodia Defenders Project.

¹⁶ Becker, E. (1998). *When the War Was Over: Cambodia and the Khmer Rouge Revolution*. New York, NY: Public Affairs. Page: 184. Her argument suggests a link between forced marriage, racial superiority and production.

¹⁷ See Closing Order for Case 002 (15 February 2010). Retrieved from <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>. Paragraph: 1429.

¹⁸ See Mam, K. (2001). Evidence of sexual abuse during the rule of the Democratic Kampuchea. *Searching for the Truth (Issue 15)*. Retrieved from <http://www.d.dccam.org/Projects/Magazines/Previous%20Englis/Issue15.pdf>. Pages: 2-5.

¹⁹ Anderson, K. (2005). Turning reconciliation on its head: Responding to sexual violence under the Khmer Rouge. *Seattle Journal for Social Justice* (3:2). Pages: 789-790.

²⁰ Outside of those sources cited previously in the notes, see also Jacobsen, T. (2008). *Lost goddesses: The denial of female power in Cambodian history*. Copenhagen: NIAS Press; Nakagawa, K. (2008). *Gender-based violence during the Khmer Rouge regime: Stories of survivors from the Democratic Kampuchea (1975-1979)*. Phnom Penh, Cambodia: n.p.; So, F (2011). *The hijab of Cambodia: Memories of Cham Muslim women after the Khmer Rouge*. Phnom Penh, Cambodia: Documentation Center of Cambodia; and the film by Phat, R. (2004) *The Khmer Rouge rice fields: The story of rape survivor Tang Kim*. Phnom Penh, Cambodia: Documentation Center of Cambodia.

²¹ See the closing argument of Cambodian Civil Party council Kong Pisey as reported by Scheffer, D. (28 November 2009). *Cambodia Tribunal Monitor*. Retrieved from http://www.cambodiatribunal.org/sites/default/files/ctm_blog_11-23-2009.pdf. Page: 4-6

²² Closing Order for Case 002 (15 February 2010). Retrieved from <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>. Paragraph: 1428.

²³ See Mam, K. (2001). Evidence of sexual abuse during the rule of the Democratic Kampuchea. *Searching for the Truth (Issue 15)*. Retrieved from <http://www.d.dccam.org/Projects/Magazines/Previous%20Englis/Issue15.pdf>. Mam concludes that “during the DK period, laws that were meant to restrict sexual activity actually encouraged sexual violence” (5) and “the laws were established in such a way that women had nothing to gain from speaking out” about rape, but much to lose in retaliation (5).

²⁴ LeVine, P. (2010). *Love and dread in Cambodia: Weddings, births, and ritual harm under the Khmer Rouge*. Singapore: NUS Press; Jacobsen, T. (2008). *Lost goddesses: The denial of female power in Cambodian history*. Copenhagen: NIAS Press. Both authors provide analysis of the gendered impact of forced marriage and the loss of other social institutions and rituals from which women gained identity and status.

²⁵ Hindstrom, H. (16 December 2011). Cambodia's future rests on punishing past sexual crimes, argue campaigners. *The Guardian*. Retrieved from <http://www.guardian.co.uk/global-development/2011/dec/16/cambodia-past-sexual-crimes-khmer-rouge>.

²⁶ The full statement of the Cambodian Women's Hearing on Sexual Violence under the Khmer Rouge can be retrieved from <http://www.awid.org/News-Analysis/Announcements2/Panel-Statement-from-the-Women-s-Hearing-True-Voice-of-Women-in-the-Khmer-Rouge-Regime-on-Sexual-Violence>.