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## **Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge**

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Katrina Anderson<sup>1</sup>

I wonder how both sides can reconcile if one side is the victim and the other is the perpetrator. And the perpetrators have not accepted their mistakes. If they admit their actions, it would be up to me to forgive them or not. It depends on how they confess. I almost died, but they have only compensated my loss with the word “sorry” . . . .

Tang Kim, Khmer Rouge rape survivor<sup>2</sup>

Tang Kim turned twenty-three years old in 1976, shortly after the Khmer Rouge defeated the American-backed Lon Nol government and unleashed a reign of terror on the countryside of Cambodia. One night, a group of soldiers seized Tang Kim and brutally raped her in a field near her village. She hid for three days in a leech-infested swamp and witnessed thirty-three families murdered. Of eight women who fled the village, she was the only one to escape alive.

In a recent film produced by the Documentation Center of Cambodia (DC-Cam),<sup>3</sup> Tang Kim breaks her silence for the first time in twenty-eight years. The importance of this film cannot be understated, for she is the first Cambodian woman to speak publicly about the crimes of rape that occurred during the five-year period of Democratic Kampuchea (DK) under the rule of the Communist Party of Kampuchea (CPK), commonly known as the Khmer Rouge.<sup>4</sup> Between 1975 and 1979, millions of Cambodians either starved to death or were killed, and countless more were tortured or were

deprived of food. No one has ever been held accountable for these crimes, nor has any serious attempt at national reconciliation ever been made.

Thirty years after the fall of the DK regime, the Cambodian government finally agreed to bring some members of the CPK leadership to trial for domestic and international crimes committed during their reign of terror. In October 2004, the Cambodian National Assembly approved a long-debated piece of legislation that created a special tribunal within Cambodia's court system, called the Extraordinary Chambers (EC), for the purpose of trying senior leaders of the DK regime.<sup>5</sup> With trials expected to begin sometime in 2005,<sup>6</sup> it is widely hoped that the EC will open the door to reconciliation by creating a historical record that documents how the Khmer Rouge came to power and why the regime caused such massive social disruption.

While the tribunal may succeed in holding accountable some of the most responsible actors for the Khmer Rouge crimes, the EC alone is an insufficient mechanism for national reconciliation. The purpose of this article is to challenge the singular approach to reconciliation through the use of judicial mechanisms that are blind to and ineffective with respect to certain crimes, and instead to promote creative approaches focused on grassroots social repair. The tribunal reflects a "top-down" approach to accountability that has dominated transitional justice discourses since the Nuremberg trials. This theory presumes that the responsibility for the crimes rests in the upper echelons of CPK leadership, not among the lower-level officers.<sup>7</sup> Hence, any historical record generated by the EC will omit culpability on the part of lower-level officers, depriving Cambodians of the opportunity to confront this class of perpetrators and learn about their role in the regime. The driving theory behind the EC therefore subverts a key purpose of creating a tribunal—to create a factual, unbiased, historical record of what happened and why.<sup>8</sup> Individual accountability for the top Khmer Rouge leaders is not likely to make a significant difference in the lives of victims of rape and sexual abuse who live in close proximity to their rapists and who struggle daily with the legacy of those horrible crimes

that remain unacknowledged by the rest of Cambodian society. For this reason, a clear majority of Cambodians recognize that other mechanisms will be necessary to repair Cambodia's torn social fabric, even though a similar proportion of the population believes the tribunal provides a critical opening for a national dialogue about the past.<sup>9</sup> Supplemental mechanisms are necessary to address crimes committed by lower-level officers; this is particularly true of sexual violence against women committed under the DK regime. Accountability and reconciliation strategies designed from the bottom-up, rather than the top-down, will more accurately meet the goals of average Cambodians to face the past and to chart the future of their country.

Part I of this article describes the sexual crimes committed under the DK regime and offers a hypothesis to explain why these crimes have been omitted from the historical narrative of Khmer Rouge atrocities. The silence surrounding crimes against women has affected the drafting of the EC Statute and has limited the possibility of holding the perpetrators accountable for rape.

Part II of this article analyzes the limited capacity of the EC to address crimes of sexual violence and predicts that such crimes will not figure prominently in the prosecutions for four principal reasons. First, as mentioned above, the EC's narrow mandate precludes the possibility of prosecuting those who actually perpetrated the sexual crimes—the lower-level cadre. Second, gaps in the EC Statute, such as the omission of rape as a domestic crime and the use of outdated terminology, would make the EC prosecutor's task extremely difficult if such prosecutions were undertaken. Third, the EC cannot possibly be immune from the hostility towards prosecutions on the basis of sexual violence that exists in Cambodia's legal system. Finally, the collection of evidence—always difficult in the case of sexual crimes—will be particularly challenging for the EC prosecutors given the passage of time between the commission of the crimes and the establishment of the tribunal, compounded by the emotional and psychological impact of testifying for victims.

The combination of these four factors virtually guarantee that prosecutions for rape at the EC will be rare and inadequate; nevertheless, observers of the tribunal must pressure the EC to investigate and to prosecute sexual crimes. Part III of the article offers four recommendations to insure that prosecutions for rape are pursued in a way that will empower women victims and witnesses. These include institutional recommendations for the EC, as well as procedural protections that proved successful at the two fully international tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Cambodia's choice to embrace a model of retributive justice through the EC does not necessarily preclude the use of restorative justice mechanisms in Cambodia. Part IV acknowledges that given both the importance of uncovering the truth about crimes of sexual violence and the unlikelihood of successfully prosecuting sexual crimes, supplemental means of addressing these crimes should be explored. For instance, traditional Cambodian or Buddhist methods of dispute resolution may provide a window for victims and perpetrators to confront each other and to move towards forgiveness and reconciliation. Part IV analyzes some possibilities for local justice initiatives in Cambodia that could be used to confront the buried history of sexual violence. This section also draws on the lessons learned from local justice models in other post-conflict situations in an attempt to predict similar obstacles and to correct them before they occur.

There is no doubt that confronting the buried history of sexual crimes in Cambodia will take a serious commitment of time and resources: first to create an accurate historical record, next to hold actors accountable, and finally to promote long-term reconciliation. This article recognizes that silence can no longer be the appropriate response. Across Cambodia, women like Tang Kim are waiting to tell their stories.

## I. SEXUAL CRIMES UNDER THE KHMER ROUGE

When the DK regime fell in 1979, the international community entered Cambodia for the first time in five years and discovered graphic physical evidence of killing and torture on an absolutely staggering scale. At least 1.5 million people—20 percent of the Cambodian population—died during the four-year Khmer Rouge regime.<sup>10</sup> Of these, between 500,000 and one million people were executed, while others died of starvation and disease. The vast physical evidence in mass graves (such as those at Choeng Ek only fourteen kilometers from Phnom Penh) and the torture devices left at Tuol Sleng (an elementary school converted into several torture chambers) offered powerful evidence of the Khmer Rouge regime's methodological acts of torture and extrajudicial killing.

At first, the scale of the destruction blurred distinctions between the victims. While the vast majority of the victims were ethnic Khmers, they also included Cambodians of Vietnamese descent and Muslim Chams. Not even Buddhist monks and nuns were spared. In the Khmer Rouge's quest to purge "enemy elements" from every sector of society, they killed men, women, the elderly, and children. No sector of Cambodian society was immune from persecution.<sup>11</sup>

The forensic evidence alone did not indicate that women had suffered differently than men. Skeletal remains do not reveal evidence of rape or sexual assault, and the dead took their stories with them. During the documentation of the Khmer Rouge crimes, women survivors remained silent on the subject of rape. Thus, it was assumed that rape had not been used as a weapon of war in the way it had under other genocidal regimes, such as in the former Yugoslavia and Rwanda.

Also, in contrast to other regimes, the Khmer Rouge was widely known to have espoused a policy strictly forbidding rape and even went so far as to outlaw sexual relations of any kind outside of marriage. The regime viewed sex as subversive behavior that would distract people from what ought to have been the focus of their work, the agrarian revolution. Although the

regime wanted to project an image of the revolutionary organization, or *Angkar*,<sup>12</sup> as morally pure, the policy was less rooted in morality than it was in the Maoist philosophy that valorized efficiency above all else.<sup>13</sup> Morality provided a convenient excuse for controlling all aspects of civilian life.

The strict prohibition on sex protected some women from sexual violence because men considered the risk of transgression too high. But as researcher Kalyanne Mam concluded after conducting the most extensive set of interviews of women survivors to date, the Khmer Rouge policy had the perverse effect of encouraging sexual crimes against many women.<sup>14</sup> In effect, the Khmer Rouge policy “drove the practices underground.”<sup>15</sup> In order to conceal evidence, soldiers killed women immediately after raping them. In the film about her life, Tang Kim also describes this practice:

They raped all of those who were sent to be killed. They would never rape a woman otherwise....You [the filmmaker] have said that you were looking for people who committed moral offenses with Khmer Rouge soldiers, but you could not find such a case. The Khmer Rouge would never do anything like that; both the rapist and the victim would be executed if it was found out. So, they would only rape those who were condemned to die.<sup>16</sup>

Moreover, as Tang Kim indicates, the laws punished both the perpetrator and the victim of sexual violence for committing a sin against the *Angkar*. Women were too afraid to report sexual abuse; they were told that if they informed the *Angkar* of the crime, they would be killed.<sup>17</sup> Like Tang Kim, who went to live in a cooperative after surviving her rape but refused to show her face to anyone, women went to great lengths to avoid the attention of the *Angkar*. A culture of blame directed at the survivors of rape persists in Cambodia, preventing survivors from coming forward with their stories. Women in rural Cambodia are particularly fearful because they may live close to their perpetrators and would risk disrupting key social networks by naming them.

The perpetrators were not only protected by laws that deterred reporting, but also by the decentralized structure of the Khmer Rouge command. This structure kept senior commanders from discovering the crimes of subordinate soldiers.<sup>18</sup> One victim reported that at one prison, women prisoners would be raped until they became pregnant, then they were killed to conceal the evidence.<sup>19</sup> The guards' crimes were never discovered because the prison was physically isolated and the guards controlled who entered and who left.<sup>20</sup> Not surprisingly, the Khmer Rouge policy did not deter rape from occurring but instead created a culture of impunity around the act of rape. If perpetrators could conceal all evidence by killing their victims, they could uphold the illusion of a moral society wholly devoted to serving the Angkar.

Most Cambodians—including women who survived the Khmer Rouge regime—believed that rape did not occur during that time because of the lack of preserved physical evidence of rape, the regime's severe regulation of sexuality and its unanticipated effects, and the forced silence of women victims. Systematic rape apparently did not occur on the massive scale witnessed in certain other genocidal regimes such as Rwanda and Yugoslavia, but rape and sexual abuse certainly did take place under the Khmer Rouge. The present challenge for Cambodians is how to address these buried crimes. Most of the physical and testimonial evidence has vanished with the death of the victims. It is imperative to create a mechanism for addressing these crimes—one that will allow Cambodians to face a buried past, shatter the myth that rape did not occur under the Khmer Rouge, and move towards genuine community reconciliation.

## II. RETRIBUTIVE JUSTICE: THE EXTRAORDINARY CHAMBERS

The EC Statute is the result of a protracted and highly political negotiation process between the United Nations (UN) and the Cambodian government.<sup>21</sup> In 1997, the Cambodian government invited the UN to assist the country in establishing a Khmer Rouge tribunal.<sup>22</sup> The UN Secretary



General soon after appointed an international and independent Group of Experts, which marked the first international response to the Khmer Rouge crimes since 1978. The Group's mandate was to evaluate the existing evidence and nature of the crimes committed, to determine the feasibility of bringing perpetrators to justice, and to evaluate the options for trials before international or domestic courts. In February 1999, the Group of Experts issued its final report calling for the creation of a fully international tribunal similar to the International Criminal Tribunal for Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).<sup>23</sup> The Cambodian government rejected this recommendation, preferring a fully Cambodian court to preserve its sovereignty.<sup>24</sup> Eventually, a compromise was reached to create a "mixed" tribunal composed of a one-seat majority of Cambodian judges who would primarily apply Cambodian law.<sup>25</sup> In December 2004, the UN and the Cambodian government agreed on a budget to fund the tribunal and initiated the UN's process of raising funds among donor nations.<sup>26</sup> Assuming fundraising efforts are successful, the EC is projected to begin trials sometime in 2005.

Among observers within and outside Cambodia, significant doubts remain as to whether fair trials are possible with the EC operating as a special court within the Cambodian court system, rather than as a separate international tribunal.<sup>27</sup> Nevertheless, the EC is the most promising accountability mechanism proposed to date, and time and opportunity yet remains to fix its flaws. This section discusses the primary obstacles to prosecuting crimes of sexual violence in hopes they can be addressed before the commencement of the EC.

#### *A. Limited Personal Jurisdiction*

One of the more controversial aspects of the tribunal is its prosecutorial scope. The UN Group of Experts recommended that the tribunal have a mandate to prosecute "those persons most responsible" for the serious crimes committed during the DK regime, including "senior leaders" as well

as “those at lower levels who are directly implicated in the most serious atrocities.”<sup>28</sup> The language in the final EC Statute narrows the scope of jurisdiction to those “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes.”<sup>29</sup>

The language of the EC Statute precludes the possibility of holding accountable a broad range of lower-level commanders who might bear a significant portion of responsibility for the crimes committed.<sup>30</sup> It was intended to exclude current political leaders, most notably Prime Minister Hun Sen, who held minor positions in the CPK. The EC Statute presumes a theory of why the crimes were committed: the top CPK leadership conspired to commit genocide, crimes against humanity, and war crimes on a mass scale by developing the machinery to carry them out.<sup>31</sup> Historian Steven Heder argues that the EC’s lack of jurisdiction over the “small fish” prevents prosecutors from exploring an equally plausible alternative theory of why the crimes occurred—that the crimes resulted from an abuse of authority in which subordinate soldiers acted on their own volition without the knowledge of the senior leaders.<sup>32</sup>

Cambodians have stated that they want a tribunal in order to understand what went wrong under the Khmer Rouge so as to prevent such events from ever happening again. Sixty-five percent of Cambodians perceive the lower-level Khmer Rouge cadre as the perpetrators,<sup>33</sup> but the public is clearly split on how to hold them accountable. Forty-one percent consider the lower-level soldiers to be both victims and perpetrators; however, a majority does not pity them,<sup>34</sup> and 67 percent stated that they could not forgive the soldiers who actually perpetrated the crimes against them.<sup>35</sup> Historical accounts show that lower-level cadre were often persecuted by CPK party leaders, but the experiences of these soldiers were too diverse to lump them all into either the “victim” or “perpetrator” category.<sup>36</sup> By shifting the focus away from the experiences of the foot soldiers toward those of the senior leaders, the EC’s restricted mandate will likely not lead

us any closer to understanding how CPK policies developed, and how these policies were upheld, changed, or rejected on the ground.

The restricted mandate also has serious implications for prosecutions of sexual violence. Prosecutors would face an enormous challenge in proving that the senior leaders ordered the lower-level soldiers' acts of sexual violence. Senior leaders were unlikely to commit rape themselves due to the Khmer Rouge policy forbidding it, so a prosecutor would have to show that the defendant held command responsibility over the lower-level cadre who actually committed the rape.

The theory of command responsibility allows a senior leader to be held accountable for the actions of a subordinate if the defendant knew, or should have known, that his subordinates were committing abuses, and the leader either failed to take necessary and reasonable measures to prevent those abuses or failed to punish the perpetrators.<sup>37</sup> This doctrine reflects the belief that commanders are more culpable than subordinates because they either ordered the crimes or failed to supervise and punish those who committed them. Senior leaders of the Khmer Rouge maintain that they did not order sexual crimes, and the well-known policy prohibiting rape supports their claim. But even if a senior leader did not order the rape, a prosecutor may still be able to prove command responsibility if there is evidence that the commander was negligent in preventing the rape.<sup>38</sup> Evidence indicates, however, that in areas where rape occurred, most senior leaders did not know about the crimes of their subordinate officers. More often, lower-level Khmer Rouge soldiers committed rape in secret and concealed all evidence of the crime. As Kalyanee Mam explained,

[I]t was imperative that all evidence of the crime was completely destroyed and higher officials did not find out about the rape that had taken place. It was not enough to simply threaten their victims not to speak against them. Victims had to be killed in order to remove all traces of the crime.<sup>39</sup>

Testimonies from survivors indicate that senior leaders also did not have effective control of their subordinates' actions, at least in certain locations. Researchers at the Documentation Center of Cambodia have gathered evidence suggesting that rape was widespread and systematic against members of ethnic minority groups in Cambodia, including the Vietnamese, Cham, and Chinese, especially when imprisoned.<sup>40</sup> Reports vary as to the extent of sexual violence in prisons, where women comprised 6.4 percent of the population.<sup>41</sup> In his authoritative book on the infamous "S-21" prison in Phnom Penh, David Chandler states that sexual assault was infrequent in the prison due to close monitoring by prison guards.<sup>42</sup> Female guards were even called to witness the interrogation of female prisoners in order to prevent torture of a sexual nature.<sup>43</sup>

In contrast, one of Mam's interviewees told her how soldiers repeatedly raped all of the young female prisoners at a provincial prison called "Munti #15." The former prisoner explained, "[t]hose people probably tried to prevent the top leaders from finding out, because [at Munti #15] there were [ten] soldiers that guarded us, so it was easy for them to conceal what they were doing. There was no one coming in or out."<sup>44</sup> Chandler's and Mam's reports are actually consistent, for they suggest that rape was more likely to occur when soldiers were least likely to be monitored. Guards in a prison such as Tuol Sleng, where senior leaders passed through regularly or had frequent communication with the prison officials, were punished severely for the slightest infraction. But in jungle camps where prisoners were isolated from the scrutiny of Khmer Rouge leadership, soldiers acted as they pleased.

A successful prosecution for rape depends on prosecutors' ability to show that senior leaders either ordered or knew of and failed to prevent or punish rape, and that they held effective control over their subordinates in those areas where the majority of the rapes seem to have occurred. The available evidence about how rape was perpetrated under the Khmer Rouge supports the opposite conclusion, that the majority of crimes resulted from an abuse

of authority by subordinates rather than a top-down conspiracy devised by Khmer Rouge commanders to use rape as a weapon of war. The fact that sexual crimes were driven underground—causing extreme secrecy and destruction of physical evidence—makes it nearly impossible to prove that senior leaders promulgated a policy to use rape “with the intent to destroy”<sup>45</sup> a civilian population, or “as part of a widespread or systematic attack”<sup>46</sup> against a civilian population. While it makes sense from a moral perspective to pursue the “big fish” and hold them accountable before the EC, a major consequence of this approach will be a lack of accountability for many serious crimes, including rape, and the absence of these crimes on the historical record.

*B. Omission of Rape as a Domestic Crime*

The EC Statute includes three domestic crimes (murder, torture, and religious persecution)<sup>47</sup> and five international crimes (genocide, crimes against humanity, war crimes, crimes against cultural property, and crimes against internationally protected persons).<sup>48</sup> Rape was not included as a domestic crime under the EC Statute even though Cambodia’s 1956 Penal Code—the criminal code in force at the time of the DK regime—lists rape as a crime.<sup>49</sup> There are many possible explanations for the omission. It could be attributed to the widespread belief that rape did not occur during the DK era because it was forbidden by the official CPK policy. As discussed in Part I, physical evidence of rape did not exist. Rape and sexual abuse were also underreported by women, who remained silent out of shame or fear. Furthermore, during the time the EC Statute was being negotiated, scant research had been undertaken on the subject of sexual crimes against women under the Khmer Rouge. Consequently, the international outrage against rape and sexual violence committed by the genocidal regimes in Rwanda and Yugoslavia—outrage that facilitated the aggressive prosecution of these crimes at the ICTR and ICTY—did not exist in Cambodia.<sup>50</sup>

Despite the lack of physical evidence, the fact that further inquiries of rape and sexual assault of Cambodian women were not conducted with the aim to include sexual crimes in the EC Statute is still disappointing. By the time of the EC's ratification in October 2004, researchers had gathered enough testimony from women survivors to allow for the possibility that rape had occurred. The lessons of other investigations of mass atrocities had also begun to focus on crimes against women. In recent years, the ICTR and ICTY have declared rape a war crime,<sup>51</sup> a crime against humanity,<sup>52</sup> an act of genocide,<sup>53</sup> and torture,<sup>54</sup> and thereby greatly contributed to the international jurisprudence on gender-related crimes.<sup>55</sup> The EC Statute's omission of rape as a specific domestic crime is especially troubling given the great strides that these tribunals' judgments have made towards recognizing the historical use of rape as a weapon of war.

*C. Use of Outdated and Restrictive Terminology*

Prosecutors will still have the option of charging rape as an international crime. Although the Geneva Conventions do not specifically list rape as a war crime, rape is now considered a grave breach under the Fourth Geneva Convention, which prohibits "willfully causing great suffering or serious injury to body or health" and "inhuman treatment" of civilians.<sup>56</sup> Furthermore, ICTY and ICTR jurisprudence have helped move international law towards acceptance of rape as a war crime.

Unfortunately, the drafters of the EC Statute chose to incorporate outdated terminology from international humanitarian law instead of the more inclusive and more current statutory language from the two main international tribunals. Article 6 of the EC Statute does not list rape or sexual violence as a war crime. The drafters rejected a more expansive definition of war crimes based on the "grave breaches" provision of the Fourth Geneva Convention or the ICTR Statute, which include "rape, enforced prostitution, and any form of indecent assault."<sup>57</sup>

On the other hand, the language in Article 6 does not limit the acts chargeable as war crimes to the acts listed therein, as evidenced by the phrase “such as the following acts.” Naming rape as the constituent act of a war crime would be preferable to charging defendants with one of the other acts that are explicitly named in Article 6, such as “torture,” “inhumane treatment,” “great suffering,” or “serious injury to body or health.” A charge on one of these bases denies the sexual and gender-based aspects of rape and its distinct physical and psychological harms that deserve particularized remedies. Furthermore, as Kelly Askin points out, the vagueness of the charge is also “wholly useless as a deterrent.”<sup>58</sup> Considering the attitudes of Cambodia’s legal system towards rape, it is optimistic to assume that rape will be separately prosecuted as a war crime without significant pressure from the international community.

Although the drafters did list rape as one of the constituent acts of crimes against humanity in Article 5, this Article notably omits other types of sexual crimes, such as abuse or enslavement, that survivors claim also took place under the DK regime. Due to differences in the language between the EC Statute and the ICTR and ICTY Statutes, it is unclear whether the EC will find the ICTR and ICTY jurisprudence authoritative in interpreting the definition of crimes against humanity based on rape.

The jurisprudence of the ICTR and the ICTY has significantly developed the definition of rape and sexual assault under international law. For example, the ICTR broadly defined “sexual violence,” which includes rape, “as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>59</sup> The tribunal then defined coercive circumstances expansively as those that include “threats, intimidation, extortion, and other forms of duress,” such as the existence of armed conflict or the presence of armed militants.<sup>60</sup> Subsequent decisions have also expanded the definition of sexual crimes that qualify as crimes against humanity to include sexual assault.<sup>61</sup> The ICTR’s precise definition of rape as a sexual act of force plus coercion is important because it recognizes the

inherently coercive aspect of armed conflict. The international judges in the EC will likely push for the application of the ICTR and ICTY's rich jurisprudence on sexual violence, but it might be too optimistic to assume that the Cambodian judges will draw on these progressive definitions.

*D. Hostility of the Cambodian Justice System Towards Crimes of Sexual Violence*

The failure of the EC Statute to include rape as a domestic crime, and the use of outdated legal terminology to describe rape, may be explained in part by the general treatment of rape under Cambodian domestic law. Even if the legal inadequacies and evidentiary problems discussed in subsections A through C above are adequately resolved, any prosecution for rape at the EC would still encounter a legal culture that is extremely hostile to such prosecutions. The Cambodian legal system's failure to deter rape is evident from three sources of information: the underreporting of rape, the low rate of rape prosecutions, and the even lower rate of rape convictions.<sup>62</sup> Human rights organizations report that even while incidents of rape dramatically increase every year, barriers in the judicial system remain that deter many women from coming forward. These barriers occur at every level of the process, from investigation to trial, and are firmly entrenched in Cambodia's legal system and culture.

Several reasons contribute to the failure of the system to prosecute rape. First, corruption within the legal system has led citizens to distrust the promise of due process at trial. Law enforcement officers frequently break Cambodian law to broker settlements between the parties, including forcing the victim to accept monetary compensation or even a forced marriage to the perpetrator.<sup>63</sup> Though Cambodian law requires the state to shoulder the costs of prosecution, victims must pay bribes to initiate investigations and pay for their medical certificates (the one critical piece of evidence in a rape case).<sup>64</sup> The cumulative cost of bribes necessary just to bring a case to court makes the cost of prosecuting a rape case prohibitive for most victims.



Second, the intense social stigmatization of rape victims in Cambodia discourages women from reporting rape for fear of bringing unbearable shame upon themselves and their families. A sense of deep shame frequently accompanies a victim's fears for her physical safety; for example, a woman may refuse to tell her story because it would lead to both acts of revenge by her perpetrator and recrimination and alienation by her community.<sup>65</sup> The president of Licadho, a major Cambodian human rights organization, explained that most people in Cambodia believe rape is not a crime because of a popular myth that men cannot control themselves.<sup>66</sup> Court officials, however, are not immune to such views, thus creating the third problem—misinterpretation of the law.

Judges have been known to acquit rape cases based on erroneous grounds, such as when the victim is not a virgin or when the perpetrator is related to the victim.<sup>67</sup> Though Cambodia's rape laws are far from ideal—for example, the law fails to define consent or capacity for determining it—it is the judges' unwillingness to suspend personal beliefs and to apply the correct law that more often harms women. One human rights organization that monitors rape reported that in 2004, judges sentenced suspects in only 7 percent of cases.<sup>68</sup>

Finally, Cambodia's citizenry has a profound distrust of the legal system. Perpetrators know that they can influence the outcome of a case by bribing a judge or the appropriate court official, and the public reacts to this sense of impunity by failing to report crimes or to file complaints. This is particularly true where the perpetrator is a state actor. Out of twenty-five cases brought to trial against a state actor in 2003, none resulted in a conviction.<sup>69</sup>

#### *E. Collection of Evidence*

Gathering evidence to prove crimes against women, particularly sexual crimes, has historically been very challenging due to a variety of social and practical factors. The passage of time between the commission of the crime

and the trial is the most obvious practical obstacle to collecting evidence for rape cases. This is especially true in the Cambodian context. After thirty years, any physical evidence of sexual crimes that may have existed has deteriorated to the point of uselessness, and testimonial evidence is inevitably lost due to the death of victims and the fading of witness memory over time.

The emotional torment and psychological impact of rape, which often endure long after the physical effects have passed, create enormous barriers for investigators. Post-traumatic stress disorder (PTSD) is common in rape victims and causes them to experience impaired memory, especially during times that they are forced to recall the triggering events. Eighty percent of rape survivors in Rwanda were identified as “severely traumatized” after the conflict ended.<sup>70</sup> Investigators in the former Yugoslavia found that repeated questioning re-traumatized rape victims, and some who retold their stories multiple times suffered such severe depression that they attempted or committed suicide.<sup>71</sup> Past experience shows that the passage of time buries the trauma but does not in itself help women recover; for example, some Japanese “comfort women” did not reveal their stories for decades after World War II.<sup>72</sup> Similarly, twenty-eight years passed before Tang Kim could talk about her rape. In both cases, the wounds caused by sexual violence had not yet begun to heal until the victims could talk about their experiences.

Another obstacle hindering the collection of evidence is the reluctance of women to report rape because of social consequences such as ridicule, humiliation, rejection, or ostracism.<sup>73</sup> This occurs more frequently in traditional and patriarchal societies where a woman’s worth is directly proportional to her chastity and virginity.<sup>74</sup> In societies where a sexual crime against a woman is a crime against her family and community, families often ostracize the victim to save face.<sup>75</sup> Investigators who interviewed women in post-conflict Guatemala found that few women talked about their experience of rape because they had deeply internalized it

as one of many anticipated consequences of the military's campaign to destroy indigenous communities.<sup>76</sup> Victims denied even to themselves that they had been raped and described only their general sadness about the impacts of war. Moreover, untrained investigators lacking the experience and expertise to ask the relevant questions only buried the crimes deeper.

It should also be noted that investigators and prosecutors can harm women by overemphasizing sexual crimes, which occurs when researchers interview with preconceived notions about the violence and fail to listen to the victims' narratives. Aryeh Neier explains how researchers in the former Yugoslavia were reluctant to focus on rape when interviewing women because, in doing so, they de-contextualized the crime and failed to represent the extent of women's harms.<sup>77</sup> When rape is accompanied by the murder of family members, imprisonment, food deprivation, or other gross human rights violations, it is absorbed into a much longer narrative of suffering. A narrative disconnect happens when victims of mass atrocity, who tend to think in terms of an uninterrupted experience of suffering, explain their story to prosecutors or investigators, who are trained to isolate facts to support elements of crimes. Separating the crime of rape from other crimes against women during wartime can cloud a more complete understanding of all human rights abuses committed against women during war.<sup>78</sup> In Cambodia, rape took place within the context of human rights abuses against women and ranged from forced separation from family members to extreme forced labor that led to miscarriages and starvation.<sup>79</sup> Prosecutors and investigators that are properly trained to listen to women victims will learn to appreciate the full range of harms that women have experienced and give sexual violence the appropriate emphasis.

### III. RECOMMENDATIONS FOR THE EXTRAORDINARY CHAMBERS

The previous section focused on the obstacles to prosecuting rape at the EC, but these obstacles are not insurmountable if attention and resources are devoted to them early in the process. The short- and long-term advantages

of prosecuting rape cannot be overstated. First and most importantly, prosecutions could expose the truth about women's experiences during the Khmer Rouge and break the silence that threatens to write them out of history. Second, charging commanders for rape strongly condemns such behavior and reverses the balance of power between victims and perpetrators.<sup>80</sup> Third, holding perpetrators criminally responsible is one of the strongest deterrents against the use of rape as a weapon of war in future conflicts. Fourth, prosecuting rape builds the jurisprudence on rape as an international crime, educating judges about gender-related crimes and normatively influencing the way that judges apply the law in rape cases.<sup>81</sup> Fifth, prosecutions would help educate Cambodian judges about sexual violence, which would lead to a better application of Cambodia's rape laws. Finally, generating public discussion on issues of sexual violence would likely challenge popular (sexist) assumptions about rape and prompt legislative reform to strengthen legal protections for rape victims.

Despite its shortcomings, the EC must be supported as the first step towards accountability in the long process of reconciliation. Trials before the EC will begin to formulate a factual record about the events that took place under the DK regime. The EC's flaws may prevent many of the real questions about rape and other crimes from being answered, but it will open a much-needed national dialogue on the events of the past that will generate momentum for supplemental forms of reconciliation.

At this point, no one can know whether Tang Kim is a lone rape survivor of the Khmer Rouge regime or one of thousands who has feared coming forward for the past thirty years to speak about her rape. Such questions about the historical record are fair, but they cannot be answered unless the EC increases both its outreach and access. In its current form, it is safe to predict that very few women, if any, will testify about rape before the EC. However, EC officials can implement certain changes at relatively low practical cost to ensure that victims of sexual violence will be treated with respect should they decide to testify. These four recommendations include:

(1) design special procedural protections for witnesses and victims of sexual violence; (2) create a victims and witnesses unit within the EC to address short and long-term care for those testifying before the EC; (3) offer gender-sensitivity trainings emphasizing issues of sexual violence to EC officials including judges, prosecutors, and investigators; and (4) appoint women as judges and prosecutors.

#### *A. Procedural Protections*

Unlike the statutes that created the other international and ad hoc tribunals, the EC Statute does not authorize the EC judges to create their own rules of procedure and evidence. And at the time of this article, the Cambodian National Assembly has yet to approve rules of procedure and evidence for the EC. Consequently, what rules will apply and who will draft them is impossible to predict. Regardless of how the general rules of procedure and evidence are established, the EC should follow the example of other international tribunals and craft special rules to address the needs of victims of sexual crimes.

Because Cambodian jurisprudence on sexual violence is so underdeveloped, the tribunal should adopt rules that reflect the valuable lessons learned from the ICTR and ICTY in dealing with such cases. For example, the rules of procedure for those tribunals do not require corroboration of a rape victim's testimony.<sup>82</sup> They also make evidence of the victim's prior sexual conduct inadmissible and acknowledge that consent is not a defense to rape when coercive conditions are present.<sup>83</sup> And the ICTR's *Furundzija* decision<sup>84</sup> marked a significant departure from harmful assumptions, such as the diminished credibility of victims suffering from rape trauma disorder, a form of PTSD, who receive counseling. The court wrote, "Even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness."<sup>85</sup>

The EC Statute calls for the protection of victims and witnesses but specifies only one procedure to do so—holding private, in camera, proceedings for judges to review sensitive evidence.<sup>86</sup> Although the EC Statute does not specify other protective procedures, neither does it limit them.<sup>87</sup> The rules of procedure should specify measures that will provide for a victim's security,<sup>88</sup> prevent further traumatization,<sup>89</sup> and protect a victim's privacy.<sup>90</sup>

*B. Victims and Witnesses Unit*

To provide comprehensive care, the EC should establish a Victims and Witnesses Unit that can coordinate the special needs of victims. The EC Statute currently designates three offices—investigating judges, co-prosecutors, and judges—to share the responsibility of caring for the victims.<sup>91</sup> The lack of clearly designated roles reveals that caring for victims was not a priority for the drafters of the EC Statute, but the EC can rectify this problem by creating a unit that will provide comprehensive care and ensure that a victim's needs do not fall through the bureaucratic cracks.

*C. Gender Sensitivity Trainings*

Educating officials involved with the EC on gender-sensitive procedures is critical to addressing crimes against women successfully. Two important lessons can be drawn from previous tribunals. First, it is important to make women feel both physically and psychologically safe.<sup>92</sup> To help create a safe environment at the EC, investigators and prosecutors must be trained to ask questions in a way that empowers women to tell their story. Specifically, investigators should be trained to ask appropriate questions and to listen to the clues in a woman's story that suggests evidence of sexual violence. The second lesson speaks to the healing nature of a trial for the victim, in that no trial should re-traumatize a woman who has suffered from sexual violence. The bottom line is that women victims or witnesses must be given a "genuine choice between remaining silent and

coming forward.”<sup>93</sup> In other words, tribunal officials should communicate to women that they are the actors who hold the power to testify or not to testify. All other protective measures for victims and witnesses should also stem from this baseline.

Admittedly, capacity-building programs aimed at the Cambodian judiciary have not had much success over the years because of corruption within the Cambodian judiciary. The Cambodian political and economic elite influence judicial outcomes in nearly every case, despite attempts to train judges to apply international standards for fair trials. Judicial trainings in Cambodia now carry the aura of futility; consequently, donors increasingly refuse to fund them. But as Steve Heder points out, the problem is not the judiciary’s incapacity to analyze the law critically and exercise independent judgment; rather, “the problem is the determination of key political players to prevent training and knowledge from being put to use against their fundamental political and economic interests.”<sup>94</sup> Thus, the international community has a responsibility to monitor the political influence exerted on judges and other actors within the EC. A problem as entrenched as corruption will not be reversed overnight, but the international spotlight on Cambodia’s legal system creates an unusual window of opportunity to educate members of the legal system about international standards of fairness.

#### *D. Women as Officials of the Extraordinary Chambers*

The experience of other tribunals has revealed, unsurprisingly, that when women serve in high-level capacities on the tribunal, crimes against women are more likely to be addressed. The ICTR’s *Akayesu* decision, which contributed significantly to the development of rape jurisprudence under international law, originally did not include rape in the indictment. Akayesu was the former mayor of the Taba commune who was accused of allowing those under his authority to rape mostly Tutsi women who had sought his protection. International human rights groups derided the

prosecutor's omission of rape in the original indictment, but many attribute the prosecutor's late decision to amend the indictment to the presence of a woman judge on the panel who pushed for the inclusion of those crimes.<sup>95</sup> As this example illustrates, appointing women as judges, prosecutors, and investigators will increase the likelihood that sexual violence will be prosecuted before the EC.

By serving in these high-profile positions, women help break the silence surrounding crimes against women. As Kelly Askin notes,

[T]heir presence in decision-making positions represents a monumental advance over women's traditionally minimized role and status in international law bodies or organizations, including in prior international war crimes tribunals. Consequently, the jurisprudence of the United Nations Tribunals reflects women's participation.<sup>96</sup>

Including women as EC officials and training them on the international legal standards for sexual violence will allow women to develop a responsible jurisprudence for crimes of sexual violence in Cambodia and take the lead in reforming this area of domestic law.

#### IV. RESTORATIVE JUSTICE IN CAMBODIA

As the previous sections have addressed, crimes against women may not figure prominently in the historical record created by the EC, or give victims of sexual violence the chance to face their perpetrators and demand justice. Just as crimes against women have been silenced since the Khmer Rouge era, so have the women's particular desires for reconciliation. No formal research has been undertaken to ascertain women's goals in the reconciliation process, or on their views concerning which strategies will best effectuate these goals.

In a recent survey distributed to readers of DC-Cam's monthly magazine, *Searching for the Truth*, respondents were asked a variety of questions to solicit their feelings about the Khmer Rouge and national reconciliation.<sup>97</sup>



A large number of respondents, 67 percent, claimed that they could not forgive the Khmer Rouge commanders, and 54 percent said that they would be unable to forgive the lower-level cadre.<sup>98</sup> Most also linked their capacity for forgiveness to accountability, with 57 percent stating that a tribunal offers the best mechanism for forgiveness.<sup>99</sup> But the survey contributes little to an understanding of whether women tend to favor a tribunal over other forms of reconciliation. Although the respondents were drawn from diverse geographic regions and professions, they were “predominantly male,”<sup>100</sup> and gender did not factor into the analysis of their preferences. The obvious precondition to introducing a reconciliation strategy that addresses crimes against women is to conduct comprehensive research into women’s experiences with the Khmer Rouge and their views on how best to face the past.<sup>101</sup>

What the DC-Cam survey does suggest, however, is that even if the EC succeeds in convicting a few senior leaders, the tribunal will not heal the deep social ruptures in Cambodian society. With over half of Cambodians claiming that they are unable to forgive the lower-level cadre, reconciliation will remain elusive without a comprehensive transitional justice strategy<sup>102</sup> that incorporates a restorative justice model. In contrast to the retributive justice model of legal tribunals, restorative justice reorients the process with a victim-centered approach that allows the victim to tell her story to an unbiased decision-maker.<sup>103</sup>

The EC’s enduring focus on the retributive justice model has prevented the Cambodian government from calling for restorative justice mechanisms. There has been some discussion, however, within Cambodian civil society, and among international observers, about designing a local justice mechanism—that is, one that derives from Cambodia’s specific sociocultural, historical, and legal culture—to promote reconciliation on the community level. Local justice mechanisms have been used in other post-conflict contexts instead of using the “top-down” approach of accountability present in international tribunals, which rarely take into account the specific

needs of local communities. The underlying premise of local justice mechanisms is that reconciliation strategies designed from the “bottom up” offers a more genuine process of social repair because local populations are more invested in the process.

An appropriate local justice mechanism could help expose the truth about sexual violence under the Khmer Rouge and lead to lasting reconciliation. Taking the emphasis off of the individual perpetrator and placing it on the victim and the community-at-large would help address the community-wide problem of sexual violence that has endured since the Khmer Rouge era. On the other hand, local justice mechanisms often have patriarchal roots that could endanger any legitimate attempt at reconciliation between female victims and their perpetrators. By drawing primarily on the example of Rwanda’s gacaca process, this section will explore how Cambodians can open channels of dialogue about sexual crimes under the Khmer Rouge through a local justice initiative.

#### *A. Rwanda’s Gacaca Courts and Other Local Justice Models*

Perhaps the best-known example of local justice following a period of mass atrocity is Rwanda’s process of post-genocide community reconciliation called the *Inkiko-Gacaca* (literally, the Gacaca Jurisdictions). These local courts are based on customary dispute resolution mechanisms called gacaca and are named for the grass upon which community leaders sit when hearing villagers’ complaints. These informal and ad hoc sessions persisted throughout Rwanda’s period of colonization, dealing with issues such as land rights, property damage, marital disputes, and inheritance rights.<sup>104</sup> The Gacaca Jurisdictions were created in 2001 by the Rwandan government under the leadership of President Paul Kagame in order to address two problems: the failure of the International Criminal Tribunal for Rwanda and the national courts to further the goal of national reconciliation or attain justice for most Rwandans, and the unsustainable burden of

maintaining the 120,000 accused perpetrators of the genocide within Rwanda's fragile prison system.

Three laws provide the framework for Rwanda's approach to reconciliation. The 1996 Genocide Law gives the ICTR and the national courts jurisdiction over "Category One"<sup>105</sup> offenders, or the main leaders of the genocide, notorious killers, and perpetrators of acts of sexual torture. The 2001 Gacaca Law provided that the gacaca process would hold lower-level Hutu offenders accountable for their role in Rwanda's genocide and put on "trial" those offenders classified as Category Two (perpetrators or accomplices to intentional homicides or serious assaults that led to death), Category Three (other serious assaults), or Category Four (property crimes). This law also expanded the scope of Category One crimes to explicitly include rape, which is defined differently than "sexual torture" under Rwandan criminal law.<sup>106</sup> The reforms to the Gacaca Law passed in 2004 give jurisdiction to gacaca courts over pre-trial proceedings for all cases, even for Category One crimes, that prosecutors did not transfer to regular national courts prior to March 15, 2001.<sup>107</sup> At the trial phase, gacaca courts will retain jurisdiction over all perpetrators except those accused of Category One crimes.

Gacaca, the only model of its kind in the world, is an experimental process that sets out to achieve both reconciliation and justice at once. It emphasizes reconciliation by giving perpetrators the opportunity to confess their crimes, with the promise of reintegration into society after they do so. Now in its initial investigative phase, gacaca calls together victims and perpetrators to face each other in a public meeting. Defendants are given the opportunity to confess publicly before those who survived the genocide, while victims and community members may offer additional information. Trials will take place in either the gacaca or the national courts. Community judges are empowered to reduce sentences of a perpetrator whom they deem has made a full and truthful account of his crimes. With

over 750 gacaca courts now established, the Rwandan government hopes to establish over 9,000 by 2006 when the trial phase is set to begin.<sup>108</sup>

Inkiko-Gacaca functions similarly to the traditional Rwandan gacaca process, but the modern system has some important distinctions. Most importantly, its focus is on extremely serious crimes rather than customary disputes. Also, the new system is created and controlled by the state rather than local authorities.<sup>109</sup> Other important modernizations include the popular election of community judges, called *inyangamugayo*, rather than the appointment of community elders to the position, and mandatory, rather than voluntary, participation by defendants in the process.<sup>110</sup> And unlike the traditional gacaca process that excluded women, the coordinating committees of *inyangamugayo* include a balanced representation of women.

At least in the initial investigative phase, women appear to be participating in the gacaca at a higher rate than men, attending more often and asking more questions than male audience members.<sup>111</sup> From a gendered perspective, one of the key advantages to the gacaca process is that it enables women victims to tell their stories in the way that they wish to tell them.<sup>112</sup> Many Rwandan women were humiliated when they testified as victims before the ICTR, where defense counsel demanded that they explain their experience of rape in explicit detail. Doing so forced the women to commit a major cultural taboo and to risk being ostracized in their communities. Samantha Power recalls that in one case, after the defense counsel demanded that a victim explain on the stand what she meant by “raping,” she recalled her reaction:

I didn't know what to do. I looked around me for help. It is not something you do in Rwandan culture. They asked me if it was for a man to put his penis in a woman's vagina. I nodded. They said I had to repeat it. So I repeated it. But then I started to cry because of the shame. For a Rwandan girl to use such words in her life, you don't know: it's awful.<sup>113</sup>

In contrast, the gacaca courts offer victims the chance to tell their own stories in their own words, to confront their perpetrators, and to demand an apology. The narrative event takes on a uniquely Rwandan—and highly emotional—quality. Power describes the modern gacaca as a “public confessional process that recalls both the Salem Witch Trials and a Mississippi Christian revival.”<sup>114</sup>

Time will tell whether this public confessional process will spur social repair generally and whether, in particular, it will provide an effective opening to address gender-based crimes that occurred during the Rwandan genocide. The proportional representation of women as judges and the high rate of female citizen participation generated hopes that crimes of sexual violence would be adequately addressed. The lack of formal evidentiary rules also provides an opportunity to hold perpetrators accountable for rape without the hurdle of presenting medicolegal evidence that was impossible to collect in post-genocide Rwanda. Although some women have been re-traumatized by testifying before the gacaca courts because of the highly charged atmosphere Power describes, others have found it healing. One woman reported:

There were about 2,000 people there. When I testified, people kept quiet . . . . The judges said nothing. I said it all without shame. Immediately after the war, I was ashamed and always started crying. But since then, it is better. People encouraged me and the women in the [support group for rape survivors] have helped me too.<sup>115</sup>

Although more instances of rape and sexual violence have been reported at gacaca than in national courts, these crimes have still been underreported during the pre-trial phase of gacaca. A comprehensive study of gacaca by Harvard University found three main reasons why women hesitated to report rape before gacaca: fear of re-traumatization through telling the story, guilt over attributing a Category One crime to the perpetrator and thereby increasing his sentence to the death penalty, and shame or embarrassment at

speaking publicly.<sup>116</sup> Victims and witnesses also fear that their testimonies will open them to acts of retribution by perpetrators or their families.<sup>117</sup>

Women are reluctant to testify because of gacaca's insufficient procedural protections. Originally, women were required to either testify publicly before a full gacaca panel of nineteen judges or the general assembly of 100 members. They could also write their testimony, but it would then be read aloud. The 2004 reforms have improved the procedures to provide for in camera hearings before one judge. These reforms came after gacaca earned a reputation of insensitivity to women's concerns, and the reputation is difficult to repair. Additionally, closed-door hearings in small communities, where people will automatically assume the victims were raped, are "necessarily public" and ultimately inadequate to address women's feelings of shame, depression, and stigmatization.<sup>118</sup> Further, human rights groups have derided gacaca for the government's failure to train or adequately prepare the community judges and have called into question the Rwandan government's ability to ensure fair trials, given its abysmal human rights record.<sup>119</sup> Indeed, training of community judges has been minimal, and even though women are decently represented, in most cases these women are also village elders whose traditional value systems do not prioritize women's safety.<sup>120</sup>

The gacaca experiment, as well as local justice experiments in East Timor, Sierra Leone, and elsewhere, can provide instructive lessons on restorative justice for Cambodians. As discussed above, implementing procedural safeguards, such as the ability for rape victims to give confidential and private testimony, is critical to any community-based process. Procedures must also be established to ensure independence and neutrality among the community adjudicators. Rwanda has tried to correct the influence of local leaders over the gacaca process by holding popular elections for community judges. Gacaca has shown that although local leaders promote community participation, their involvement can also re-institutionalize social power relationships that disenfranchise female

victims. A similar struggle exists in East Timor's Commission for Truth, Reception, and Reconciliation, a process that has attempted to reintegrate militia members into local communities through reconciliation meetings. Adapted from a traditional justice mechanism, the process allows militia members to confess their crimes to village elders and promise not to repeat them.<sup>121</sup> One of its flaws is that communities rely on local leaders to provide them information on perpetrators, which leads to criticism that leaders too often protect their own interests.

The importance of practical considerations in this calculation cannot be overestimated. East Timor's Commission has run into problems when its sentences conflict with the formal justice system's trials against militia leaders.<sup>122</sup> Similarly, the failure to specify the relationship between Sierra Leone's Truth and Reconciliation Commission and the Special Court for Sierra Leone has generated both confusion and due process concerns.<sup>123</sup> In the Cambodian context, the relative jurisdictions of the EC and some local mechanism must be distinguished at the outset. A second issue is funding. Relying on community donations could open the door to corruption, but outside funding would guarantee that victims and perpetrators are not treated differently depending on their social and financial status within the local community. However, international support is unlikely, given the "donor fatigue" with the EC and a general skepticism of experimental local justice mechanisms. A commitment on the part of Cambodia's government to sponsor such initiatives could offer the necessary independence and neutrality to make the process fair. Similarly, a financial commitment on behalf of the government would convey its interest in long-term reconciliation and stability that could inspire funding from other sources.

No community-level reconciliation mechanism can be a completely neutral and independent process, but by learning from these other systems, Cambodians can anticipate and address these flaws from the outset. Like Rwandans, Cambodians have repeatedly expressed the need to confront their perpetrators publicly and to force them to explain their actions.

Indeed, the impulse to confront and to demand answers—even more than the need to know the facts, even more than a desire for revenge—is what Cambodians mean when they say they want to know “why” the horrors occurred.<sup>124</sup> Thus, these experiments with local justice mechanisms may inspire Cambodians to formulate their own grassroots approach to reconciliation.

*B. Local Justice in Cambodia*

**1. Buddhism**

Some have suggested that a restorative justice mechanism for Cambodia could draw on principles and teachings from the Middle Path of Buddhism, which preserves social harmony through a spirit of compromise.<sup>125</sup> Cambodia is an overwhelmingly Buddhist country and the monastery represents the focal point of most communities. The Buddha taught that forgiveness begins when the victim puts aside anger and instead acts out of love, and when the perpetrator takes responsibility for his or her actions and faces their consequences.<sup>126</sup> As depicted in the film about her life, Tang Kim turns to the teachings of the Buddha in order to deal with her anger. One of the monks who helped guide her decision to become a nun quotes from the Dharma: “‘Vindictiveness ends in vindictiveness.’ If someone does something bad to you and you take revenge, the vindictiveness will never end.”<sup>127</sup> Buddhist legal thinking thus prioritizes two virtues—understanding the consequences of one’s actions and promoting a positive state of mind.<sup>128</sup>

In Cambodia, as in most of Southeast Asia, a rich legal tradition based on principles of Theravada Buddhism was rapidly replaced by western legal values in the nineteenth century.<sup>129</sup> The monk as the traditional resolver of disputes and the temple as the locus of reconciliation gave way under French colonialism to a professional class of judges; dispute resolution moved from the center of the community to the courthouse.<sup>130</sup> These



modern systems were characterized by popular distrust from their inception, and the social disruption of the DK era soon after prevented effective institution building.<sup>131</sup> As a result, today the Cambodian legal system is plagued by widespread corruption and is more widely distrusted by the Cambodian people than ever. In contrast, the long historical role of the monastery in community life allowed it to survive the enormous disruption of the DK regime. For example, loyal villagers rebuilt pagodas soon after the Khmer Rouge fell, and survivors housed the remains of relatives in *stupas* across the countryside. Buddhist pagodas became important sites of remembrance for those killed during the regime.<sup>132</sup> Nevertheless, the DK period caused a deep rupture in the practice and traditions of Buddhism from which the institution has yet to truly recover.

Even though history suggests more hope for the monastery than the courtroom to be the locus of reconciliation, Cambodians have not expressed enthusiasm for the Buddhist reconciliation mechanisms proposed thus far. While 74 percent of Cambodians favor a tribunal,<sup>133</sup> only 15 percent of Cambodians endorse a Buddhist ceremony in which perpetrators would come forward to confess their crimes and ask for forgiveness.<sup>134</sup> But it would be a mistake to assume based on this statistic that Cambodians favor no involvement of Buddhism in the reconciliation process. The concept of apology, particularly public apology, is foreign to Cambodian society. Furthermore, the survey proposed Buddhist reconciliation as a process in itself, detached from the familiar role that Buddhism has always played in community reconciliation techniques. Given the widespread corruption within Buddhist institutions in Cambodia, the population's distrust of these institutions, and the historical gap in knowledge and tradition caused by the Khmer Rouge regime, any reconciliation mechanism that incorporates Buddhism must necessarily accommodate Cambodians' ambivalence towards it.

## 2. Traditional Dispute Resolution: *Somroh-somruei*

Rural Cambodia has a traditional process of informal conflict resolution called *somroh-somruei*.<sup>135</sup> This process is a form of third-party mediation<sup>136</sup> based on Buddhist principles of peacebuilding that takes place at the village level, or *phum*.<sup>137</sup> The most common types of disputes resolved through this process are land and fishing lot disputes, neighborhood quarrels, and domestic violence. When a dispute occurs, the parties may approach a respected village chief, an elder, a commune chief, or a Buddhist monk to mediate. The mediator often recruits village elders and lay religious teachers to help in the resolution. Many community members are involved in a long-term effort to compensate the victim, heal broken relationships, and allow the parties to return to communal life. The conflict may be resolved by referring to the Dharma or to codified, community-based *krom* (norms), *chbab* (laws or rules), and *vineay* (modes of discipline). On the community level, Buddhism is properly understood as an integral part of the dispute resolution process, and it is inextricable from social relationships and community organization.

The idea of a *somroh-somruei* process to address the crimes of the Khmer Rouge has yet to be thoroughly explored. Would this be an appropriate mechanism to address crimes of the DK era, particularly crimes of sexual violence against women? Ultimately, communities seeking to address sexual violence through traditional reconciliation methods will have to balance the need to repair the social fabric through locally supported mechanisms against the desire to reject traditions that oppress women. This tension leads to controversial questions that cut into the core of social traditions and community practices. What do you preserve? What do you change?

This tension also warrants a careful weighing of the advantages and disadvantages of local justice. Because it is familiar to most villagers, *somroh-somruei* could foster participation of both victims and perpetrators while involving the entire community. Similarly, it could carry a high level

of legitimacy among local populations. However, there is no guarantee that women's grievances would be properly addressed in a somroh-somrue process without significant adaptations. For example, even though somroh-somrue has been used in situations of domestic violence, the level of women's involvement in the actual mediation process is unclear. And although Buddhist nuns, or *duon chi*, sometimes provide refuge to women victims of domestic violence, they do not usually play key roles in the resolution of the conflict itself.<sup>138</sup>

Somroh-somrue could provide a framework to draw women into the overall reconciliation process and also to address crimes specific to their experience. But an obvious requirement of a grassroots restorative justice mechanism designed to address crimes against women is that it be driven and controlled by women. As the traditional gacaca process in Rwanda was modernized to give women greater control over the process, somroh-somrue could be similarly adapted so that nuns, female village elders, or members of non-governmental organizations could figure more prominently in the process. Rwanda's gacaca process has shown that women serving in positions of power as the *inyangamugayo* often uphold the patriarchal values that oppress women; because of their detachment from village life, Buddhist nuns may be able to avoid replicating these traditional power structures. Buddhist nuns are perceived as less political than monks and therefore less likely to be unduly influenced. As most nuns are older women, a high percentage of nuns are also survivors of the Khmer Rouge regime and command a high level of respect among villagers across Cambodia. These are powerful reasons for urging nuns to serve as mediators in a local process focusing on crimes against women.

As Rwanda has done in formalizing its traditional gacaca dispute mechanism, Cambodians could incorporate modern procedural protections into somroh-somrue to ensure that women are not re-victimized by the reconciliation process itself. First, cases involving sexual violence could be heard by a nun serving in the role of mediator, rather than a monk or male

elder. Additionally, women could choose to conduct the hearing in private in order to minimize the shame that would arise in telling their stories publicly and the intimidation of confronting their perpetrators. Other post-conflict situations have shown that for many women, telling the stories of their rapes in public may be more painful than continuing to suppress their memories of the acts. To be sure, this private approach would differ from the confrontational aspect of most transitional justice mechanisms, which seek a public disclosure of the truth as the path towards social reconciliation. But it would also recognize the concept that the crime of rape causes different kinds of harm than other crimes of war, and as such demands a different approach. In short, a private hearing may calm the natural dissonance between the private act of rape and the public event of retelling it.

### **3. Creative Approaches**

DC-Cam's documentary film about Tang Kim's life models a new approach to reconciliation that holds promise for victims of sexual violence, particularly in the context of patriarchal societies. The film presents a condensed version of one individual's reconciliation process. Exploring a broad range of emotions, the victim wrestles with the conflict between facing her past and burying it. At the beginning of the documentary, Tang Kim desires that her persecutors suffer as much as she did; she expresses her anger towards the Khmer Rouge soldiers by declaring, "Take them all to be killed so that I can have some peace."<sup>139</sup> After a while, she begins to believe that she could reconcile with her perpetrators if they confessed their crimes publicly. The process of telling her story on camera transforms her desire for revenge into an overriding desire for peace. In the end, she decides to enter the monastery so that she will be sheltered from the judgments and recriminations of villagers who now know her past. "I am happy here [at the pagoda]. In the village, it was too noisy from the people

fighting and quarreling. Here, we only hear the sounds of chanting . . . . Everyone seeks the truth.”<sup>140</sup>

Expressing her narrative through the medium of a documentary, rather than through a public confrontation with her perpetrators, grants Tang Kim a certain freedom from cultural constraints. She is at times angry, confused, and demanding, but noticeably uncensored. Tang Kim herself did not agree to speak publicly about the film after it was made. “I think it is better if I don’t reveal my story. That way, people will not know who I am, and I will feel more at peace.”<sup>141</sup> She clearly does not want to endure the pain of retelling her story until she is assured that she can face her perpetrators and demand answers; she explains, “If they admit their actions, it would be up to me to forgive them or not.”<sup>142</sup> The film preserves the story, thereby accomplishing two goals at the same time. It retains its power to impact new viewers with the force of her narrative at every screening while also releasing Tang Kim from the burden of retelling it and reactivating the pain of those events.

DC-Cam’s plan to screen “The Khmer Rouge Rice Fields” in communities across Cambodia will illuminate the role of art and new media in the process of reconciliation. This experiment breaks new ground in several ways. First, the film can spark community discussions about a buried piece of history and the taboo topic of sexual crimes. Second, because the film does not endorse one answer to the question of how to find accountability for perpetrators of rape, it can spur local populations to address the barriers within their communities and debate potential solutions. Third, the film can serve as a gateway for communities to address their concerns and hopes about the broader issues of accountability and reconciliation in Cambodia. Fourth, this film can validate victims’ stories of rape even before they choose to tell them and thereby encourage other women to share their experiences with sexual violence under the Khmer Rouge. As Rachana Phat, the film’s director, explains: “Women must be given a chance to share their stories of tremendous hardships to remind

others that they are not alone in their sufferings.”<sup>143</sup> It serves the goal of individual reconciliation for Tang Kim and other women who struggle against the weight of social constraints, repressed memories, and the fear of conjuring a dark history. As a popular education tool, “The Khmer Rouge Rice Fields” also spurs social reconciliation by teaching Cambodians about the unique experiences of women in the DK era. In this way, the film itself becomes a grassroots mechanism for reconciliation.

Finally, a discussion about rape in the past begs the question about rape in Cambodia today. As discussed in Section II (D), survivors of rape in Cambodia are re-victimized by the country’s hostile legal system. Untrained legal professionals, unbridled corruption, and barriers to access for the poor contribute to this hostile legal culture. The film cannot address these problems, but it can challenge patriarchal views that blame women victims for the crime of rape. These views abound in Cambodian culture and influence the way that judges apply the law, even when the law itself would protect women.

## V. CONCLUSION

Cambodian views towards reconciliation have constantly evolved since the Khmer Rouge regime fell. Most Cambodians now accept that reconciliation cannot be possible without some form of accountability. The latest step towards accountability and reconciliation with the creation of the Extraordinary Chambers has already spurred a robust conversation about what Cambodians want and need for reconciliation, both in the short and long-term and at the individual and social level. For the first time since 1979, the international community has committed to help Cambodia face its past. International legal experts, lawyers, and judges stand ready to lend their expertise to the EC in hopes of finding accountability for Khmer Rouge victims and building the historical record to address one of the most murderous regimes in world history.

Although the road to justice and reconciliation will be long for victims of sexual violence under the Khmer Rouge, time and opportunity still exist to remedy the omissions from the historical record and hold accountable the perpetrators of rape and other gender-based crimes. Adopting rules of procedure that protect victims and witnesses will send a strong message to Cambodians that the process encourages their participation. Institutional mechanisms, such as a unit within the EC to address the needs of special victims, can help remedy the EC's current flaws. True, these adjustments will require additional resources, but the return on the long-term investment will exceed the short-term costs. These changes will promote both greater public participation in the EC trials and renew Cambodians' long-term trust in the legal system. And even if few prosecutions for rape are obtained at the EC, the effort to train Cambodian investigators, prosecutors, and judges to responsibly prosecute crimes of sexual violence promises a lasting impact on the Cambodian legal system, such as improved accommodations for the special needs of rape victims, better application of existing rape laws, and legislative action to strengthen victims' rights.

The good news is that the momentum has already begun, mainly through creative approaches within civil society. DC-Cam's documentary film, in which a brave Cambodian publicly acknowledges for the first time that rape occurred under the Khmer Rouge regime, is an example of this bold effort to face the past and the legacy that lives on today. Cambodians also have the advantage of learning from the experiences of women in other post-conflict situations such as Rwanda, South Africa, East Timor and Sierra Leone. These courageous women have drawn attention to the particular ways that women suffer during war, have educated local populations about the legacy of sexual violence, and are working towards lasting cultural and legal reform within their own societies.

Cambodian women face a long road towards accountability in a patriarchal culture that still regards rape as shameful, and in a legal culture that lacks the tools to hold perpetrators of rape accountable. Indeed, part of

Tang Kim's burden was feeling isolated and alone as she struggled to come to terms with her past in a society that did not yet have the tools to receive her story. Deciphering what happened to women under the Khmer Rouge not only promises accountability for women like Tang Kim, but also has the potential to fundamentally change the culture of impunity for rape perpetrators in Cambodia today. In this way, the EC is best viewed as the beginning, rather than the end, of Cambodia's reconciliation story. As Steve Heder reminds us, "The notion of 'closure' is antithetical to the pursuit of truth and understanding, and therefore, ultimately to justice and prevention."<sup>144</sup> Whatever the outcome, the EC will undoubtedly illuminate what more needs to be done in the long pursuit of justice and reconciliation for Cambodia.

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<sup>2</sup> THE KHMER ROUGE RICE FIELDS: THE STORY OF RAPE SURVIVOR TANG KIM (2004) (directed by Rachana Phat and Youk Chhang, and on file with the Documentation Center of Cambodia's Public Information Room, <http://www.dccam.org> (last visited Apr. 10, 2005)).

<sup>3</sup> *Id.*

<sup>4</sup> The more common reference to the CPK is the "Khmer Rouge," a term coined by Prince Norodom Sihanouk in the 1960s to distinguish the Maoist rebels from the royalist forces, or "Khmer Bleu." This article will, in most cases, use the more familiar terminology of "Khmer Rouge."

<sup>5</sup> Reach Kram ND/RKM/1004/006, 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, (Oct. 5, 2004), *available at* <http://www.cambodia.gov.kh/krt/english/> (last visited Mar. 19, 2005). The UN General Assembly had previously approved on May 13, 2003, 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. *Report of the Third Committee, Social, Humanitarian and Cultural Affairs*, 57th Sess., U.N. Doc. A/57/806 (2003); *see also* U.N. GAOR, 57th Sess., Agenda Item 109(b), U.N.



Doc. A/RES/57/228B (2003). The Agreement is similar, though not identical to the Cambodian legislation, and provides for the establishment of the EC in the Cambodian court system to be operated and financed with international assistance. The Cambodian Government promulgated the Agreement on October 19, 2004. Instrument of Ratification on 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, (Oct. 19, 2004), <http://www.cambodia.gov.kh/krt/english/> (last visited Mar. 19, 2005).

<sup>6</sup> The establishment of the EC ultimately depends on securing financial backing from donor nations. The total budget for the three-year tribunal is \$56.3 million (USD). Japan has pledged nearly half the amount needed from international donors, with Great Britain, Australia, and France also contributing. Ker Munthit, *Japan to Donate US \$21.5 Million for Khmer Rouge Tribunal in Cambodia*, ASSOC. PRESS, Feb. 10, 2005.

<sup>7</sup> Steve Heder, *Reassessing The Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, in *AWAITING JUSTICE: ESSAYS ON KHMER ROUGE ACCOUNTABILITY* (Jaya Ramji & Beth Van Schaack eds.) (forthcoming 2005).

<sup>8</sup> *Id.*

<sup>9</sup> See SUZANNAH LINTON, *RECONCILIATION IN CAMBODIA* 225–52 (2004).

<sup>10</sup> Estimates of the death toll have varied widely, as have methodologies for calculating the toll. Although they arrive at the figure differently, most scholars agree that at least 20 percent of the population must have perished. For a comparative analysis of studies, see BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79*, at 456–60 (1996). See also STEVEN HEDER & BRIAN D. TITTEMORE, *SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 3* (2004) (claiming the toll approaches two million dead).

<sup>11</sup> The motivations of the CPK in carrying out its purges against various sectors of the Cambodian population are the subject of great scholarly debate. Ben Kiernan argues that the regime was motivated by a racist and expansionist totalitarianism manifested by a top-down conspiracy in which the CPK crimes and their results were premeditated by party leaders. The two most important themes in the history of the Pol Pot regime are the race question and the struggle for central control. KIERNAN, *supra* note 10, at 26. While acknowledging that some crimes were likely the result of such planning, Steve Heder takes the view that the majority of crimes may not have been the result of a top-down conspiracy. Rather, the vague Marxist ideology of the CPK regime possessed “inherent but unintended tendencies towards both class and racial genocide,” which compelled subordinates to label others as enemies based on race, ethnicity, or class, and to kill such groups. Heder, *supra* note 7.

<sup>12</sup> The “Angkar,” literally meaning “organization,” was the term used by the CPK to refer to the Party itself, as well as to certain individuals in the command leadership of the Party. Documentation Center of Cambodia, *Instructions on Usage the Terms “Angkar” and “Party,”* June 11, 1977 (on file with the author).

<sup>13</sup> KALYANEE E. MAM, *DEMOCRATIC KAMPUCHEA (1975–1979): WOMEN AS INSTRUMENTS FOR SOCIAL CHANGE* 25 (2000).

<sup>14</sup> *Id.* at 26.

<sup>15</sup> Joanna R. Munson, "Rape, Sexual Abuse under the Khmer Rouge," *Searching for the Truth* (analyzing Mam's research) (on file with the author).

<sup>16</sup> THE KHMER ROUGE RICE FIELDS, *supra* note 2.

<sup>17</sup> MAM, *supra* note 13, at 28.

<sup>18</sup> *Id.* at 26.

<sup>19</sup> *Id.* at 27.

<sup>20</sup> *Id.*

<sup>21</sup> For a comprehensive history of the negotiations process, see HEDER & TITTEMORE, *supra* note 10, at 11–26; STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 277–83 (2d ed. 2001). See also William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 30–41 (2002) (showing how the political divisions within the Cambodian elite have stalled the process towards creating a criminal tribunal, and how these delays, combined with pressure from the international community, have strengthened the political power of the governing elite instead of debilitating it).

<sup>22</sup> G.A. Res. 52/135, U.N. GAOR, 52d Sess., Supp. No. 49, at 288, 289, U.N. Doc. A/52/49 (1997).

<sup>23</sup> *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135*, U.N. SCOR, 53rd Sess., Annex, Agenda Item 110(b), U.N. Doc. A/53/850-S/1999/231.

<sup>24</sup> *Id.*

<sup>25</sup> See Reach Kram ND/RKM/1004/006 at ch. IV.

<sup>26</sup> *Cambodia and United Nations Agree on US \$56.2 Million Budget for Khmer Rouge Tribunal*, ASSOC. PRESS, Dec. 10, 2004.

<sup>27</sup> For a concise summary of these arguments, see Cambodian Defenders Project, *Minimum Standards for Fair Trials of Leaders of Democratic Kampuchea*, Mar. 13, 2003, at [http://www.cdpcambodia.org/public\\_kr.asp?autologin=true](http://www.cdpcambodia.org/public_kr.asp?autologin=true) (last visited Apr. 25, 2005).

<sup>28</sup> U.N. Doc. A/53/850-S/1999/231.

<sup>29</sup> Reach Kram ND/RKM/1004/006 at art. 1. Numbers vary on how many people the EC could bring to trial, but the best estimate includes ten senior leaders and the fifty most responsible subordinates. Steven Heder, *in* *The Khmer Rouge Trials: Is It Worth It and for Whom?*, Public Discussion held in Phnom Penh (Nov. 17, 2004) [hereinafter Heder Public Discussion] (transcript on file with the author).

<sup>30</sup> As Steve Heder points out, the language of "most responsible" was added to include a few middle-level commanders such as Ta Mok and Duch, the officer in command at S-21, Cambodia's infamous torture chamber. Heder, *supra* note 7.

<sup>31</sup> *Id.*

<sup>32</sup> Heder Public Discussion, *supra* note 29.

<sup>33</sup> LINTON, *supra* note 9, at 154.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 157.

<sup>36</sup> *Id.* at 158.

<sup>37</sup> Beth Van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213, 1217 (2003).

<sup>38</sup> See William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 106 (2d ed. 2004).

<sup>39</sup> MAM, *supra* note 13, at 27. One woman described how prison guards would entrap women and rape them:

They raped the young women and things like this. And afterwards they usually just pushed them into the water . . . They selected the young women who were pretty. They liked them and the young women themselves were not aware. They were honest, thinking the men felt sorry for them and truly loved them. So they just followed, unaware that this would happen. If they don't kill [the woman] and they cannot destroy the evidence, they will be punished personally.

*Id.*

<sup>40</sup> Rachana Phat, *Women Deserve a Voice*, SEARCHING FOR THE TRUTH (DC-Cam, Phnom Penh, Cambodia), Third Quarter 2004, at 1, <http://www.dccam.org/Magazine/eng0304.pdf> (last visited Mar. 19, 2005).

<sup>41</sup> DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON 37 (1999).

<sup>42</sup> *Id.* at 170 n.38.

<sup>43</sup> *Id.*

<sup>44</sup> MAM, *supra* note 13, at 27.

<sup>45</sup> This special intent is required to prove the crime of genocide. See Reach Kram ND/RKM/1004/006 at art. 4.

<sup>46</sup> A required element of crimes against humanity. See *id.* at art. 6.

<sup>47</sup> *Id.* at art. 3.

<sup>48</sup> *Id.* at arts. 4–8.

<sup>49</sup> Rape (defined as penetration or attempt to penetrate a woman without her consent) of a woman under thirteen years old was considered a “first-level felony” and punishable by death. Rape of a girl over age thirteen was treated as a “third-level misdemeanor” and punishable by a one-to-five year prison term. Punishments were to be more severe if the girl was a virgin, married, related to the perpetrator, under custodial care of the perpetrator, gang raped, drugged, or sleeping at the time of the rape. See Cambodia Penal Code, arts. 443–46 (1956) (an informal translation by Terith Chy, DC-Cam researcher, is on file with the author).

<sup>50</sup> See Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L LAW 277, 278 (2002) (explaining that condemnations by the UN Security Council as to reports from Yugoslavia of organized detentions and mass rape of Muslim women was a “key element in the motivation for the establishment of the tribunal.”).

<sup>51</sup> Prosecutor v. Furundzija, No. IT-95-17/1-T (I.C.T.Y. Dec. 10, 1998).

<sup>52</sup> Prosecutor v. Akayesu, No. ICTR-96-4-T (Oct. 2, 1998); *Furundzija*, IT-95-17/1-T at ¶¶ 176–86.

<sup>53</sup> *Akayesu*, No. ICTR-96-4-T.

<sup>54</sup> See Prosecutor v. Delalic, No. IT-96-21-T (I.C.T.Y. Nov. 16, 1998).

<sup>55</sup> For example, the *Delalic* decision was the first to recognize that rape could be used as an “instrument of terror, an instrument they were given free rein to apply whenever and against whomever they wished,” providing an opportunity to prosecute for rape in the absence of a direct order. *Delalic*, No. IT-96-21-T (addressing war crimes in Foca, Bosnia).

<sup>56</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 598 (Jean Pictet ed., 1958).

<sup>57</sup> U.N. SCOR, U.N. Doc. S/RES/955 (1994).

<sup>58</sup> Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L L. 97, 101 n.31 (1999) [hereinafter *Sexual Violence*]. See also KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 336–74 (1997).

<sup>59</sup> *Akayesu*, No. ICTR-96-4-T at §§ 6.4, 7.7; see U.N. Doc. S/RES/955 at art. 3(g).

<sup>60</sup> *Akayesu*, No. ICTR-96-4-T at §7.7.

<sup>61</sup> *Delalic*, No. IT-96-21-T.

<sup>62</sup> See generally CAMBODIAN LEAGUE FOR THE PROMOTION AND DEFENSE OF HUMAN RIGHTS (LICADHO), RAPE AND INDECENT ASSAULTS CASES, AND THE CAMBODIAN JUSTICE SYSTEM (2004),

<http://www.licadho.org/reports/files/48Rape%20briefing%20report%202003%20English.pdf> (last visited Mar. 20, 2005) [hereinafter Licadho].

<sup>63</sup> *Id.* at 9.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> Dr. Lor Vann Thary, a clinical supervisor with the Transcultural Psychosocial Organization of Cambodia, stated that “[t]he one who was raped . . . feels worthless. She may not care about her body . . . . Most victims live in [rural] communities, so when a woman is raped, other people know. It makes some people want to rape her next time because they feel like she’s already spoiled.” Yvonne Lee, *In Cambodia, Rape an All Too Accepted Crime*, 2 CAMBODIA DAILY 31, 31 (Feb. 4, 2005).

<sup>66</sup> *Id.*

<sup>67</sup> Under both these circumstances, Cambodian law would call it rape. Licadho, *supra* note 62, at 6.

<sup>68</sup> Lee, *supra* note 65, at 31.

<sup>69</sup> Licadho, *supra* note 62, at 10.

<sup>70</sup> Amnesty International, *Lives Blown Apart: Crimes Against Women in Times of Conflict*, (2004), at 23, at

[http://web.amnesty.org/library/pdf/ACT770752004ENGLISH/\\$File/ACT7707504.pdf](http://web.amnesty.org/library/pdf/ACT770752004ENGLISH/$File/ACT7707504.pdf) (last visited Mar. 20, 2005).

<sup>71</sup> See Dorothy Q. Thomas & Regan E. Ralph, *Rape in War: Challenging the Tradition of Impunity*, SAIS REV., 1994, at 82 n.41, at

<http://www.hrw.org/women/docs/rapeinwar.htm> (last visited Mar. 20, 2005).

<sup>72</sup> See Kate Fitzgerald, *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults Under International Law*, 8 EUR. J. INT’L L. 638, 653 n.89 and accompanying text (1997) (describing the story of Ruff O’Herne, a Japanese woman who

survived a Japanese rape camp in World War II and who was so traumatized by the experience and subsequent denial of the events by those around her that she did not tell her family about the experience until fifty years later).

<sup>73</sup> Amnesty International, *supra* note 70, at 24.

<sup>74</sup> Fitzgerald, *supra* note 72, at 653 n.89.

<sup>75</sup> *Id.*

<sup>76</sup> Amnesty International, *supra* note 70, at 23.

<sup>77</sup> ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 185 (1998).

<sup>78</sup> Thomas & Ralph, *supra* note 71, at nn.11–13 and accompanying text.

<sup>79</sup> See Phat, *supra* note 40.

<sup>80</sup> According to Neier, “the prosecution and punishment of political leaders and military commanders who tolerated or directed rapes could turn the tables by humiliating and degrading *them*. They deserve to be stigmatized as rapists.” NEIER, *supra* note 77, at 185 (emphasis in original).

<sup>81</sup> See MICHELLE JARVIS, THE GENDER PERSPECTIVE AT THE ICTY 3–4, at [http://www.iuscrim.mpg.de/forsch/krim/docs/ewald2\\_JarvisICTY.pdf](http://www.iuscrim.mpg.de/forsch/krim/docs/ewald2_JarvisICTY.pdf) (last visited Mar. 19, 2005). Progressive developments in the law have been a result not of changing legal definitions but of judicial interpretation. For example, the Geneva Convention’s “grave breaches” provision does not include rape, but rape has been read into the definition as an enumerated crime. *Id.* at 4.

<sup>82</sup> See, e.g., I.C.T.Y.R. CRIM. P. 96, available at <http://www.un.org/icty/legaldoc/> (last visited Mar. 20, 2005).

<sup>83</sup> *Id.*

<sup>84</sup> *Furundzija*, IT-95-17/1-T at ¶¶ 176–86.

<sup>85</sup> *Id.* at ¶ 109.

<sup>86</sup> Reach Kram ND/RKM/1004/006 at art. 33; U.N. Doc. A/57/806 at art. 23.

<sup>87</sup> See Reach Kram ND/RKM/1004/006 at art. 33.

<sup>88</sup> This includes both at the tribunal and after the victim returns home. Victims who testify and return to their communities may be alienated or may face direct threats to their safety. This ostracism was common after rape victims testified before the South African Truth and Reconciliation Commission. See FIONA C. ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA 85 (2003).

<sup>89</sup> It is very common for victims of sexual assault to be re-traumatized by the act of testifying. There are several ways to prepare for, and to minimize, this possibility. One is to communicate frankly with victims in advance of trial about their rights and what will be expected of them. Establishing a clear and continuous line of communication between the victim and the Chambers would also help victims address their fears early in the process. Another beneficial method is making psychological counselors available for the victims of sexual assault when they testify and encouraging family and friends to attend proceedings. Finally, all parties to the Chambers who have contact with victims—including investigators, prosecutors, and judges—should be properly trained on how to deal with victims of sexual assault to minimize re-traumatization and to inspire a victim’s confidence in the process. For more suggestions, see Open Society Institute, *International Standards for the Treatment of Victims and Witnesses in Proceedings*

before the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2004), at [http://www.justiceinitiative.org/activities/ij/cambodia\\_working\\_group](http://www.justiceinitiative.org/activities/ij/cambodia_working_group) (last visited Mar. 20, 2005).

<sup>90</sup> Procedures that could protect women's privacy include the use of tools like pseudonyms and image-shielding or voice-altering devices for victims who testify publicly.

<sup>91</sup> U.N. Doc. A/57/806 at art. 23.

<sup>92</sup> JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 221–222 (2001).

<sup>93</sup> *Id.* at 222.

<sup>94</sup> Heder Public Discussion, *supra* note 29.

<sup>95</sup> “Rape was not among the initial charges against Akayesu. After witnesses testified about sexual assaults, pressure by Judge Pillay, the sole woman on the panel, and by human rights groups resulted in further investigation and an amended indictment.” Diane Marie Amann, *Prosecutor v. Akayesu, Case ICTR-96-4-T, International Criminal Tribunal for Rwanda, September 2, 1998*, 93 AM. J. INT’L L. 195, 196 (1999).

<sup>96</sup> *Sexual Violence, supra* note 58, at 98.

<sup>97</sup> The survey was distributed inside the magazine and relied upon voluntary responses. For more details on distribution, data collection, processing, and analysis, see LINTON, *supra* note 9, at 116.

<sup>98</sup> *Id.* at 145.

<sup>99</sup> *Id.* at 142.

<sup>100</sup> *Id.* at 118.

<sup>101</sup> Gender is very likely to affect respondents' preferences. In other studies, variables such as the urban/rural divide and the age of respondents have led to widely divergent views about reconciliation among Cambodians. See William W. Burke-White, *Preferences Matter: Conversations with Cambodians on the Prosecution of the Khmer Rouge Leadership*, in AWAITING JUSTICE: ESSAYS ON KHMER ROUGE ACCOUNTABILITY (Jaya Ramji & Beth Van Schaack eds.) (forthcoming 2005) (comparing factors that likely explain why his study yielded different results from one conducted by Jaya Ramji); see also Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137 (2000).

<sup>102</sup> See LINTON, *supra* note 9, at 232.

<sup>103</sup> IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 19 (Naomi Roht-Ariazza ed., 1995). Some have proposed designing a truth commission along the model of South Africa's Truth and Reconciliation Commission. See, e.g., Ramji, *Reclaiming Cambodian History, supra* note 101. Indeed, this mechanism could be useful in the context of sexual crimes. Due to the lack of physical evidence of rape and the reluctance of victims to come forward, the testimony of perpetrators before a truth commission could help Cambodians understand the real scope of sexual violence under the Khmer Rouge. But Linton's survey revealed that the majority of Cambodians are not interested in a truth commission. Possible explanations include the perception that a truth commission is a “soft option” in comparison to a tribunal, the lack of popular education about truth commissions and their goals, or the cultural irrelevance of a mechanism that

depends on a public confession of private grief in a country where “loss of face” is unbearably shameful. See LINTON, *supra* note 9, at 239. This article does not comment on whether truth commissions are appropriate for Cambodia because the proposal is so finely articulated in Jaya Ramji’s work and elsewhere; instead the article aims to broaden the discussion on the scope of mechanisms available to Cambodians as they seek both justice and reconciliation.

<sup>104</sup> Amnesty International, *Gacaca: A Question of Justice*, Dec. 2002, at 26, available at [http://news.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AFR470072002ENGLISH/\\$File/AFR4700702.pdf](http://news.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR470072002ENGLISH/$File/AFR4700702.pdf) (last visited Apr. 3, 2004).

<sup>105</sup> Four categories of crimes were defined by the Organic Law enacted in August 1996. Rwanda Organic Law 8/96, On the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed since October 1, 1990, art. 19, *Official Gazette of the Republic of Rwanda* (Aug. 30, 1996), available at [http://web.amnesty.org/library/pdf/AFR470121997ENGLISH/\\$File/AFR4701297.pdf](http://web.amnesty.org/library/pdf/AFR470121997ENGLISH/$File/AFR4701297.pdf) (last visited Apr. 13, 2005). The “Category One” killers number approximately 2,500 of the 120,000 prisoners. See Press Release, Amnesty International, Rwanda: Gacaca—Gambling with Justice (June 19, 2002), <http://web.amnesty.org/library/Index/engAFR470032002>.

<sup>106</sup> Rwanda Organic Law 40/2000, Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994, *Official Gazette of the Republic of Rwanda* (Jan. 26, 2001), available at <http://www.kituoachakatiba.co.ug/ORGANIC%20LAW%20N0%2040.htm> (last visited Apr. 13, 2005).

<sup>107</sup> Rwanda Organic Law 16/2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994 *Official Gazette of the Republic of Rwanda* (June 19, 2004).

<sup>108</sup> UN Integrated Regional Information Networks, *Rwanda: Investigations Begin for Gacaca Genocide Trials* (Jan. 18, 2005), at [http://www.irinnews.org/report.asp?ReportID=45106&SelectRegion=Great\\_Lakes&SelectCountry=RWANDA](http://www.irinnews.org/report.asp?ReportID=45106&SelectRegion=Great_Lakes&SelectCountry=RWANDA).

<sup>109</sup> The Gacaca Jurisdictions are under the control of the Ministry of Justice and the Department of Gacaca Jurisdictions within the Supreme Court.

<sup>110</sup> Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL’Y & L. 921, 958 (2003).

<sup>111</sup> Jens Meierhenrich et al., *Gacaca Jurisdictions: Transitional Justice in Rwanda, Observations from June 10–August 8, 2002*, pt. IV, § 4, at <http://www.fas.harvard.edu/~socstud/rwanda/preface.html> (last visited Mar. 20, 2005) [hereinafter Harvard Study]. The authors note that Rwanda’s current demographics, where women greatly outnumber men, offer one explanation for this imbalance.

<sup>112</sup> See Smith, *supra* note 110, at 958 (discussing how the gacaca courts understood the importance of narrative).

<sup>113</sup> Samantha Power, *Rwanda: The Two Faces of Justice*, 50 N.Y. REV. BOOKS 48, Jan. 16, 2003.

<sup>114</sup> *Id.*

<sup>115</sup> Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda*, Sept. 2004, pt. VI, available at <http://hrw.org/reports/2004/rwanda0904/index.htm> (last visited Apr. 10, 2005).

<sup>116</sup> Harvard Study, *supra* note 111, at pt. IV, § 2. See also Human Rights Watch, *supra* note 115, at pt. VI.

<sup>117</sup> Harvard Study, *supra* note 111, at pt. IV, § 1.

<sup>118</sup> Human Rights Watch, *supra* note 115, at pt. VI.

<sup>119</sup> “[T]he extrajudicial nature of gacaca and the inadequate preparation for its start, coupled with the present government’s intolerance of dissent and unwillingness to address its own poor human rights record, risk subverting the new system. . . . Gacaca may become a vehicle for summary and arbitrary justice that fails defendants and genocide survivors alike.” Press Release, Amnesty International, *supra* note 105.

<sup>120</sup> Smith, *supra* note 110, at 958.

<sup>121</sup> Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301, 416. See also Aisling Swaine, *Traditional Justice and Gender Based Violence* (2003) (report prepared for the International Rescue Committee).

<sup>122</sup> Sriram, *supra* note 121, at 416; see also Swaine, *supra* note 121.

<sup>123</sup> See International Center for Transitional Justice, *The Sierra Leone Truth and Reconciliation Commission: Reviewing the First Year* (Jan. 2004), at 5, available at [http://www.ictj.org/downloads/SL\\_TRC\\_Case\\_Study\\_designed.pdf](http://www.ictj.org/downloads/SL_TRC_Case_Study_designed.pdf) (last visited Mar. 20, 2005) [hereinafter ICTJ report].

<sup>124</sup> Dinah PoKemper, *The Tribunal and Cambodia’s Transition to a Culture of Accountability*, in AWAITING JUSTICE: ESSAYS ON KHMER ROUGE ACCOUNTABILITY (Jaya Ramji & Beth Van Schaack eds.) (forthcoming 2005).

<sup>125</sup> LINTON, *supra* note 9, at 77; Ian Harris, *Onslaught on Beings: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period*, in AWAITING JUSTICE: ESSAYS ON KHMER ROUGE ACCOUNTABILITY (Jaya Ramji & Beth Van Schaack eds.) (forthcoming 2005).

<sup>126</sup> See LINTON, *supra* note 9, at 76.

<sup>127</sup> THE KHMER ROUGE RICE FIELDS, *supra* note 2.

<sup>128</sup> Harris, *supra* note 125.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Since 1995, DC-Cam has mapped eighty memorials to the Khmer Rouge genocide, most of which are located at pagodas. Documentation Center of Cambodia, Third Quarterly Report, Jan.–Mar. 2004, at [http://www.dccam.org/About/Annual/Third\\_Quarterly\\_Report.htm](http://www.dccam.org/About/Annual/Third_Quarterly_Report.htm) (last visited Mar. 19, 2005).



<sup>133</sup> LINTON, *supra* note 9, at 132. Other surveys have placed the figure closer to 80 percent. See also Heder Public Discussion, *supra* note 29.

<sup>134</sup> In a survey by the Centre for Social Development, only 15 percent of respondents favored a religious ceremony. No respondents in the DC-Cam survey supported a large religious ceremony, and only 16 percent of respondents said a (non-religious) public apology would be important to reconciliation. LINTON, *supra* note 9, at 224.

<sup>135</sup> LINTON, *supra* note 9, at 107 (citing a comprehensive study funded by USAID, authored by William A. Collins, and entitled *Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers* (1997)).

<sup>136</sup> The Khmer language uses the terms “mediation,” “conciliation,” and “reconciliation” interchangeably. This confusion has generated much debate over the proper understanding of the processes and goals of dispute resolution. Some have suggested that the term “mediation” is unsuitable to the Cambodian context because it refers to a process based on western cultural values. See Doung Virorth, *Cambodian Community Peace Building*, at <http://www.appra.org/cambodian.htm> (last visited Feb. 6, 2005).

<sup>137</sup> Cambodian rural life is organized around several administrative units, beginning with a group of houses known as *krum*, then moving upwards to the *phum* (village), *khum* (commune), *srok* (district), and *khet* or *krung* (province or municipality). See *id.*

<sup>138</sup> LINTON, *supra* note 9, at 107.

<sup>139</sup> THE KHMER ROUGE RICE FIELDS, *supra* note 2.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Phat, *supra* note 40.

<sup>144</sup> Heder Public Discussion, *supra* note 29.