

Pragmatism Must Yield to Compassion

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June 19, 2012

When it was determined in 2010 that the senior leaders on trial at the ECCC would not be charged with genocide against the Khmer Krom, the tribunal's international co-prosecutor met with 250 victims of the Pol Pot regime to explain why this particular persecution was deemed to be outside the scope of the investigation.

At the meeting, Andrew Cayley promised to do his best to ensure the voices of these victims would nevertheless be heard in court.

So it is interesting to note the different approach taken by Cayley in his response to the letter from Margot Wallström published in the Post on May 29.

Wallström is not just an interested party. As the Special Representative of the UN Secretary-General on Conflict-Related Sexual Violence, she is the highest-ranking UN official mandated to raise public awareness and political will to end impunity for sexual and gender-based violence in times of armed conflict.

Cayley's response to Wallström was supplemented by a press release by the Trial Chamber on June 5.

It points out that "the ECCC can not meet all the needs of these victims" and the Trial Chamber asserts the court "can only ever hope to bring to justice a small percentage of perpetrators of all crimes".

Sexual crimes are too often neglected in international criminal tribunals because of "legal pragmatism". This is true for the ECCC, as I discovered during a study on its gender-responsive approaches.

Sexual crimes are difficult to prove and, according to the presumption of many officials I interviewed for the study, are subordinated to an economy of scale when compared with the sheer volume of other crimes.

The investigation and prosecution of sexual crimes entails special expertise to identify and engage victims without further trauma and stigma. Egregious sexual violations are

only now receiving the global attention they deserve as crimes rather than the normal outcome of armed conflict and repressive regimes.

Creative, pro-active approaches are necessary to ensure the law bends to ensure comprehensive justice. It is exactly this expertise and creativity that has been sorely lacking within the ECCC.

Although it is the largest trial of its kind, it operates without the benefit of a standing gender unit or even a single gender adviser.

Perhaps this lack of expertise is most glaring when considering the investigations into rape and other forms of sexual violence undertaken by the office of the co-investigative judges in response to the co-prosecutor's final submission to the co-investigating judges in respect to Case 002.

In that instance, the investigative team did not include a single woman — not a female investigator, a female analyst or even a female interpreter. Investigating incidents of rape with an all-male team jars against best practice as well as common sense.

Nevertheless, in its closing order for Case 002, the OCIJ concluded that the “official CPK policy was to prevent rape and punish perpetrators of this crime” — a conclusion more in line with an untested academic thesis than in the stories shared by actual victims and witnesses in the field.

Indeed, recent research has demonstrated that the threat, or reality, of sexual violence was a daily trauma for most women under the Khmer Rouge, as common an experience as starvation.

The “official CPK policy” cited in the Case 002 closing order was not an anti-rape policy, but a policy against any sexual activity outside of state-sanctioned marriage.

Sexual crimes outside of forced marriage have not been given the full benefit of the court's resources, perpetuating impunity for this violence.

If, as Cayley claims, sexual and gender-based crimes were included in the confidential introductory submission of July, 2007, they did not make it into the published summary later that month.

Sexual and gender-based crimes appeared only in 2009, with a supplementary submission to investigate five cases of forced marriage brought forward by civil parties.

The ECCC has an obligation to include the experience of these heinous crimes as part of the official record of the atrocities, as well as to leave a legacy in which the rule of law and justice in Cambodia encompasses the protection and promotion of women's right to be protected from gender-based violence, especially that perpetrated by the State.

So what are some alternatives? They might begin by Andrew Cayley meeting with victims of these crimes to publicly explain why sexual crimes outside of forced marriage are not included in the prosecution and offering his commitment to include stories of sexual violence at every opportunity to ensure they are included in the official record.

The Trial Chamber could also make the charge of forced marriage the next trial as part of Case 002 — which represents the second-largest pool of civil parties after forced movement — allowing stories of rape and other forms of sexual violence outside forced marriage to be heard and recorded.

Overall, such a step must include an explicit aim to infuse an old story of silence and stigma with new approaches for establishing accountability and achieving justice, in which shame is shifted from the victims of sexual violence to the perpetrators.

This is an imperative legacy with as much influence in rectifying the global neglect of these crimes and these victims as it will have in ending the epidemic levels of violence against Cambodian women.