

**Gender and Transitional Justice: A Comparative Study of Cambodia and South Africa**

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**Thesis submitted to McGill University in fulfillment of  
the requirements of the Degree of Master of Laws (LLM)**

**Lucie George 2016**

“In the nineteenth century, the central moral challenge was slavery. In the twentieth century, it was the battle against totalitarianism. We believe that in this century the paramount moral challenge will be the struggle for gender equality around the world.”

– Nicholas D. Kristof, *Half the Sky: Turning Opression in Opportunity for Women Worldwide* (2009)

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## Acknowledgments

My first and greatest debt is to my supervisor, Professor Nandini Ramanujam. I am deeply grateful for her support and wisdom which made this thesis a reality. I would also like to express my thanks to Daniel Judd, who corrected much of the language in this thesis and checked the footnotes.

Writing a thesis can be a solitary experience, however I never felt alone. Thanks go to my four best friends who have always believed in me; I grew up with them in Aix-en-Provence, and may well grow old with them too. I would also like to note my thanks to all of my friends at McGill who have been through this experience with me. This academic undertaking would not have been the same without you all. Special thanks go to Gregor Zymek who supported me during the very hardest times. I would like to thank my nine flatmates who created a convivial and supportive environment.

Finally, I would like to acknowledge the unfailing support of my mother. Without her encouragement and belief in me, I may never have started this project, and without her patience and love, I may never have finished it.

**Abbreviations:**

African National Congress (ANC)

African National Congress Women's League (ANCWL)

Bantu Women's League (BWL)

Cambodian Defenders Project (CDP)

Centre for the Study of Violence and Reconciliation (CSVSR)

Congress of Democrats (COD)

Convention for a democratic South Africa (CODESA)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Extraordinary Chambers in the Court of Cambodia (ECCC)

Federation of South African Women (FEDSAW or FSAW)

Front uni national pour un Cambodge indépendant, neutre, pacifique et coopératif (FUNCINPEC)

Gender Advisory Committee (GAC)

Human Rights Violations Committee (HRVC)

International Center for Transitional Justice (ICTJ)

International Criminal Court of Justice (ICC)

International Criminal Tribunal for the former Yugoslavia (ICTY)

International Criminal Tribunal for Rwanda (ICTR)

Islamic State of Iraq and the Levant (ISIL)

Khmer People's National Liberation Front (KPLNF)

Natal Indian Congress (NIC)

Non-Governmental Organization (NGO)

Pan Africanist Congress of Azania (PAC)

Party of Democratic Kampuchea (PDK)

People's Republic of Kampuchea (PRK)

Post-Traumatic Stress Disorder (PTSD)

Reparation and Rehabilitation Committee (RRC)

Sexual Offences and Related Matters Act (SOA)

South African Indian Congress (SAIC)

Transcultural Psychosocial Organization in Cambodia (TPO))

Transvaal Indian Congress (TIC)

Truth and Reconciliation Commission (TRC)

United Nations (UN)

United Nations Security Council (SC)

United Nations Women (UN Women)

Victims Support Section (VSS)

Women's National Coalition (WNC)







Credit: Lucie George

## Résumé

In this thesis I will analyze the relationships between mechanisms of transitional justice and gender-specific crimes. I will base my work on a study of two case studies. The first is South Africa, which, after Apartheid, favoured restorative justice; and whose leading initiative was the Truth and Reconciliation Commission (TRC). The second case study concerns Cambodia which has set up, with the help of the UN, a hybrid tribunal. This is the Extraordinary Chambers in the Court of Cambodia (ECCC), composed of both national and international judges. I will analyze how these two mechanisms of transitional justice have separately provided a mitigated response to the needs of female victims. The TRC alone has failed to change the culture of rape and the attitudes surrounding the issue of sexual violence in South Africa. It did not incorporate a gender-specific approach within its mandate and throughout the hearings, and if it did so, it was too late. Many female victims have developed the sense that their perpetrators can act with impunity. The ECCC, for its part, failed to give a satisfactory answer to the victims' needs of recognition in their healing process. In the final part, I will then consider recommendations for improved holistic transitional justice. By holistic transitional justice, I mean justice that takes into account all the mechanisms of transitional justice by making them cooperate together to achieve the goals pursued by post-conflict societies: prosecution, truth recovery, institutional reform, reparations, and reconciliation.

## Introduction

On the 7<sup>th</sup> of August 2014, the verdict of Khieu Samphan and Nuon Chea, two former leaders of the Khmer Rouge in Cambodia, was handed down in front of the Extraordinary Chambers in the Court of Cambodia (ECCC) in Phnom Penh. I was, at the time, lucky enough to intern for the Pre-Trial Chamber of the ECCC and was sitting in the cafeteria of the Court with the other interns when the final judgment of the Case 002/01 was rendered. The television was transmitting the trial live, and we were all waiting to know the verdict. The judges asked the two accused men to stand up and listen to the final decision of the Court. They were convicted, and sentenced to imprisonment for life. This is the justice that, as a young lawyer, I had read about. It was punitive justice. If someone commits a wrong, let alone a wrong on a large scale, they should be punished. This trial and its outcome prompted me to question the nature of justice rendered by such criminal tribunals. It seemed merely partial, inadequate in terms of redressing mass atrocities committed by the Khmer Rouge regime. I realized that law alone was not sufficient for delivering justice in a post-genocide context. It seemed too formal, too narrow, and too procedural to deal with what seemed to be the most important thing: to treat the multifaceted needs of the victims. The confines of law could not encompass the suffering of all the victims, respond to the need for healing, or provide a comprehensive answer to the reconciliation the country needed. The question then arose: was the formal judicial system alone sufficient to deal with breaches of

human rights in the context of transitional justice? Was it enough when a great proportion of the violence is directed against women? We know that in most humanitarian catastrophes, women are the first to suffer violence because of pre-existing structural inequalities. The question is, suddenly, worth asking.

Through this inter-disciplinary research I will be exploring the link between two major themes; gender and transitional justice. Violence against women in conflict situations is not a new phenomenon. We can refer to history and take the example of “comfort women”, girls and women who were forced into sexual slavery by the Imperial Japanese army in occupied territory before and during World War II.<sup>1</sup> After the war a number of controversies emerged concerning the extent of the practice and the number of victims. Official apologies were made, but the victims barely received any redress for the pain and injury suffered. More recently, in 2014, several Yazidi women were abducted, raped and enslaved by the Islamic State of Iraq and the Levant (ISIL). Rape was used by ISIL as a weapon of war and many pregnant women had to endure forced abortion. They were subjected to systemic gender-based violence such as forced marriage or sexual violence.<sup>2</sup> This recent illustration is just one among many. As Kimberly Fils-Aimé said in her thesis: “The status of women within a society is determined by several underlying factors. These can include a nation’s history of development (colonialism, war, etc), its customs and traditions, and its economic climate.”<sup>3</sup> These pre-existing factors manifest themselves and become worse in the context of a conflict or Apartheid, since a culture of violence is created that targets the most vulnerable, such as women. That is why this paper will adopt a feminist vision of transitional justice that departs from the premise that crimes affecting women can have different

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1 See George Hicks, *The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War* (New York City: WW Norton & Company, 1997).

2 See Rukmini Callimachi, "ISIS Enshrines a Theology of Rape", *The New York Times* (13 August 2015), online: <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html>.

3 Kimberly Fils-Aimé, “A gender sensitive approach to urban planning: Enhancing security of women in the context of natural disasters” (2014) McGill University, at 12.

consequences from those affecting men. In particular, this depends on the political and social context in which the victims are situated. This thesis posits that the transitional justice of a post-conflict country should take into account this particular violence committed against women and incorporate a gender-sensitive approach in all of its dimensions. More specifically, this project explores the issue of a holistic transitional justice that answers the needs of women by fulfilling the different goals of Justice: retribution, reparation and restorative justice.

## **1. Gender-Based Violence in Conflict Situations**

I will first study the concept of gender before then examining gender-based violence outside a period of conflict. Finally I will analyze gender-based violence during a conflict.

### **1.1. The Concept of Gender**

The term "gender" can refer to “the social construction of what is defined as male or female in a particular culture, and includes reflections on symbols, theories, practices, institutions and individuals.”<sup>4</sup> The definition of Spike Peterson is even more detailed. According to him “Gender refers not to anatomical or biological distinctions but to the social construction, which is always culturally specific, of masculine and feminine as hierarchical and oppositional categories. Symbols, theories, practices, institutions, and, of course, individuals are gendered, meaning that their characteristics can be associated with, or construed as manifestations of, masculinity or femininity.”<sup>5</sup>

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4 Fionnuala Ní Aoláin, Dina Francesca Haynes & Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford University Press, 2011), at 3, para 3, lines 3-6.

5 Spike Peterson, “New Wars and Gendered Economies” (2008) 88 *Feminist Rev* 7, cited by Miranda Alison, *Women and Political Violence: Female Combatants in Ethno-National Conflict* (Great Britain: Routledge, 2009), at 9.

These definitions can be found in legal texts. Article 7 paragraph 3 of the Rome Statute provides that "For the purpose of this Statute, the term sex refers to both sexes, male and female, within the context of society. It involves no other meaning."<sup>6</sup> For the purposes of this thesis, "gender justice" refers to issues relating to laws or access to justice that affect women.

## 1.2. Gender and Violence

Very often, before a conflict, gender discrimination exists in many societies. According to Wendy Wood, gender roles "arise from the distribution of men and women into social roles within a society. In current industrial and postindustrial economies, women are more likely than men to assume domestic roles of homemaker and primary caretaker of children, whereas men are more likely than women to assume roles in the paid economy and to be primary family providers."<sup>7</sup>

In more traditional societies this is even more true, as women are often consigned to domestic chores, and have almost no voice in the public sphere.<sup>8</sup> Socially constructed gender roles are considered to be hierarchical, and are characterized as male-advantaged gender hierarchies by social constructionists. Further, as Wendy Wood also notes: "Commonly observed in modern nations are women's lack of political representation as well as their lesser education and literacy, access to health care, and sexual autonomy. Women also can be disadvantaged in their control of economic resources, wages for paid labor, and access to professional and managerial employment."<sup>9</sup>

Those structural inequalities expose women to more risks such as, most commonly, sexual or domestic violence. According to the World Health Organization: "It is estimated that 35 per cent of women

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6 *The Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UN 38544 art 7 (entered into force 1 July 2002).

7 Wendy Wood & Alice H Eagly, "A Cross-Cultural Analysis of the Behavior of Women and Men: Implications for the Origins of Sex Differences" (2002) 128:5 *Psychological Bulletin* 699 at 701.

8 Laura Turano, "The Gender Dimension of Transitional Justice Mechanisms" (2010) 43 *NYUJ Intl L & Pol* 1045 at 1062.

9 Wood & Eagly, *supra* note 7 at 710.

worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives.”<sup>10</sup>

Within gender justice, two key areas of particular concern are sexual violence and, more globally, gender-based violence. Sexual violence is a serious crime that occurs in all societies, whether in times of peace or conflict. Sexual violence refers to “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting.”<sup>11</sup> Gender-based violence is:

An umbrella term for any act that is perpetrated against a person’s will and that is based on socially ascribed (gender) differences between men and women, boys and girls. The nature and extent of specific types of gender-based violence vary across cultures, countries and regions. Examples include sexual violence, including sexual exploitation and abuse, and forced prostitution; domestic violence; trafficking; and harmful traditional practices including forced/early marriage, female genital mutilation, honour killings and widow inheritance.<sup>12</sup>

### **1.3. Gender-based Violence During Conflict**

During a time of conflict, the risks that women face are even higher. Due to the fact that their position in society is often vulnerable already, they become the main target of gender-related violence.

The crimes committed against women in conflict periods can be of several kinds; they can include either the death of a loved one or the loss of lifestyle, forced displacement, and personal injury. Women will often be less mobile since they are responsible for ensuring the well-being of young children and

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10 World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, [Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence](#) (2013) at 2, online: <[http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf)>.

11 WHO, *World Report on Violence and Health* (Geneva: World Health Organization, 2002) at 149, online: <[http://apps.who.int/iris/bitstream/10665/42495/1/9241545615\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf)>.

12 Criminal Law and Judicial Advisory Service Office of Rule of Law and Security Institutions Department of Peacekeeping Operations, *Handbook for Judicial affairs officers in United Nations peacekeeping operations* (New York: United Nations, 2013) online: <[http://www.un.org/en/peacekeeping/publications/cljas/handbook\\_jao.pdf](http://www.un.org/en/peacekeeping/publications/cljas/handbook_jao.pdf)> at 213.

the family in general. According to United Nations Women (UN Women) “more than 75 per cent of displaced people are women and children, and in some refugee populations they constitute 90 per cent.”<sup>13</sup>

Above all, they will be exposed to sexual violence, such as rape, as a weapon of war. Thus, according to a United Nations (UN) report: "In many recent conflicts, women have suffered different forms of sexual and gender based violence, including systematic rape, sexual slavery and marriage, pregnancy, sterilization or forced abortion."<sup>14</sup> They will also be more likely to be the victims of prostitution trafficking to meet the needs of soldiers.

These crimes have a different impact on women. Once the conflict is over, the loss of a husband, father or brother may reverse the family structure and force them to take on new roles and responsibilities, such as being the head of the family. This complete restructuring of the family hierarchy may lead to marginalization within the bigger community or even to domestic violence. According to UN Women “[s]tudies in Cambodia in the mid-1990s indicated that many women – as many as 75 per cent in one study – were victims of domestic violence, often at the hands of men who have kept the small arms and light weapons they used during the war.”<sup>15</sup> In the public sphere, women will often be absent during the peace process as they very rarely participate in elections as candidates, and sometimes not even as voters in a transitional government. Therefore legal responses have quickly become necessary.

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13 UN Women Website, online: <<http://www.un.org/womenwatch/daw/followup/session/presskit/fs5.htm>>.

14 UN Women, *Une fenêtre d'opportunités: faire de la justice transitionnelle un réussite pour les femmes* (2012) at 4, online:

<<http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2012/10/wpssourcebook-06b-transitionaljusticework4women-fr.pdf>>.

15 Elisabeth Rehn & Ellen Johnson Sirleaf, "Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building" (2002) 1 *Progress of the World's Women* 219 at 233.



## **2. International Law and Gender-Based Violence in Conflict Situations**

In this section I will study how gender is taken into account in international human rights law and in international criminal and humanitarian law.

### **2.1. Gender-Based Violence and International Human Rights Law**

The issue of gender has appeared gradually in doctrinal debates and practice relating to transitional justice. There are a number of international and regional human rights instruments which are exclusively focused on issues relating to women, including gender justice.

First, I will study the black letter law, which binds the States that have ratified conventions such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was adopted by the United Nations General Assembly in 1979 and entered into force in 1981. The Convention defines discrimination against women, and requires the ratifying States to adopt all appropriate measures required for the elimination of such discrimination. The Committee on the Elimination of Discrimination against Women is the body of independent experts that monitors the implementation of CEDAW. States Parties to the treaty are obliged to submit regular reports to the Committee on the implementation of the treaty.

There is also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This supplements the United Nations Convention against Transnational Organized Crime, and was adopted by the United Nations General Assembly in 2000 and entered into force in 2003. The Protocol requires States Parties to criminalize the trafficking of victims, including women, and to effectively investigate and prosecute such cases.

We can also refer to regional instruments such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and the Protocol to the Africa Charter on

## Human and Peoples' Rights on the Rights of Women in Africa.

Soft law instruments are also an important part of international human rights law for the protection of women, such as the Declaration on the Elimination of Violence against Women. This was proclaimed by the United Nations General Assembly in 1993. It was adopted in response to the need for a clear and comprehensive definition of violence against women, a clear statement of the rights applicable for ensuring the elimination of violence against women in all its forms, a commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women.

Besides, the Security Council of the UN adopted the 1325 resolution,<sup>16</sup> followed by resolutions 1820,<sup>17</sup> 1888,<sup>18</sup> 1889,<sup>19</sup> 1960,<sup>20</sup> 2106<sup>21</sup> and 2122<sup>22</sup> on women, peace and security. Those resolutions make sure that a gender-specific approach is ensured in conflict and post-conflict situations, which runs through "the analysis of the political, economic and cultural context - the definition of policy and strategic frameworks focused on gender equality - the definition, planning and implementation of gender equality programs - the management and evaluation of gender equality programs."<sup>23</sup> With

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16 *Resolution 1325 (2000) on Women, Peace and Security*, SC Res 1325, UNSCOR, 4213<sup>th</sup> meeting, UN Doc S/RES/1325 (2000), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>>.

17 *Resolution 1820 (2008) on Women, Peace and Security*, SC Res 1820, UNSCOR, 5916<sup>th</sup> meeting, UN Doc S/RES/1820 (2008), online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>>.

18 *Resolution 1888 (2009) on Women, Peace and Security*, SC Res 1888, UNSCOR, 6195<sup>th</sup> meeting, UN Doc S/RES/1888 (2009), online: <[http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1888\(2009\)&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1888(2009)&Lang=E)>.

19 *Resolution 1889 (2009) on Women, Peace and Security*, SC Res 1889, UNSCOR, 6196<sup>th</sup> meeting, UN Doc S/RES/1889 (2009) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1889\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1889(2009))>.

20 *Resolution 1960 (2010) on Women, Peace and Security*, SC Res 1960, UNSCOR, 6453<sup>rd</sup> meeting, UN Doc S/RES/1960 (2010) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1960\(2010\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1960(2010))>.

21 *Resolution 2106 (2013) on Women, Peace and Security*, SC Res 2106, UNSCOR, 6984<sup>th</sup> meeting, UN Doc S/RES/2106 (2013) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2106\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2106(2013))>.

22 *Resolution 2122 (2013) on Women, Peace and Security*, SC Res 2122, UNSCOR, 7044<sup>th</sup> meeting, UN Doc S/RES/2122 (2013) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2122\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2122(2013))>.

23 Françoise Nduwimana, *La résolution 1325 du Conseil de sécurité de l'ONU sur les femmes, la paix et la sécurité*, (New York: the Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women (OSAGI), 2005) at 10, para 17.

Resolution 1820, passed in June 2008, the UN Security Council (SC) affirms that rape should be treated as a war crime. With the passage of Resolution 1888 in 2009, the SC of the UN requires that the tasks of peacekeeping protect women and girls from sexual violence. Finally, with the adoption of Resolution 1889 in the same year, the issue of the participation of women in peace processes is discussed.<sup>24</sup> According to a recent study: “It is only recently that conflict-related sexualized and gender-based violence-have come under specific scrutiny and received broader international and high-level attention. Sexualized violence related to conflict is now acknowledged as a threat to peace and security, demanding a high-level response from the United Nations Security Council (UNSC).”<sup>25</sup>

Several international conferences have also contributed to the development of this approach. Thus, as defined at the Beijing Conference in 1995, the main purpose of gender-based perspectives is to ensure, through appropriate measures, that the existing gender issues in society have been taken into account in all decisions affecting the community and society, both at the international, regional, national and local level.<sup>26</sup> In 2000, the United Nations proclaimed the Millennium Development Goals that include gender equality as one of their eight goals. Finally, the UN sustainable development goals for 2015-2030 target to achieve gender equality and empower all women and girls by assuring women’s rights through legal frameworks among other measures.<sup>27</sup>

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24 Ni Aolain, Haynes & Cahn, *supra* note 4 at 16.

25 See Judith Strasser, Thida Kim Silke Studzinsky & Sopheap Taing, *A Study About Victim's Participation at the Extraordinary Chambers in the Court of Cambodia and Gender-Based Violence under the Khmer Rouge Regime*; (Phnom Penh: Transcultural Psychosocial Organization Cambodia, 2015) at 21.

26 Declaration et Plate-Forme d’Action de Beijing, chap IV, para 202, see online: <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20F.pdf>.

27 UN Website, online: <https://sustainabledevelopment.un.org/sdg5>.

## 2.2. Gender-Based Violence and International Criminal Law and Humanitarian Law

The gender-sensitive view of transitional justice has particularly influenced international criminal law by gradually integrating notions of rape and sexual violence as *separate* crimes in the categories of crimes against humanity, genocide and crime of war. However, it took until 1994, and the establishment of ad hoc courts, for violence against women to be fully considered crimes under international law<sup>28</sup>. Today, rape in the course of international or internal armed conflict is considered a war crime, a crime against humanity, and may constitute an element of genocide. The most important case is that of *Akayesu*<sup>29</sup> rendered by the Trial Chamber of the Tribunal for Rwanda (ICTR) on September 2, 1998. The judgment concludes that rape and other forms of sexual violence have been used as instruments of genocide. Moreover, because these crimes were committed in a widespread and systematic attack against civilians they also constitute a crime against humanity. For the first time, an international court recognized rape as being a component of genocide and/or crimes against humanity.<sup>30</sup> This decision was followed in *Furundzija*<sup>31</sup> handed down by the Trial Chamber of the Tribunal for the former Yugoslavia (ICTY) on December 10, 1998. The crime of rape was recognized as a crime of torture, and therefore could be part of the definition of a crime of war. In the words of the Court:

Integration into the customary international law of the fundamental prohibition of outrages upon personal dignity contained in Article 3 common to the four Geneva Conventions (a)

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28 Before 1994 “Rape” was included in Control Council Law No. 10 (US Military Tribunal at Nuremberg) as one of the constituent acts of crime against humanity, and the Geneva Conventions also contained provisions on outrages on personal dignity that contributed to emergence of rape as an international crime as recognized in *Furundzija* that the author invokes. In fact, Rule 93 of the ICRC Customary International Humanitarian Law study indicates that “rape” was already prohibited by the Lieber Code as early as 1863.

29 See *Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-T (2 September 1998) (International Criminal Tribunal for Rwanda, Chamber 1).

30 See Kelly D Askin, “Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles” (2003) 21 BJIL 288, 295 at 318.

31 See *Prosecutor v Anto Furundzija*, Judgment, IT-95-17/1-T (10 December 1998) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

contributed to the emergence of universally accepted standards prohibiting rape as well as severe sexual violence. These standards are applicable throughout armed conflict.<sup>32</sup>

Similarly, the idea that women judges would be biased in judging crimes of rape is ultimately rejected. This follows the historic decision of *Kunarac*,<sup>33</sup> rendered by the Trial Chamber of the ICTY on February 22, 2001. The Chamber sentenced an alleged perpetrator of a crime against humanity for rape and slavery. Regarding this jurisprudence, considerable progress has been made from the time when violence and related offences against women were merely seen as crimes of honour.

The Statute of the International Criminal Court of Justice (ICC) (the Rome Statute), entered into force on July 1<sup>st</sup>, 2002, has taken into account these developments. There is now an explicit reference to rape in its statute. Thus Article 8 of the Rome Treaty lists rape, sexual slavery, enforced prostitution as war crimes. Article 7 of the Treaty includes the same concepts as crimes against humanity. This article recognizes that crimes of this nature can be directed against civilians in times of war or peace by both the State and private actors. This feature is especially important for women, who are often the victims of non-institutional actors.<sup>34</sup> This is the case, for instance, regarding Yazidi women, who as seen above, are the victims of a militant group. Given the nature of warfare now, most conflicts involve multiple non-state actors who are not bound by international humanitarian law.

The only exception to the explicit codification of crimes specific to women is found in Article 6 of the Statute, and this concerns the crime of genocide. No changes were made in relation to other statutes of the ad hoc Courts. If the International Criminal Court can be seen as an example where gender crimes were included, it may be that progress can still be made. Indeed, Navanethem Pillay, former judge of

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<sup>32</sup> *Ibid* note 29, para 168.

<sup>33</sup> See *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment, IT-96-23-T& IT-96-23/1-T (22 february 2001) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

<sup>34</sup> Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law; Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?" (2000) 46 McGill LJ 217 at 221–23, 227.

the ICC and ICTR, notes: “The normative framework is, therefore, in place. However, if we take even a cursory look at the extent of the prosecution of sexual violence perpetrated during conflict, it is clear that we are only addressing the tip of the iceberg in terms of cases examined, and merely scratching the surface in terms of our understanding of how women experience violence.”<sup>35</sup> We must then take gender-related violence into consideration in all the mechanisms of transitional justice.

### **3. Transitional Justice Theory and Practice**

In this section I will first examine the origin of the concept of transitional justice and its practical use. I will then draw a parallel between transitional justice and the fight against impunity.

#### **3.1. The Practice and Conceptual Approach of Transitional Justice**

The practice of transitional justice appeared, according to Kora Andrieu,<sup>36</sup> in Argentina following the fall of the military dictatorship and after Raul Alfonsin's election in 1983. The creation of a truth commission to uncover the fate of people who were missing or who had disappeared, and criminal proceedings against some members of the junta, was the beginning of a practice that since the 80s has expanded worldwide. To note some figures “between 1980 and 2004, of 85 countries “in transition” 34 had put into place truth commissions, and 50 trials for the violation of human rights.”<sup>37</sup>

Its conceptual development followed. According to Kora Andrieu: “The term found a first consecration in the pioneering book of Neil Kritz, inspired by the Salzburg conference about the foundation of the

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35 Navanethem Pillay, "Sexual violence: standing by the victim" (2009) 42 Case W Res J Intl L 459 at 461.

36 Kora Andrieu, *La Justice Transitionnelle de l'Afrique du Sud au Rwanda* (Paris: Folio essais, Ed Gallimard, 2012) at 479.

37 *Ibid*, at 483, para 2, l 3 to l 6: « Entre 1980 et 2004, sur 85 pays « en transition » 34 avaient mis en place des commissions Vérité, et 50 des procès pour la violation des droits de l'homme ».

Chart 77 named `justice in time of transition.’<sup>38</sup> It is now accepted throughout the academic world, and there are two journals dedicated solely to this issue.

Transitional justice refers to justice during periods of political change. Often it occurs during the passage from a State in crisis (such as a dictatorship or civil war) or whose legitimacy is contested (as in the example of Palestine) to a democratic State. According to Professor Ruti G. Teitel, this phenomenon is closely linked to a liberal vision of politics.<sup>39</sup> The liberal tradition is explained very clearly by Kora Andrieu who writes “the democratic state is a state that limits its power to the extreme and expressly distinguishes itself from a society conceived as fundamentally diverse and plural. The political conception of liberal justice only applies to the basic structure of society, which means its political institutions, and may be made independently of any particular conception of morality and goodness.”<sup>40</sup>

### **3.2. Transitional Justice and the Fight Against Impunity**

The term “transitional justice” can be compared to the fight against impunity, the latter being defined as “the absence, in law or in fact, of the questioning of criminal responsibility of the perpetrators of violations of human rights, and their civil, administrative or disciplinary liability, since they are not under any investigation that might lead to their indictment, arrest, or trial, and if found guilty, they are

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38 *Ibid*, at 480, para 1, l 3 to l 7. « Le terme trouve une première consécration dans l'ouvrage pionnier de Neil Kritz, tiré de la conférence de Salzbourg de la Fondation de la Charte 77 intitulée « Justice in Times of Transition ».

39 See Ruti G Teitel, *Transitional Justice*, (Oxford: Oxford University Press, 2000) at 225.

40 Andrieu, *supra* note 35 at 589- 590: “l'Etat démocratique est un Etat limitant à l'extrême son pouvoir et se distinguant expressément d'une société conçue comme fondamentalement diverse et plurielle. La conception politique de la justice libérale s'applique uniquement à la structure de base de la société, c'est à dire à ses institutions politiques, et peut être formulée indépendamment de toute conception particulière de la morale et du bien”.

not sentenced to appropriate punishments, including making reparations to their victims."<sup>41</sup> However, the aim of transitional justice is not only to ensure retributive justice by designating who society should punish. It is also to take relevant precautions and to sustain peace and stability. Justice should be in the service of the current order, which is about healing, rebuilding the torn social fabric, and re-establishing trust and legitimacy in the state and its institutions. Therefore restorative justice is also needed because it focuses more on the victims rather than the accused, and aims at collective reconciliation with the community at large. Restorative justice is:

A process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have inflicted the harm must be central to the process.<sup>42</sup>

The measures related to transitional justice adopt different forms. They can vary from trial, through reparation, to revelation of the past. These measures respond, according to Louis Joinet, to three objectives: first, to restore truth; secondly, the legal punishment of criminals; and finally, to rebuild the state on a democratic basis.<sup>43</sup>

The discovery of truth is a duty of the State: "International law obliges States that have ratified the main protector texts of Human Rights to investigate human rights violations."<sup>44</sup> For instance, the UN Convention on the Protection of all Persons from Enforced Disappearances establishes, in article 24,

41 Louis Joinet, *Question de l'impunité des auteurs des violations des droits de l'homme (civils et politiques)*, Final Report for the Commission of human rights of the United Nations ( E/CN.4/Sub.2/1997/20/Rev.1): "l'absence, en droit ou en fait, de la mise en cause de la responsabilité pénale des auteurs de violations des droits de l'homme, ainsi que de leur responsabilité civile, administrative ou disciplinaire, en ce qu'ils échappent à toute enquête tendant à permettre leur mise en accusation, leur arrestation, leur jugement et, s'ils sont reconnus coupables, leur condamnation à des peines appropriées, y compris à réparer le préjudice subi par leurs victimes".

42 See John Braithwaite, "Restorative Justice and De-Professionalization" (2004) 13:1 *The Good Society* 28.

43 Louis Joinet, ed, *Lutter contre l'impunité, Dix questions pour comprendre et agir* (Paris: La découverte, 2002).

44 *Ibid*, at 21, para 1, l 2 to l 5: "le droit international fait obligation aux Etats qui ont ratifié les principaux textes protecteurs des droits de l'homme d'enquêter sur les violations de ces droits".



the right of victims to “know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”<sup>45</sup> According to the International Center for Transitional Justice (ICTJ) “[t]he right to the truth should be pursued through both judicial and nonjudicial proceedings.”<sup>46</sup> This quest for truth often requires establishing the identity of perpetrators, the causes that led to abuses, and the circumstances and facts of the violation. For that reason, we have to emphasize the important role of archives and testimony. A testimony can be made in front of a tribunal or in front of a truth commission. This last mechanism is used increasingly often as a complement or alternative to a judicial process. Truth commissions can be defined as official, nonjudicial bodies of limited duration, established to determine the facts, causes, and consequences of past human rights violations.<sup>47</sup> We will study further the role of truth commissions in the first part of this thesis.

The legal punishment of criminals can be done mainly through due process. The trial is important for the sanction of the criminal but also, and indeed, above all, for its symbolism. The philosopher Pierre Bouretz has also written on the subject, noting that “victims do not actually require punishment, they do not seek redress; they expect public recognition, mediation of the trial as a means of transforming the individually felt in socially happened, experience in discourse.”<sup>48</sup>

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45 See also, for example, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art 2; (entered into force 23 March 1996); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, ESC Dec E/CN.4/2005/102/Add.1, UNESCOR, 2005, 61<sup>st</sup> Sess, UN Doc E/CN.4/2005/102/Add.1, Principles 2–5, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>>.

46 Eduardo Gonzales & Howard Varney, ed, *Truth Seeking, Elements of Creating an Effective Truth Commission* (New York: ICTJ report, 2013) at 3, online: <<https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>>.

47 Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2010).

48 Pierre Bouretz et al, “La prescription: table ronde du vendredi 22 janvier 1999”, *Droits*, n°31, (Paris: PUF, 2000): “les victimes ne demandent effectivement pas un châtement, une punition, elles ne réclament pas une réparation; elles attendent la reconnaissance publique, la médiation du procès comme moyen de transformer l'individuellement ressenti en socialement arrivé, le vécu en discours”.

Reparation is also an important element of the legal sanction. According to the Inter-American Court of Human Rights in the Velasquez-Rodriguez case of 1988,<sup>49</sup> repair is a full process that includes the restoration of the previous situation, the reparation of the consequences of the violation and compensation for damages, including moral damages. Transitional justice mechanisms are now under a legal obligation to ensure the right of victims to reparations<sup>50</sup>.

Finally, the reconstruction of the State on democratic principles can be done through measures that are initially aimed at strengthening the protective legal order of human rights: “This requires, among other things, signature and ratification of the main international instruments on human rights, and the recognition of existing international bodies and courts. In some cases it is necessary to undertake constitutional reform or to adopt a new Constitution, which more respectful of human rights, and to abrogate all laws and special courts.”<sup>51</sup> This can also be done by vetting or national reconciliation that sometimes is brought into effect by amnesty laws. Amnesty laws can be reconciled with the obligation

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49 *Velasquez-Rodriguez case (Honduras)* (1988), Inter-Am Ct HR (Ser C) No 4, at para 172, Annual Report of the Inter-American Court of Human Rights.

50 See, for example, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art 2; (entered into force 23 March 1996); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Art 14; (entered into force 26 June 1987); International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 2716 UNTS 3, Art 24; (entered into force 23 December 2010); International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, Art 6 (entered into force 4 January 1969).

Convention on the Rights of the Child, 20 November 1989, (1989), 1577 UNTS 3, Art 39 (entered into force 2 September 1990).

51 Joinet, *supra* note 42, at 29, lines 2-9: “Cela passe entre autres par la signature puis la ratification des principaux instruments internationaux relatifs aux droits de l'homme, et par la reconnaissance des instances et juridictions internationales existantes. Dans certains cas, il est nécessaire d'entreprendre une réforme constitutionnelle, voire d'adopter une nouvelle Constitution, plus respectueuse des droits de l'homme, et d'abroger toutes les lois et juridictions d'exception”.

to prosecute<sup>52</sup> thanks to what Christine Bell calls the “new law” of transitional justice and that consists of:

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52 See Christine Bell, "The “new law” of transitional justice." In *Building a future on Peace and Justice* (Berlin: Springer, 2009) at 107: “the United Nations Secretary General’s Report on The Rule of Law and Justice in Conflict and Post-Conflict Societies August 2004, provides in recommendation 64 that Peace agreements and Security Council resolutions and mandates should: (a) Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court (b) Ensure that the United Nations does not establish or directly participate in any tribunal for which capital punishment is included among possible sanctions.” and also at 107-108: “(1) Genocide Convention: Persons committing genocide are required to be punished. (2) Convention Against Torture: alleged torture must be investigated and, if the state has jurisdiction under any of the enumerated bases, it must either extradite the offender, or “submit the case to its competent authorities for the purpose of prosecution”. (3) The Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention on Torture have similar provisions. (4) 1949 Geneva Conventions: require that persons accused of grave breaches be sought and prosecuted, or extradited to a state that will do so. This requirement, however, only applies in international conflicts, which under Protocol I to the Geneva Conventions includes conflicts involving “national liberation movements” – a term that is currently viewed as somewhat anachronistic with states resisting its use with reference to armed actors. Where Protocol I does apply, it also adds to the list of “grave breaches” matters such as: attacking a person who is hors de combat; perfidious use of the distinctive emblems of the International Committee of the Red Cross and other signs protected by the Convention; and practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination. (5) The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity: holds that the passage of time cannot bar prosecutions for war crimes, crimes against humanity and genocide. (6) The other major source of treaty-based obligation affecting the scope of amnesty is found in general human rights treaties at the international and regional level, including the International Covenant on Civil and Political Rights (ICCPR), American Convention on Human Rights and European Convention on Human Rights. These treaties clearly outlaw deprivation of the right to life, including arbitrary disappearances and extra-judicial executions and torture. While the treaties, contain no explicit references to prosecution or amnesty, they prohibit the underlying violations, and provide for a right to a remedy (in general terms), and to a hearing before a competent tribunal for violations of rights. This might seem to leave open whether prosecution and punishment are required, or whether other “restorative justice” type approaches might fulfil human rights obligations. Increasingly, jurisprudence relating to torture and the right to life in particular requires adequate investigation capable of leading to a determination of guilt or innocence. In some cases the treaties and international bodies talk of prosecution and/or punishment. These obligations apply to successor regimes as regards the human rights abuses of the previous regime, provided that the state has been a party to the Conventions throughout. (7) Crimes against humanity and gross human rights abuses. In addition to these treaty provisions, there are strong arguments that some fundamental rights are protected as a matter of customary law and apply even where key treaties have not been ratified. These arguments have been bolstered by the notion of “crimes against humanity” as crimes which cannot be amnestied. Crimes Against Humanity are defined by the statutes establishing the international criminal tribunals for Rwanda, the former Yugoslavia, the Sierra Leone Special Criminal Court and the Rome Statute of the International Criminal Court (ICC). They include crimes such as murder, extermination, enslavement, deportation, imprisonment, torture and rape. The crimes have to be part of widespread or systematic attack, and directed against a civilian population. As regards gross human rights violations, the violations need to be of a serious scale. While it has for a long time been the case that states have permission to prosecute for these crimes, a view that there is a duty on states to prosecute crimes against humanity is beginning to emerge. Indeed, there have been increasing assertions of universal jurisdiction (the ability of states anywhere) to prosecute these offences regardless of where they occurred.”

“1. Blanket amnesties that cover serious international crimes are not permitted. 2. Some amnesty, however, is required as conflict-related prisoners and detainees must be released, demilitarised, demobilised, and enabled to reintegrate. 3. Mechanisms should be creatively designed aimed at marrying the normative commitment to accountability, to the goal of sustaining the ceasefire and developing the constitutional commitments at the heart of the peace agreement. The following approaches may be used: (a) Quasi-legal mechanisms, which deliver forms of accountability other than criminal law processes with prosecution, such as truth commissions. (b) A dual approach whereby international criminal processes for the most serious offenders, coupled with creatively designed local mechanisms aimed at a range of goals such as accountability and reconciliation, for those further down the chain of responsibility, and general amnesty at the lowest level. 4. Innovative mechanism should be designed with close consultation with affected communities . 5. Should any party evidence lack of commitment to the peace agreement, and in particular return to violence, any compromise on criminal justice is void and reversible through the use of international criminal justice.”<sup>53</sup>

## 4. Case Studies

I have selected the cases of Cambodia and South Africa because these countries, one post-conflict, and the other post-Apartheid regime, offer particularly rich insights into the very different pathways to transitional justice each one has pursued. South Africa, in order to facilitate a peaceful and sustainable transition, favored reconciliation and amnesty. Cambodia, on the other hand opted for a retributive model. Studying those two cases will help me assess the effectiveness and shortcomings of these different approaches in addressing the needs of the victims of gender-based violence.

### 4.1. South Africa

South Africa had to deal with forty years of Apartheid from 1948 to 1991. After the end of the regime the new government decided to create a Truth and Reconciliation Commission (TRC) to deal with the past violation of human rights. However, according to the International Center for Transitional Justice (ICTJ) “most other efforts to respond to victims’ rights and pursue individual criminal responsibility for crimes committed during apartheid have failed.”<sup>54</sup>

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<sup>53</sup> *Ibid*, at 106.

<sup>54</sup> ICTJ Website, online: <<https://www.ictj.org/our-work/regions-and-countries/south-africa>>.

The mandate of the TRC allowed it to grant amnesty against the confession of those responsible for the gross violation of human rights in what was called a “truth-for-amnesty” process. The victims had to accept that “in case where amnesty was afforded, they would lose out the possibilities of not just criminal justice, but on claiming damages or compensation through the civil courts.”<sup>55</sup>

In this thesis, I will focus on the women victims of the Apartheid, since the TRC hardly adopted a gender-specific approach. This lack of recognition left structural inequalities unchanged, and did not break the vicious circle of violence against women that exists in South Africa. Besides, I will argue that the lack of prosecution after Apartheid has contributed to a culture of impunity in the country that still persists today. As a matter of fact, Michelle J. Anderson noted in 1999 that South Africa was in a rape crisis.<sup>56</sup>

## **4.2. Cambodia**

Cambodia, unlike South Africa, started its transitional justice almost thirty years after the fall of the Khmer Rouge regime. This late transitional justice revolved around the idea of retributive justice and the prosecution of former leaders of the former communist regime. For that purpose the Extraordinary Chambers in the Court of Cambodia (ECCC) were created jointly by the Royal Government of Cambodia and by the United Nations, and began operating in 2006. However, the justice as rendered in Cambodia seems far from reaching its goal, since only a handful of leaders have been tried, and abuses of political and economic rights in post-conflict Cambodia are still present. Questions also arose

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55 ICTJ Website, online: <<https://www.ictj.org/news/ignoring-cries-justice-south-africa-fails-victims-apartheid-era-crimes>>.

56 Michelle J Anderson, "Rape in South Africa" (1999)1 *Geo J Gender & L* 789 at 789.

concerning the therapeutic benefits of the trial since most women victims in Cambodia faced difficulties in testifying before the Court.

As a matter of fact, women in modern Cambodian society are stigmatized based on a double standard: their gender on the one hand, and the aftermath of the violation they suffered from on the other. Indeed, according to the Transcultural Psychosocial Organization in Cambodia (TPO):

Women in particular continue to suffer from the violence they experienced during that time. Some live with the consequences of forced pregnancy or abortion. Others suffer from gynecological and other physical health issues, such as headaches, pain and disability. Most have ongoing psychological issues related to trauma. This can take many forms including anxiety, depression, panic attacks, flashbacks and insomnia. Many survivors continue to experience poverty, presenting financial challenges to accessing health, legal and other services.<sup>57</sup>

Yet these mental issues are seen as a flaw in the Cambodian society and are referred to by the pejorative term “Ckuot”, meaning that someone who is “disturbed” or “crazy.”<sup>58</sup>

Therefore, a Truth and Reconciliation Commission would have been beneficial both for the sake of reconciliation, and also in recognition of the majority of the women victims of the Khmer Rouge era. A Truth and Reconciliation Commission would have offered an opportunity to give them an arena in which to express their suffering. Indeed, in front of the Khmer Tribunal “victims do not get an opportunity to participate in proceedings unless the harm they experienced is linked to the charges being prosecuted by the court against the accused.”<sup>59</sup>

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57 Judith Strasser et al, *supra* note 25 at 35.

58 S Megan Berthold & Gerald Gray, «Post-Traumatic Stress Reactions and Secondary Trauma Effects at Tribunals: The ECCC Example" in Beth Van Schaack, Daryn Reicherter, Youk Chaang et Autumn Talbott, dir, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: volume on Cambodia's mental health, 2011) at 103.

59 Susana SáCouto, "Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?" (2012) 18 Mich J Gender & L 297 at 336.

## **5. Conclusion: Research Design and Methodology**

This research study is divided into three Chapters. Chapter One will begin by examining the case of South Africa. In this first Chapter, I will focus first on the history of South Africa during the Apartheid and during the period of transition. In this section, I seek to emphasize the role women played in liberation movements in addition to the democratic transition of the country. In the next section, I plan to recentre my work on transitional justice and the work of the Truth and Reconciliation Commission (TRC). I want to analyze how the TRC failed to adopt a gender-sensitive approach. Finally, I will demonstrate that the lack of prosecutions after the Apartheid created a climate of impunity that remains today particularly harmful for women.

Chapter Two will explore the case of Cambodia. In this second Chapter, I will proceed in the same order and start with the history of Cambodia during both the Khmer Rouge regime and the democratic transition of the country. In the following section I will insist on the limits of the ECCC in dealing with the suffering of women victims. I will reach the conclusion that the healing process should not be undertaken through retributive justice only.

In Chapter Three, I will draw out the lessons that can be learned from the two cases above, and argue in favour of a holistic justice. I will, by consequence, argue for the use of all the mechanisms of transitional justice.

This study is presented in a narrative style and the information obtained draws heavily on academic literature. I also based my work on the legal texts available, such as the decisions of the ECCC and the work of the Truth and Reconciliation Commission in South Africa.

# **I. Transitional Justice in South Africa**

The case of South Africa is interesting in the way that it helps us understand why peace has sometimes been preferred to retributive justice. Here it will be seen how the political situation in South Africa did not allow for full justice, and opened the door for what we can call “impunity”. We will, afterwards, evaluate how this decision represented a step backwards for women in the south african's justice.

## **1. South African History During and After Apartheid (1948-1994)**

### **1.1.The History of Apartheid**

Apartheid was a system of racial segregation in South Africa enforced through legislation by the National Party (NP), the party in power from 1948 to 1994.<sup>60</sup> The concept of apartheid was divided by authors in two different categories: the grand apartheid and the petty Apartheid.

The grand apartheid was the segregation of facilities based on race. It was prominent during 1960 and 1970 and was implemented by different laws. Individuals were classified by race and the Group Area Act of 1950 became the heart of the Apartheid system.<sup>61</sup> According to this Act, urban areas were to be

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<sup>60</sup> Greg Myre, “South Africa ends Racial Classifications”, *Southeast Missourian* (18 June 1991) Cape Girardeau. Retrieved 18 August 2016.

<sup>61</sup> Nelson Mandela Center of Memory Website, Online:



divided into racially segregated zones “where members of one specific race alone could live and work.”<sup>62</sup> This Act was coupled with the Population Registration Act of 1950 that classified all citizens according to their race and obliged them to wear an identity pass.<sup>63</sup> The Bantu Self-Government Act of 1959 created ten Bantu homelands known as Bantustans.<sup>64</sup> The homelands were places where black people were obliged to live and those areas were supposed to develop, at the end of the process, into a separate-nation State.<sup>65</sup> Most black people were stripped of their South African citizenship when the "homelands" became "independent."<sup>66</sup>

Besides the grand Apartheid occurred what was called the “petty Apartheid” which was the practice of segregation in the routine of daily life. The Separate Amenities Act of 1953 is its most striking illustration.<sup>67</sup> This Act created separate facilities and public access to amenities depending on the race of the individual. Therefore, segregation was imposed on “taxis, ambulances, hearses, buses, trains, elevators, benches lavatories, parks, church halls, town halls, cinemas, theaters, cafes, restaurants, and hotels, as well as schools and universities.”<sup>68</sup>

Although apartheid laws affected all blacks, coloured or Indian inhabitants, women in particular felt certain restrictions more harshly than their male counterparts. They had to face discrimination based on

<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01839.htm>.

62 Leonard Thompson, *A History of South Africa* (New Haven: Yale University Press, 1990) at 194.

63 *Population Registration Act* (S Afr) No 30 of 1950.

64 *Promotion of Bantu Self-Government Act* (S Afr) No 46 of 1959.

65 See T Trial, et al, *Apartheid in South Africa* (Age, 1936) in the sub-section: grand apartheid the homeland system.

66 *Ibid.*

67 *Reservation of Separate Amenities Act* (S Afr) No 49 of 1953.

68 Thompson, *supra* note 62 at 197.

their race but also on their gender. The few rights allowed to black people like education in separate universities or access to property in certain areas were not enjoyed or extended to women.

First of all, the legal capacity of women was not the same as men. Section 27 (2) of the Natal Code of Zulu Law,<sup>69</sup> a product of early colonialism, stated that unless she has been emancipated, a Bantu female was deemed a perpetual minor in law, when African men had full legal capacity at the age of twenty-one. This legal incapacity was the root of other discriminations, such as a lack of access to property on the part of women.<sup>70</sup>

The “petty Apartheid” was particularly harsh for women. The Immorality Act of 1927 forbade extra-marital sexual relations between whites and blacks.<sup>71</sup> The Prohibition of Mixed Marriages Act of 1949 banned marriage between a white and a non-white person.<sup>72</sup> Even if those laws were directed to both men and women, the majority of non-white people indicted under these Acts were women.<sup>73</sup> Besides, women married under customary law, as was common in the Bantu community, but these were not recognized by the State as such, and this weakened their position in society.

The “grand Apartheid” was no better. As seen above, one of the criteria of the “grand Apartheid” was

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69 *The Natal Code of Zulu Law* (S Afr) Proc R151 of 1987 and *the KwaZulu Act* (S Afr) No 16 of 1985 on the Code of Zulu Law.

70 United Nations Center against Apartheid, “Women and Apartheid” (1978) 10:1 *The Black Scholar* 11 at 14 : “The access to the property for the woman is dependent of the ante nuptial contract that can stipulate the exclusion of the husband's marital power over his wife's property or provide for joint ownership. Women who live in reserves don't have access to land simply because they are women even if they are family heads and then would be legally allowed to own their own land.”

71 See also *the Immorality Amendment Act* (S Afr) No 21 of 1950 that forbade such relations between Whites and Coloreds. See also *the immorality Act* (S Afr) No 23 of 1957, which forbade any sexual relations between Whites and non-Whites.

72 *Prohibition of Mixed Marriages Act* (S Afr) No 55 of 1949.

73 See United Nations Center against Apartheid, *supra* note 70.

control of the influx of people as a result of pass laws.<sup>74</sup> According to those laws, only black people who were needed to serve labour needs could have access to white urban areas. Others had to stay in their Bantu Homeland. This policy tore apart families since women would not be considered as part of the labour force.<sup>75</sup> They were therefore obliged to remain in rural areas, living in poor conditions and assuming a role that, in their customs, they were not used to.<sup>76</sup> According to the UN: “The reserves in reality operate as dumping grounds for old people, children and women whose labor is not needed for the white economy”.<sup>77</sup>

As is often the case, the discriminatory legal rules were just the tip of the iceberg. The practice of the State and private actors was often worse than it seemed on paper. It was reported that the State “used sex and gender-based violence and discrimination in ways that reflected and exploited the norms in society regarding women and gender.”<sup>78</sup> Women endured different forms of torture from their male counterparts “including miscarriages in detention, torture using electric shock on pregnant women, allegations of rape by soldiers.”<sup>79</sup> The State was not the only actor to commit gender-related crimes. In societies corrupted by violations of human rights, and in which there is a patriarchal culture, rape against women often becomes a weapon to humiliate opponents. This was the case in South Africa. According to Katie Reid “liberation movement camps also committed gendered human rights abuses, including allegations of rape against women and girls and other forms of sexual abuse.”<sup>80</sup>

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74 See *the Bantu Consolidation Act* (S Afr) No 25 of 1945, *The Bantu Act* (S Afr) No 67 of 1952 & *the Bantu Resettlement Act* (S Afr) No19 of 1954.

75 See Katie Reid, “Gender, women and truth commissions: the Canadian and South African truth and reconciliation commissions”, (2014) University of Victoria, MA Thesis.

76 *Ibid*, at 79.

77 See United Nations Center against Apartheid, *supra* note 70.

78 Kiri Gurd & Rashida Manjoo, “The Need for a New Narrative: Challenging Hegemonic Meanings of Human Rights Violations in the South African Truth and Reconciliation Commission” in Robin Chandler, Lihau Wang & Linda Fuller (eds), *Women, War, and Violence: Personal Perspectives and Global Activism*, (Basingstoke: Palgrave MacMillan, 2010) at 83.

79 *Ibid* at 83.

80 Reid, *supra* note 75 at 80.

Violence against women was not restricted to sexual violence. Women suffered distinctively from structural violence, even if suffered by both sexes. Apartheid made sure that black people would live in worse conditions than white people.<sup>81</sup> The socio-economic situation of black people was very concerning, with people living without access to water or electricity. The situation of black women was however worsened, since as seen above, they could not be tenants in urban areas.<sup>82</sup> According to the United Nations, girls did not have the same access to education as boys,<sup>83</sup> or even the same opportunities for accessing jobs. Those inequalities have had long-lasting consequences after the end of Apartheid and the reconstruction of South African society.

## **1.2. The Role Played by Women in Liberation Movements**

Women were not just victims of Apartheid. They also tried to play a role in the liberation of the country and to fight against its discriminatory rules. In the 1950s, the population started to organize itself in order to demand equality in society. The women movements were an important part of this struggle.

The liberation movements were led by the African National Congress (ANC), which was the main actor of liberation of the country. One of its leaders was Nelson Mandela who founded the Umkhonto we Sizwe (“Spear of the Nation”), the military wing of the ANC, and who was incarcerated from 1963 to 1990, his liberation being the symbol of the end of the regime. In 1947, the “Three Doctors Pact”

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81 United Nations Center against Apartheid, *supra* note 70 at 16.

82 *Ibid* at 16: “therefore if her husband dies or divorces her she can't keep her house. If she wants to stay in the urban area she should then obtain a lodger permit that often oblige her to live as a concubinage with another man, or come back to the homeland that result in her being uprooted.”

83 *Ibid* at 16.

was signed “committing the ANC, Transvaal Indian Congress (TIC) and Natal Indian Congress (NIC) to co-operation.”<sup>84</sup> The Pact set the scene for the Congress of the People. This was an alliance between the ANC, the Indian National Congress, the Coloured People’s Organisation and the Congress of Democrats (COD). Together, they decided to plan a convention and draft a new constitution for South Africa, which would be called the Freedom Charter.

The campaign for the Freedom Charter of 1955 was the work of various liberation movements, as it gathered over 3,000 representatives of resistance organizations. They all worked together to attain equal civil and economical rights. This campaign was a window for every citizen to speak out for his or her rights. “The most remarkable feature of this campaign was that it attempted to do what had never been done before in the history of South Africa – it allowed ordinary people, irrespective of race, language, sex, religion, class, educational standard, personal beliefs and values and organisational affiliation to speak about their hopes and dreams of the future.”<sup>85</sup> The Freedom Charter of 1955<sup>86</sup> included the main requests of the liberation movements at the time, and called for the respect of human rights, equality, and the right of every citizen to vote. It was after this text was approved that the Pan Africanist Congress of Azania (PAC), another important movement of the rebellion, was created on the 6<sup>th</sup> of April 1959, in order to protest against the Charter. The PAC believed in a non-racial South Africa rather than a multi-racial one, as expressed by Robert Mangaliso Sobukwe, the first president of the party.<sup>87</sup>

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84 Trial and al, *supra* note 65.

85 South African history online's website, under the section “Significance of the Congress of the People and the Freedom Charter”, online: <<http://www.sahistory.org.za/article/significance-congress-people-and-freedom-charter>>.

86 See *freedom Charter* (S Afr) of 1955, online:

<[http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdf/AD1137/AD1137-Ea6-1-001-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AD1137/AD1137-Ea6-1-001-jpeg.pdf)>.

87 South African history online's website, under the section “Origins: Formation, Sharpeville and banning, 1959-1960”, online: <<http://www.sahistory.org.za/article/origins-formation-sharpeville-and-banning-1959-1960>>.

According to the United Nations: “In the 50's non-white women joined men in the non-violent defiance campaign against unjust law. The women were organized by the women's league of the ANC. The most prolonged struggles by women centered around their refusal to accept passes”.<sup>88</sup> Numerous movements of women emerged during Apartheid, however, in this thesis, I will focus on the three main ones created in the early years of the regime.

First of all, The African National Congress Women's League (ANCWL) is a wing of the ANC that regroups women and that promotes their interests. It was founded in 1931 with Charlotte Maxeke as its first president, when it was called the Bantu Women's League (BWL). In 1948, after women were finally admitted as ANC's members, the ANCWL was formed.<sup>89</sup> The ANCWL was very much involved in the Defiance Campaign, the largest non-violent campaign organized by the ANC and the South African Indian Congress (SAIC), which took place on the 26<sup>th</sup> of June 1952. The Campaign regrouped thousands of volunteers who were willing to defy the unjust laws of Apartheid and go to jail for their actions. It is seen as the first multi-racial organized protest against the Apartheid. The ANCWL was also involved in the 1956 Women's March as we will see below.

Secondly, the Federation of South African Women (FEDSAW or FSAW) was launched on 17 April 1954 in Johannesburg as the first attempt to establish a broad-based women's organization. It is usually seen as an umbrella body of the ANCWL. The Federation brought together individual women but also organizations of black, coloured or white women as well as trade unions.

This Federation was at the origin of the Women's Charter.<sup>90</sup> This Charter did not only ask for equal

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88 See United Nations Center against Apartheid, *supra* note 70 at 9.

89 See ANC's website, online: <<http://womensleague.anc.org.za/show.php?id=3038>>.

90 *Women's Charter* (S Afr) of 1954, online: <[http://www.artsrn.ualberta.ca/amcdouga/Hist247/winter%202010/additional%20rdgs/what\\_women\\_want\\_1955.pdf](http://www.artsrn.ualberta.ca/amcdouga/Hist247/winter%202010/additional%20rdgs/what_women_want_1955.pdf)>.

rights for all races, but also equal rights between men and women. Besides, political and economic equality were requested on the same footing.<sup>91</sup> They called, among others, for equality of opportunity in employment, equal pay for equal work, and equal rights in relation to property, marriage and children. By writing this Charter, women were showing their rejection of the past laws noted above. Those demands paid off since they were ultimately incorporated into the "[Freedom Charter](#)", adopted by the Congress of the People in Kliptown on June 25-26, 1955.<sup>92</sup>

However, the Women's Charter also suffered some shortcomings, as it was unable to overcome the limitations of formal legal equality. "By calling for social amenities and services such as maternity homes, welfare clinics and proper homes,"<sup>93</sup> women were maintained in their domestic and family role.

The Federation was also famous for the demonstrations it organized, the most well-known being on August 9, 1956, in Pretoria, when 20,000 women from all parts of South Africa staged a march on the Union Buildings. Thanks to this demonstration, women showed that they could be a political force in their country and that their role in society was not confined to the home. The FEDSAW, besides other women movements, was also famous for protesting against pass laws.

Next to these groups of black women stood a group of white women that also fought for equality and respect for the rule of law: the Black Sash Organization. This organization was founded by six women who wanted to protest against the bill removing voting rights for coloured people in South Africa. They were mainly protesting against the alterations of the Constitution after the Nationalist Government came into power in 1948.

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91 Catherine Albertyn, "Women and the transition to democracy in South Africa" (1994) *Acta Juridica* 39 at 41.

92 See South African history online's website, online: <<http://www.sahistory.org.za/topic/federation-south-african-women-fedsaw>>.

93 Albertyn, *supra* note 91 at 45.

These women mainly fought for the right of coloured people to vote. We can notice here that white women campaigned for political rights, while the concern of black women focused on political and economic equality within the transformation of the State.<sup>94</sup> Moreover, in the 1950s this organization was uninterested in protecting the rights of African citizens. Nevertheless, when the pass laws were enforced, the Black Sash Organization joined the black movements in protesting against them. They later opened a legal advice office to help the victims of pass stand up for their rights.<sup>95</sup>

In the 1960s, the Apartheid regime became more fierce: many leaders of the FSAW were arrested,<sup>96</sup> and demonstrations were banned. Several organizations were also banned, such as the ANC. This led to clandestine meetings, covert membership and armed struggle. In 1964, Nelson Mandela was sentenced to life in prison. It became more difficult for women movements to demonstrate and campaign for equal rights. Moreover, the liberation movements had to wait until the 1970s to find support in the international community. The United Nations General Assembly denounced Apartheid in 1973 in the International Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>97</sup> It was only in the following years that the commitment of the UN to end Apartheid became stronger. In 1974, South Africa was suspended from participating in the work of the organization. The General Assembly of the UN also called for a non-racial democracy in 1980.<sup>98</sup> This reaction against the regime of the Apartheid was followed by economic sanctions imposed by States such as the United Kingdom and the United States in 1985. This involvement of international actors played a great part in the end of the

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94 *Ibid* at 42.

95 South African history online's website, under the section "The Black Sash Organisation: A History of Transformation", online: <<http://www.sahistory.org.za/article/black-sash-organisation-history-transformation>>.

96 Georgina Waylen, "What can the South African transition tell us about gender and democratization." (2004) Unpublished manuscript, Queens University Belfast, at 6, see online at: <<https://www.qub.ac.uk/cawp/research/Waylen.pdf>>.

97 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, the General Assembly of the United Nations, 30 November 1973, Resolution 3068(XXVIII) (entered into force 18 July 1976).

98 *Declaration on Apartheid and its Destructive Consequences in Southern Africa*, GA Res 16/1, UNGAOR, 6<sup>th</sup> plenary meeting, UN Doc A/RES/S-16/1 (1989), see online at: <<http://www.un.org/documents/ga/res/spec/ares16-1.htm>>.



regime and in the beginning of the democratic transition, South Africa being more and more isolated from the rest of the world.

However, women still had to face new challenges in the ranks of the ANC. Even if this party is considered a political party of liberation, its inclusion of women and gender issues was questionable. Women's representation in the leadership of the ANC was still very poor in the late 1980s. According to Georgina Waylen “only 3 of the 35 members of the ANC were women.”<sup>99</sup> The ANC's 1988 Constitutional Guidelines have been seen as the most important political document since the Freedom Charter.<sup>100</sup> But the guidelines barely took into account gender inequalities, except for one clause on legal equality where it was stated that: “Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.”<sup>101</sup> According to Catherine Albertyn, by doing this the Guidelines did not take into account structural inequalities suffered by women such as poverty or unequal access to job opportunities and education.<sup>102</sup>

To face these challenges, women and men sensitive to gender issues gathered and attended different conferences. The ANCWL held a seminar in London in 1989 on the topic of feminism and national liberation.<sup>103</sup> But the most important conference was that held at Malibongwe, co-ordinated by the ANC Women's Section. It was held in January 1990 to discuss issues such as how to include gender equality in the future democratic constitution, the political participation of women, violence, education

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99 Waylen, *supra* note 96 at 9.

100Albertyn, *supra* note 91 at 46.

101*Ibid* at 47.

102*Ibid* at 47.

103Waylen, *supra* note 96 at 8.

and customary law. The final Program for Action of the conference included two important statements expressing that “national liberation in South Africa does not automatically guarantee the emancipation of women and that there is an urgent need for united action towards the formation of a national women's structure.”<sup>104</sup> According to Georgina Waylen: “Many of these ideas were incorporated into the subsequent ANC Statement on the Emancipation of Women of May 1990 which recognized that the emancipation of women was not a by-product of a struggle for democracy and had to be addressed in its own right, and pointed to the lack of women, particularly in decision-making structures within the ANC and of a strong mass women’s organization”.<sup>105</sup> However, these steps forward were not transformed into decisive change during the transition phase.

### **1.3. The Democratic Transition**

According to Georgina Waylen: “The political system was not designed in a national convention but in elite level multi-lateral and bilateral negotiations, many of them secret, between the political parties.”<sup>106</sup> Women fought through the democratic transition to secure places in the negotiating teams. In the first phase of the negotiation, a Gender Advisory Committee (GAC) was created at the convention for a democratic South Africa (CODESA). However, CODESA broke down a few months later and a second round of talks started. Agreement was reached that one of the delegates from each party, and government that formed the negotiating teams, had to be a woman. Besides, the civil society played an important role in this period for promoting the rights of women in the democratic transition. The development of an alliance of women in the Women's National Coalition (WNC) took place.<sup>107</sup> The

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104 *Ibid* at 9.

105 *Ibid* at 9.

106 *Ibid* at 15.

107 Albertyn, *supra* note 91 at 49.

WNC was launched on 25 April 1992. Its membership consisted of 70 national organizations and eight regional coalitions.<sup>108</sup>

The first goal of the WNC was to set out a political campaign to educate women about their rights. But it was also “to influence the national political process of writing a constitution and ensuring equality for women in it.”<sup>109</sup> For that purpose, the organization aimed at writing a Charter incorporating a summary of all the requests made by women all over the country during the campaign. But quickly political difficulties arose.<sup>110</sup> The political negotiations ultimately moved more quickly than the collection of women's demands and the writing of the Charter for Women's interests. As a result, neither the Charter nor the research was available for the interim Constitution. However, thanks to the inclusion of women in the negotiating team, the new Constitution included “women” as a category along with “race” not only in its preamble but also in the core of its text.<sup>111</sup>

Moreover, the political impact of the action of the WNC had some positive effects. According to Sheila Meintjes: “Gender desks within regional government departments are being established in some provinces.”<sup>112</sup> Besides, through the campaign to draft the Charter, women realized that they were able to challenge existing norms. This awareness was followed by the start of new legislative reforms, as we will see further in this thesis.

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108 *Ibid* at 50.

109 *Ibid* at 51.

110 *Ibid* at 52.

111 Shila Meintjes, "The women's struggle for equality during South Africa's transition to democracy." (1996) *Transformation-Durban* 47, online: <<http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/transformation/tran030/tran030004.pdf>>, at 47.

112 *Ibid*, at 61.

The process of transition ended with the first non-racial elections held in April 1994,<sup>113</sup> and has been seen by some authors as a landmark for women:

Few transitions to democracy have been seen as relatively successful in gender terms. South Africa is an exception. The adoption of a constitution with gender equality enshrined within it; the establishment of a package of state women's machineries; high levels of women's representation in parliament and the executive; as well as policy outcomes such as laws on domestic violence, and reproductive rights, are all seen as increasing levels of descriptive and substantive representation for women.<sup>114</sup>

This outcome was possible thanks to the ANC that played an important role in the inclusion of women in its decisions and in the consideration of gender issues after the conferences seen above.<sup>115</sup> "Because the ANC won a landslide victory as expected, gaining 252 out of the 400 seats, women formed 27.2% of the total number of elected representatives. Levels of descriptive representation in post transition South Africa have therefore been relatively high."<sup>116</sup>

Nevertheless, two shortcomings were still noticeable. First of all, the democratic transition left aside the issue of the structural inequalities that existed before and that were maintained after the fall of the Apartheid. And secondly, if South Africa succeeded in incorporating women in the rebuilding of a new democratic society, it failed to face the crimes that were committed in the past. To that extent, the country had to choose between prosecuting the people responsible for the violation of human rights or privileging forgiveness and choosing impunity over retributive justice. However, a third way was preferred between prosecution and impunity: the creation of a Truth and Reconciliation Commission. This commission was seen as a great alternative to the deficient judicial system in South Africa.<sup>117</sup> Indeed, after the fall of Apartheid, the transitional regime had to face the political and technical

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113 Waylen, *supra* note 96 at 17-18.

114 *Ibid* at 3.

115 *Ibid* at 14.

116 *Ibid* at 19.

117 See Paul Van Zyl, "Dilemmas of transitional justice: The case of South Africa's Truth and Reconciliation Commission" (1999) *Journal of International Affairs* 647.

difficulties of trying every person who was involved in the crimes committed under the previous regime. They would have had to face the cost of thousands of political trials with an insufficient number of trained detectives and prosecutors. The choice was therefore to preserve this money for trying future human rights violations in preference to those of the past.

In addition, as Paul Van Zyl writes “a country's choice of policy has as much to do with power as it does with principle.”<sup>118</sup> In the case of South Africa, the movements of liberation did not succeed in making the former government powerless. The former government retained control over military and police forces. According to the same author, the police made clear before the elections that they would not support the democratic transition if there was a risk that they would be prosecuted.<sup>119</sup> Therefore, the amnesty agreement was added to the interim Constitution, which recognised the principle that “the conflicts of the past had caused immeasurable injury and suffering to the people of South Africa and that, because of the country’s legacy of hatred, fear, guilt and revenge: ‘there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimisation’”.<sup>120</sup> Therefore, once a perpetrator had been granted amnesty, the right of the victims and/or their families to institute criminal and/or civil proceedings was extinguished.<sup>121</sup> Consequently, truth and peace were seen as the best way to look forward and to rebuild the society on a better basis, to the detriment of retributive justice.

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118 *Ibid*, at 649.

119 *Ibid*.

120 *Constitution of the Republic of South Africa Act* (S Afr) No 200 of 1993, 251 under the section “National Unity and Reconciliation”, online:

[http://www.constitutionnet.org/files/south\\_africa\\_interim\\_constitution\\_of\\_the\\_republic\\_of\\_south\\_africa\\_1994-1997.pdf](http://www.constitutionnet.org/files/south_africa_interim_constitution_of_the_republic_of_south_africa_1994-1997.pdf).

121 See section 20(7) of *Promotion of National Unity and Reconciliation Act* (S Afr) No 34 of 1995.

## **2. A Focus on Truth and Peace to the Detriment of Retributive Justice: The Truth and Reconciliation Commission**

In South Africa transitional justice mainly focused on restorative justice with the creation of the TRC.

We will see why this political choice was unsatisfactory for women victims.

### **2.1. The Work of the Truth and Reconciliation Commission**

The TRC was established in Cape Town by the new South African government by the Promotion of National Unity and Reconciliation Act of 1995.<sup>122</sup> Its mandate lasted from December 1995 to 2002. The TRC Act had as its principal goals:

The establishment of a complete picture of the causes, nature, and extent of gross violations of human rights committed during the specified period, the discovery of truth regarding these violations and the political conflict in general, the promotion of reconciliation, the granting of amnesty to obtain full disclosure and the making of recommendations in respect of reparations for the victims/survivors as well as for measures to prevent the violation of human rights.<sup>123</sup>

The Commission was empowered to grant amnesty to “persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act.”<sup>124</sup> It was funded by international sources, including the government of the United States, with a budget of about \$40 million.<sup>125</sup>

The TRC was formed of three committees. First, the Reparation and Rehabilitation Committee (RRC)

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<sup>122</sup> *Promotion of National Unity and Reconciliation Act* (S Afr) No 34 of 1995, online:

<http://www.justice.gov.za/legislation/acts/1995-034.pdf>.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, at 3 (b).

<sup>125</sup> World Bank, “Gender, Justice and Truth Commissions” (Washington: World Bank, 2006) at 11, online:

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/GJTClayoutrevised.pdf>.

whose mandate was based on the following reparation and rehabilitation policy:

- a) Redress: the right to fair and adequate compensation;
- b) Restitution: the right to the restoration, where possible, of the situation existing prior to the violation;
- c) Rehabilitation: the right to medical and psychological care, as well as such other services and/or interventions at both individual and community level that would facilitate full rehabilitation;
- d) Restoration of dignity: the right of the individual/community to an acknowledgment of the violation committed and the right to a sense of worth, and
- e) Reassurance of non-repetition: the right to a guarantee, by means of a p p ropriate legislative and/or institutional intervention and reform, that the violation will not be repeated.<sup>126</sup>

The RRC was founded by domestic law with the passage of Promotion of National Unity and Reconciliation Act No. 34 of 1995, which mandated the Commission to develop measures for the provision of reparation to those found to have been victims of gross violations of human rights. The RRC also recommended service interventions to provinces, 29% of them being related to the mental health sector.<sup>127</sup> However, no report was produced on the actual implementation of such measures.

The second committee was the Human Rights and Violations Committee, which was in charge of investigating human rights abuses that occurred between 1960 and 1990. Finally, Amnesty Committee considered applications for Amnesty in accordance with the provisions of the Act.

In the first phase of the TRC's work, even if women participated almost as much as men, they were mainly testifying about the experience of their loved ones rather than their own suffering.<sup>128</sup> They were therefore seen as secondary victims. As defined by the South African TRC “primary victims are those

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126 Report of the Reparation & Rehabilitation Committee, Volume six section 2 chapter 1, online: [http://www.justice.gov.za/trc/report/finalreport/vol6\\_s2.pdf](http://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf) at 93-94.

127 *Ibid*, at 172.

128 See Gurd & Manjoo, *supra* note 78/ See also SATRC, Vol 4, Ch 10, at 291 “close on six of every ten deponents were women, but that over three-quarters of the women’s testimonies and 88 per cent of the men’s testimonies were about abuses to men”.

victims which have experienced the gross violations of human rights directly, whereas secondary victims or dependents are those individuals articulating a form of their personal suffering as a result of the trauma experienced by the primary victim.”<sup>129</sup> Even if this fact is certainly due to the major involvement of men in the liberation because of the patriarchal structure of society, it does not give a complete picture of the actions of women against the Apartheid. The importance of women movements was key to ending the regime as seen above.

However, thanks to the determination of feminist activists and scholars, a more gender-sensitive approach was adopted in the second stage of the TRC's work. As a result, Special Hearings for women were established and were held in Cape Town, Durban and Johannesburg. The Commission also tried to change its procedure and encouraged women to speak about their own experience instead of focusing on those of people close to or related to them.<sup>130</sup> According to Oboe, even if the special hearings entitled women to speak as primary victims, “it was only a narrow set of the stories that came out of the hearings.”<sup>131</sup> Women were also able to express themselves about particular violence in other themed and issue-focused hearings. For example, “[t]he business sector hearings highlighted that all the discriminatory legislation and many practices of the apartheid system had severely undermined the opportunities for women, particularly black women, with regard to both employment in the business sector and financial activities, such as obtaining loans.”<sup>132</sup>

A gender-sensitive approach requires both staff and a budget. With those two elements, it becomes

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129 SATRC, Vol 1, Ch 5 at 367.

130 SATRC, Vol 4, Ch 10, at 285.

131 Anna Lisa Oboe, “The TRC Women’s Hearings as Performance and Protest in the New South Africa” (2007) 38:3 African Literatures 60 at 61.

132 Ayumi Kusafuka, "Truth Commissions and Gender: A South African Case Study" (2009) 2 African Journal on Conflict Resolution 9 at 56.



possible to conduct gender training for all members of staff, to appoint women to high ranking positions in the commission, and to prioritize resources in order to incorporate a gender analysis in all of the commission's work. In the TRC, an attempt was made to respect parity since seven commissioners out of seventeen were women.<sup>133</sup> According to Gurd and Manjoo “[s]pecial Hearings took into consideration issues of confidentiality and protective measures, such as in-camera hearings, testifying before only women commissioners and allowing them to remain anonymous.”<sup>134</sup> Besides, Ayumu Kusafuka notes that:

A small ‘Gender and the Truth and Reconciliation Commission’ working group of individuals such as trauma counselors and psychologists from the Gender Research Project of CALS and the Centre for the Study of Violence and Reconciliation (CSVr) was formed and met every six to eight weeks during 1996 and 1997 to discuss gender issues at the TRC and to strategise on how NGOs could intervene further, particularly in relation to a reparations policy.<sup>135</sup>

Also according to the same author, by April 1997, the TRC required itself to be more gender-sensitive while taking statements from the victims, and trained its staff to ask more “probing questions” for women in order to reveal more about their own experience.<sup>136</sup> Finally, during special hearings women could testify in front of a camera and before a panel of commissioners who were only women.<sup>137</sup> Those measures were necessary for women victims to feel comfortable testifying about a traumatic experience.

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133 World Bank, *supra* note 125, see online at:

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/GJTClayoutrevised.pdf> at 11.

134 Gurd and Manjoo, *supra* note 78 at 87.

135 Kusafuka, *supra* note 132 at 50-51.

136 *Ibid*, at 53.

137 *Ibid*, at 55.

## 2.2. The Therapeutic Effect of Testimony Before the Truth and Reconciliation Commission

It is often easier for victims of gender-specific violence to testify in front of a truth commission rather than a tribunal as the language adopted is less formal, and the emotional part of the testimony finds a more benevolent ear. However, the same limits of testifying in front of a tribunal persist. It is often hard for the victims to testify in an open space:

In opening one of the special hearings, Ms Thenjiwe Mtintso spoke about the difficulties of describing ones suffering in a public arena. Ms Mtintso had previously spoken openly in a face-to-face interview as part of the CALS research. She was not, however, prepared to speak about her personal experiences in the open hearings. She congratulated the women who were prepared to “open those wounds... The personal cost may be high. They may have to go back home and deal with the pain that has opened today.”<sup>138</sup>

Moreover, testifying about sexual abuse can often be perceived by other members of the community as revealing a lack of dignity. In the case of South Africa, this fact was re-enforced by the taboo surrounding rapes committed by the liberation forces. Ms Jessie Duarte noted the way in which the liberation movements had contributed to the silence during the 1980s, in that “if women said that they were raped, they were regarded as having sold out to the system in one way or another.”<sup>139</sup> In consequence, commissioners should be trained and prepared to deal with those particular kinds of victims and circumstances. The mandate of a TRC should also include broad definitions of what gross violation of human rights can be to include as much victims as possible. Yet, in the case of South Africa, the commission shaped women's testimonies in a way that did not allow for full healing on the part of the victims.

First of all, the TRC defined “apartheid” as “gross violations of human rights” during the period in

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<sup>138</sup> SATRC, Vol 4, Ch 10, at 296.

<sup>139</sup> *Ibid*, at 296.

which the civil war took place.<sup>140</sup> Therefore, it limited its attention to gross human rights violations emanating from the conflict of the past, rather than focusing on the Apartheid policies themselves.

The Act states that: “‘gross violation of human rights’ means the violation of human rights through – (a) the killing, abduction, torture or severe ill treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a).”<sup>141</sup> Therefore, it put a heavy emphasis on physical violence and bodily harm. One positive aspect of this was that the Commission not only “regarded rape as ‘severe ill treatment’ regardless of the circumstances under which it occurred,”<sup>142</sup> but included under this heading other gender-related abuses. This inclusion of gender-related abuses in the definition of “ill treatment” allowed the Commission to take into consideration the testimony of women who suffered from sexual abuses, such as electronic shocks on genitalia or degrading treatments during menstruation while being in jail.<sup>143</sup> The Commission also considered psychological suffering, even if it was less severe in extent. For example, Ms Sylvia Nomhle Dlamini described one of the numerous psychological pressures she suffered from the regime by explaining “how her child was taken away from her when it wanted to suckle.”<sup>144</sup>

However, absent from this conceptualization of violence were structural inequalities and disadvantages,<sup>145</sup> even if social and economic rights operated primarily in the private sphere during the

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140 Gurd & Manjoo, *supra* note 78 at 88.

141 SATRC, Vol 4, Ch 10, at 290.

142 SATRC, Vol 4, Ch 10, at 298.

143 *Ibid*, at 300.

144 *Ibid*, at 307.

145 Gurd & Manjoo, *supra* note 78 at 88.

Apartheid, and this disproportionately affected women over men.<sup>146</sup> “Women were subject to more restrictions and suffered more in economic terms than did men during the apartheid years.”<sup>147</sup> These indirect violations and violences were not covered under the definition of gross violations of human rights. A broader interpretation of “severe ill treatments” could have also allowed the TRC to take into consideration other crimes committed under the Apartheid that particularly affected women such as “forced removals, pass law arrests, alienation of land and breaking up of families.”<sup>148</sup> Indeed, “while men were usually the primary actors in the political struggle, women as wives and mothers suffered economic loss when the men in their households were detained, imprisoned or killed.”<sup>149</sup>

Moreover, by restricting the definition of gross violations of human rights to those acts associated with a “political motive”, the scope of what the commission could establish as truth was narrowed,<sup>150</sup> especially concerning rape and other forms of sexual violence; “In practice, both the Amnesty Committee and the Human Rights Violations Committee (HRVC) often struggled to draw a line between political and personal motives behind sexual violence”.<sup>151</sup> This restriction on the scope of the definition of “gross violation of human rights” can be explained by the involvement of women organizations on other fronts, such as the inclusion of democratic rights in text of the constitution, and democratic representation in the Parliament during the drafting process of the TRC legislation.<sup>152</sup>

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146 Fionnuala Ní Aoláin, et al, *supra* note 4 at 79.

147 SATRC, Vol 4, Ch 10 at 290.

148 *Ibid.*

149 Ayumi, *supra* note 132 at 50.

150 See Tristan Anne Borer, "Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa" (2009) 15 *Violence against women* 1169, online at:

<<http://carleton.ca/africanstudies/wp-content/uploads/gendered-war-and-peace.pdf>>.

151 Ayumi, *supra* note 132 at 52.

152 *Ibid* at 49.

Similar to the definition of gross violations of human rights, which was overly restrictive, amnesty was also considered only for those acts that had a political objective.<sup>153</sup> However, determining the political motive of rape, or any form of violence, can be extremely complex and problematic. As a result, Borer argues that there was no accountability for a variety of violations which reinforced women's positions of inferiority in South African society. As a result, some perpetrators of human rights violation against women were not held accountable. For example, at the Amnesty Committee hearing for Jabu Jacob Nyethe, when details of rapes were revealed, the Chairperson reminded those present that the hearing should limit the collection of testimonial evidence on rape as there was no application for amnesty against rape.<sup>154</sup>

Recognizing how gender was a constitutive component of Apartheid in South Africa helps us appreciate the value this would have had in challenging patriarchal systems.<sup>155</sup> The framework and composition of the mandate could have provided an opportunity to give serious scrutiny to issues of sexual violence. However, subcultural social norms continued to dominate how women expressed themselves, even in a comparatively safe space such as the Special Hearings. "Commissioners shaped women's testimonies. While Black women consistently testified about structural disadvantages they faced daily during Apartheid, testimonies consistently reverted back to narrow categories of sexual violence, or the suffering women endured as a result of their husbands."<sup>156</sup> Moreover, "due to time constraints statement-taking became a checklist with little space for a deponent to share her own narrative."<sup>157</sup> Finally, the TRC failed to collect the testimony of women in more remote and rural areas,

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153 Borer, *supra* note 150 at 1178.

154 Ayumi, *supra* note 132 at 58.

155 Reid, *supra* note 75.

156 *Ibid.*

157 Ayumi, *supra* note 132 at 54.

which was a big limit in the way women suffering was reported during the Apartheid.<sup>158</sup>

### **2.3. The Final Report of the Truth and Reconciliation Commission**

Gender issues were not included in the reparation policies of the TRC. Therefore the matter was left mainly to the work of support groups or NGOs, such as the CSVR as seen above.<sup>159</sup> In more positive terms, the criteria for reparations eligibility adopted by the TRC allowed for both direct victims and their "relatives and dependants – parents, spouses, children, and other dependants under the customary or legal duty of the victims"<sup>160</sup> to receive reparations. This approach was a good asset for women since, as seen before, they were mainly testifying as secondary victims during the hearings.<sup>161</sup> However “both urgent, interim and final reparation grants were available only to those who had been identified as ‘victims’ by the TRC, excluding those who had not made applications before the ‘closed’ deadline.”<sup>162</sup> Therefore, a large number of women victims could not be granted any kind of reparation.

The South African TRC’s final report summary consists of seven-volume report, released in October 1998, for the first five volumes, and March 2003, for the last two volumes. They declared Apartheid a crime against humanity. Volume 4 of the final report devoted specific attention to the context of institutional and special hearings.<sup>163</sup> The final report acknowledged many of the shortcomings that arose during the special hearings.<sup>164</sup> Despite these acknowledgments, the self-evaluation conducted by

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158 *Ibid* at 57.

159 *Ibid* at 63.

160 SATRC, Vol 5, Ch 5 at 33.

161 *Ibid*.

162 *Ibid*.

163 SATRC, Vol 4, Ch 8, at 290.

164 *Ibid*.

the Commission neglected to comment on “its ability to uncover more truth about women’s experiences or to hold perpetrators of gross violations of women’s human rights accountable for their actions.”<sup>165</sup> The commission’s final report did not address how the maintenance of violence in the aftermath of apartheid, politically, economically, and socially continued to be gendered.<sup>166</sup>

The section of the final report entitled ‘Gendered Roles and Socializations’ noted that gender is a social construct, and how roles in the public and private sphere are socially determined, commonly placing men in the public, political sphere, and women in the private, domestic sphere.<sup>167</sup> However, the final report “failed to highlight where the sources of male dominance were rooted, how institutions perpetuated violence against black women, and failed to consider how to uncover and approach policies and practices in a gendered way.”<sup>168</sup> In Volume 5, Chapter 9 (entitled ‘Reconciliation’), the report argued that the Commission focused on the past, and should have shifted its focus to the future in addressing violence against women stating that: “While violence is attributed to war, violence against women is part of the operation of patriarchy itself, and the bodies of women and children continue to be used as ‘the terrain of anger and struggle.’”<sup>169</sup>

The TRC never “analysed the links between the political struggle of the past and the ongoing high rates of sexual and domestic violence.”<sup>170</sup> As a result, the South African TRC finished its mandate over ten years ago and South African women continue to face issues of racial and gendered discrimination. The lack of proper national or international trials was seen by most people as representing a lack of justice

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165 Borer, *supra* note 150 at 1180.

166 Reid, *supra* note 75.

167 SATRC, Vol 4, Ch 10, at 292.

168 SATRC, Vol 4, Ch 10, at 290.

169 SATRC, Vol 5, Ch 9, at 418.

170 Ayumi, *supra* note 132 at 60.

for the country, and especially for women victims.

### **3. Denial of Justice and its Impact for Women in Contemporary South Africa**

I argue that the transitional justice mechanism of South Africa embellished the sense of impunity. The process of a criminal trial has the potential of providing a sense of justice for the victims. It can, among other aspects, empower them through the public recognition for their suffering. In this thesis I will focus on the impact of the denial of justice for victims of sexual violence.

According to Laura Turano, how a trial is conducted and how a judgment is delivered provide an insight into the values of a society. Thus, the trial may represent an opportunity to build respect for women in a post-conflict society.<sup>171</sup> However, in South Africa, even if the law changed concerning the victims of sexual violence, the mentalities regarding this question did not really evolve. I will focus on sexual violence since it is the most striking example, although there are of course other kinds of violence that have a different impact on women such as structural violence.

One of the main goal of transitional justice is to facilitate individual victims and the society to heal, rebuild and to restore trust and legitimacy in the State and its institutions. The mechanisms of transitional justice can also challenge the traditional structures of a society to make sure that such crimes will not occur again in the future. However, in the context of South Africa, if the TRC addressed the crimes of sexual violence, no one has been condemned for these crimes committed during the Apartheid. This lack of prosecution did not permit a full recognition of the gravity of such crimes that

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<sup>171</sup> Turano, *supra* note 8 at 1079.



mostly concern women, in a society still marked by patriarchy<sup>172</sup>.

### 3.1. Law Reforms and Gender Justice

Sexual violence is more likely to appear in so-called patriarchal societies, where there is a strong ideology of male superiority, emphasizing male honour, physical strength and domination. Men are thus more likely to commit sexual violence in communities where the concept of male honour is culturally accepted and where sexual violence remains unpunished. After the end of Apartheid, the trial of former leaders of the regime who perpetrated gender-related violence could have presented an opportunity for the entire society to consider those crimes as serious and punishable.

In South Africa, it was not until recently that sexual offences have been fully recognized in the legislation of the country. The legal definitions of sexual assault in South Africa were understood very narrowly.<sup>173</sup> Rape was defined too restrictively, as concerning cases where a man had unlawful and intentional sexual relations with a woman without her consent. Moreover, even today, not all forms of sexual violence fall within current definitions of crimes in South Africa. Sexual harassment, for example, is part of a behaviour that is considered simply a “fault”. It is treated in terms of labour law and is only included in the disciplinary codes of the institutions concerned.<sup>174</sup>

Today, however, sexual offences are dealt with in a broader regulatory framework which, in addition to

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172 See <http://theconversation.com/south-africa-needs-a-strong-feminist-movement-to-fight-patriarchy-40508>

173 R Sigsworth, *Anyone can be a rapist... An overview of sexual violence in South Africa* (Johannesburg, Centre for the Study of Violence and Reconciliation (CSV), 2009) at 8, online at: <http://www.csvr.org.za/images/docs/sexualviolence.pdf>.

174 See Lisa Vetten, “Rape and other forms of sexual violence in South Africa ” (2014) 72 Policy Brief at 44, online : <https://www.issafrica.org/uploads/PolBrief72.pdf>.

the Sexual Offences and Related Matters Act (SOA)<sup>175</sup>, also includes the Law on Criminal Procedure of 1977,<sup>176</sup> which offers a wide scheme applicable to the education sector. In addition, national instructions guide the work of the police, while the guidelines regulate the roles and duties of healthcare workers.<sup>177</sup>

The SOA, signed on 16 December 2007, broadened the definition of rape to include all acts of non-consensual penetration of a person by another. The new SOA law categorizes a greater number of acts as criminal offences such as forced rape, sexual assault, forced sexual assault, and so on.<sup>178</sup> The South African legislation now refers to 59 different sexual offences. These offences can be found in the SOA 2007, as well as provisions of the Sexual Offences Act of 1957 that has not yet been repealed.<sup>179</sup>

These changes signalled the success of women's campaigns for their rights even in the private sphere.<sup>180</sup> “The Charter has been used as a touchstone for the needs and demands of women in South Africa in policy prescriptions and in legislation”. The Commission for Gender Equality was also established in terms of section 187 of the Constitution of the Republic of South Africa to promote and protect gender equality.<sup>181</sup> However, while the law has given greater recognition and credibility to victims of sexual violence, the testimony of victims of sexual violence continues to be perceived as unreliable in criminal courts.

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175 *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (S Afr), No 32 of 2007.

176 *Criminal Procedure Act* (S Afr), No 51 of 1977.

177 Vetten, *supra* note 174.

178 Sigsworth, *supra* note 173 at 9.

179 Vetten, *supra* note 174.

180 Meintjes, *supra* note 108, at 62.

181 See website of the Commission for Gender Equality, online: <<http://www.cge.org.za/>>.

### 3.2. A Culture of Rape

We see that, currently, the rate of prosecution for rape or sexual violence is very low in South Africa, while the number of victims is very high. This lack of prosecution can be explained partly by the culture of impunity that followed the end of Apartheid and that has created a form of mistrust for the victims of rape in the judicial system. According to Clara Sandoval trials help “to improve human rights protection in countries undergoing transitions and even in neighboring countries.”<sup>182</sup> However, by not condemning the past violations women suffered during Apartheid, the State sent the wrong message. Indeed, according to Diane F. Orentlicher:

By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence. Trials may, as well, inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.<sup>183</sup>

A formal trial would have allowed for public condemnation of structural violence against women as well as of cultural ones, that usually occur in the private sphere such as sexual and domestic violence. As Payam Akhavan wrote: “Publicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behavior”.<sup>184</sup>

However, today in South Africa, even if some criminal tribunals have begun to consider that it is unfairly stereotypical to see the testimony of victims of sexual assault as unreliable,<sup>185</sup> very few victims see their damage remedied in court. The judge's suspicion of rape is manifested in several ways, and is rooted in older legal and social traditions. For example, the "hue and cry" rule, which existed before

182 Clara Sandoval, *Transitional Justice: Key Concepts, Processes and Challenges* (2011) at 5, online: [http://repository.essex.ac.uk/4482/1/07\\_11.pdf](http://repository.essex.ac.uk/4482/1/07_11.pdf).

183 Diane F Orentlicher, “Settling the Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100 Yale LJ 2535 at 2542.

184 Payam Akhavan, “Beyond impunity: can international criminal justice prevent future atrocities?” (2001) 95(1) Am J Intl L 7 at 10.

185 *S v Jackson* [1998] ZASCA 13 (SCA) para 476e-g.

the SOA was enacted, was based on the idea that "real" rape victims would speak at the earliest reasonable opportunity. Every time there was a delay between the time of the rape and the time the victim reported the facts, lawyers were able to raise doubts as to the veracity of the rape.<sup>186</sup> While the SOA of 2007 attempted to abolish this belief, judicial decisions continue to emerge which illustrate the persistence of suspicious attitudes towards rape victims. These factors contribute to the low rate of convictions for rape in South Africa.<sup>187</sup> In one study conducted by Gauteng in 2008, of the 2,068 complaints filed, 50% were arrested (50.5%), but only 42.8% of the alleged perpetrators were tried in court and only 4.1% reported cases of rape resulted in a conviction.<sup>188</sup> Looking at those who were sentenced, 15.6% received less than the minimum sentence of 10 years. Moreover, while 34 men (41%) convicted of rape were eligible for life imprisonment, this sentence was recognized in only three cases.<sup>189</sup> The criminal justice system therefore operates too rarely and inconsistently to act as an effective deterrent to sexual violence.

This example shows us the importance that trials can have in post-conflict countries in the fight against impunity. It is clear however that this is only the case if they are properly conducted and sensitive to gender and women's issues. This mechanism of transitional justice should not be discarded.

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186 Vetten, *supra* note 173.

187 L Vetten et al, *Tracking Justice: The Attrition of Rape Cases Through the Criminal Justice System in Gauteng* (Tshwaranang, South African Medical Research Council and the Centre for the Study of Violence and Reconciliation, 2008) online: <[http://www.csvr.org.za/docs/tracking\\_justice.pdf](http://www.csvr.org.za/docs/tracking_justice.pdf)>.

188 Vetten, *supra* note 174.

189 *Ibid.*

## **II. Transitional Justice in Cambodia**

Trials are expressions of the refusal to accept the violation of human rights, and contrast sharply with the behaviour of the accused. Therefore, as seen above, this pillar of transitional justice is needed to achieve a more complete justice. However, as we will see in the case of Cambodia, the trial by itself cannot be enough because it is unable to take into account the needs of all the victims, and cannot translate perfectly the suffering of a crime experienced in the flesh. Therefore, this mechanism has to be seen for what it is: one way among many for achieving holistic transitional justice.

### **1. History of Cambodia During and After the Khmer Rouge Period**

In this section I will outline the situation of women under the Khmer Rouge regime. I will then discuss the challenges faced by the population once the regime ended, and why the start of the transition of the country took so long.

#### **1.1. The Khmer Rouge Period**

The Khmer Rouge period extended from 17 April 1975 to 6 January 1979, and was infamous for the numerous violations of human rights for which it was responsible. On April 17 1975, the Khmer Rouge took control of Cambodia, renaming the country Democratic Kampuchea. Three years and eight months of communist governance followed. The people forming the Khmer Rouge were largely from the CPK (Communist Party of Kampuchea), whose first task it was to "conduct a national revolution based on the alliance of workers and peasants by gathering forces of the people ... to 'liberate' the

nation.”<sup>190</sup> Marxism-Leninism and "democratic centralism" were also incorporated in the statutes of the ruling party, and became fundamental principles of the regime. The Khmer Rouge operated by separating the population into two categories: the city dwellers who previously resided in Phnom Penh, and the peasants. The city dwellers were deported to the countryside and classified as “new people” while the peasantry was considered the ruling class and classified as “old” or “base people.”<sup>191</sup>

To fulfil the political ideals and production aims of the party, forced labour was introduced for work in rice plantations, salt fields, and the construction of irrigation systems and dams. The individual was replaced by the idea of the community, and therefore only the economic need of the country was considered relevant. Individual rights were abolished. Families were separated and personal relationships were banned or regulated. As a result many people died of starvation, overwork, and a lack of medical treatment.<sup>192</sup> The communist regime of the Khmer Rouge was not only based on the idea of collectivity, but was also based on the idea of the full control of individuals. Those who were seen as enemies of the revolution were sent to re-education centres or security centres such as the notorious S-21 security centre. “Approximately 1.7 million people died During the Democratic Kampuchea (DK) period.”<sup>193</sup>

This period is of particular concern for this thesis because of the many abuses against women that were committed. Sexual violence and rape during this period were unprecedented in the modern history of Cambodia.<sup>194</sup> Various abuses were committed. One was the result of the over controlling regulation of

190 *Judgement of the first trial for the case N°002*, affaire N° 002/19-09-2007/ECCC/TC, First instance Chamber of the Extraordinary Chambers in the Court of Cambodia (2014) (Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online:ECCC <[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_ENG.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf)> para 86.

191 Strasser et al, *supra* note 25 at 27.

192 *Ibid.*

193 *Ibid.*

194 Bridge Development-Gender by Bridget Byrne, Rachel Marcus & Tanya Powers-Stevens, “Case studies: Cambodia, Rwanda, Kosovo, Algeria, Somalia, Guatemala, Eritrea” (1995) Rapport No 35 Gender, Conflict and Development 2 at 11.

the regime. Indeed, one of the crimes recognized during the Khmer Rouge period was “moral fault”. The moral misconduct included sexual relations between a man and a woman outside marriage, pregnancy outside marriage, or rape, in which case both the victim and the raper were condemned. The penalties could range from imprisonment to the death penalty.<sup>195</sup>

The abuse that had the most dire consequences for the population on a large scale was forced marriage. This practice also resulted from the desire of the regime to control the birth rate and the population. The official aim of this practice was to produce children for the regime. The unofficial one was to get rid of minorities through the mixing of races and ethnicities. This practice concerned mainly ethnic minorities of Democratic Kampuchea, of which 67% were involved.<sup>196</sup> Once married, individuals saw themselves often forced to consummate the marriage, observed by an official member of the regime.<sup>197</sup>

Many cases of sexual favours in exchange for food, in addition to sexual slavery, were also reported, especially in security centres or during periods of displacement.<sup>198</sup> Forced prostitutions were

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195 See Nakagawa Kasumi, “Gender-Based Violence During the Khmer Rouge Regime, Stories of Survivors from the Democratic Kampuchea (1975-1979)” (2006) 2 APYIHL 46, see online: <<http://gbvkr.org/wp-content/uploads/2013/02/Kasumi-GBV-Study-2007.pdf>>.

196 Rochelle Braaf, *Sexual Violence Against Ethnic Minorities During the Khmer Rouge Regime*, (Phnom Penh: Cambodian Defenders Project, 2014).

197 Strasser et al, *supra* note 25 at 13: “119 respondents (54.1%) reported forced marriage during the regime. 96.6% of these had not wanted to marry the person they were asked to wed. Over half (59.3%) of those asked to marry tried to refuse. The majority of those who tried to refuse were subjected to verbal threats (69.4%) and to a lesser extent imprisonment (4.8%), sexual assault (3.2%) and other forms of punishment such as hard labour (12.9%). A vast majority (80.5%) of those who finally married felt forced to have sex after the wedding proceedings. Whilst in many cases (57.6%), people felt that being observed by Khmer Rouge cadre was enough to make them feel forced to have sex, 24.2% reported that they were directly ordered to have sex; some experienced verbal threats (7.6%) and others physical violence (4.5%).”

198 *Ibid*, at 14: Of the total 222 respondents, 67 (30.6%) reported having witnessed rape during the Khmer Rouge regime, whilst 10 (4.6%) of respondents reported having experienced rape outside of forced marriage directly. Several witnesses of rape confirmed that rape was committed before victims were executed ... A significant majority (85.1%) of respondents reported that Khmer Rouge cadres were the perpetrators of the rapes. According to the respondents of this study, all the perpetrators of rape were male. An overwhelming majority of victims were female (97.0%) whilst 3.0% of respondents knew about male victims.”

common<sup>199</sup> as well as bodily mutilations.<sup>200</sup> Finally, prisons and detention centres were created in Cambodia during the Khmer Rouge period to punish citizens who were seen as non-revolutionary. The S21 (Toul Slen prison) was well-known as a place where many women were tortured and sexually abused.<sup>201</sup>

Regarding the post-conflict period, the large number of deaths in men has totally reshaped the country's social structure. Women have increasingly been forced to be the heads of households, which has had a particularly significant impact on the lifestyle of families and the poverty of the country. The number of women who have not remarried is much higher than for men, reflecting both the higher number of male deaths but also the difficulty for women of remarrying in Cambodian society.<sup>202</sup>

In addition, numerous women have developed mental and physical troubles linked to the trauma of the violence endured:

A considerable number of interviewees described symptoms of 'baksbat', including nervousness, sleeping problems and headaches. 20.4% of respondents said that the experience

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199 *Ibid*, at 15: "A number of witnesses described that team leaders, military leaders or village chiefs abused their positions by organizing women for their subordinates and forcing them into prostitution. One witness reported that some women were kept to have sex with cadres in order to produce children and if the woman refused she would be killed. Two witnesses knew about forced pregnancies which resulted in the death or killing of the women victims. Another witness explained that new people were forced to provide massages and engage in sexual acts with cadres."

200 *Ibid*, at 15: "Compared to other forms of gender-based violence, a rather high number of victims of sexual mutilation were male (20.5%) according to witnesses in this survey. Cutting or squeezing the female breast, mutilating the vagina by inserting hot iron or other objects and cutting the penis were the types of mutilation mentioned by the interviewees. One witness reported seeing a man's penis cut off whilst in prison. A further witness reported that girls who refused to have sex with Khmer Rouge cadres were punished by having their vagina burned by inserting a hot iron. Five witnesses of sexual mutilation described that acts of mutilation were committed as a punishment for not complying with "Code Number Six", the Khmer Rouges' so called policy against "moral offenses"."

201 See David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prisons* (Berkeley: Univ of California Press, 1999).

202 Strasser et al, *supra* note 25 at 17-18: "Among the 119 victims of forced marriage, 68.9% revealed that they are still worrying about what others may think of them in light of the sexual violence they have experienced. 89.9% of respondents reported feeling that no one understands them. The vast majority reported that they are still suffering from feelings of shame (50.0%) and guilt (87.5%). 60.0% of respondents to this survey reported that they have never spoken about their experiences."



of violence has affected their physical wellbeing, whilst 15.2% reported that it has harmed their sexual functioning. Female respondents reported feeling on-going pain in the vagina and uterus while 5 respondents reported feeling uncomfortable when having sex.<sup>203</sup>

As a result, Cambodia is ranked second lowest in the index of development related to gender out of Southeast Asian countries after 2002. The first factor is related to the high rate of sick and injured people as a result of the war. By looking after the injured, women have found themselves unable to get involved in other activities including political activities in the life of their country. The second factor is the low rate of access to education for women and consequences such as sexual trafficking and HIV.<sup>204</sup>

## 1.2. The Period of Transition

The regime ended with the defeat of the country at the hands of the Vietnamese in January 1979,<sup>205</sup> who “installed a communist regime under the rule of Hun Sen and Heng Samrin, known as the “People’s Republic of Kampuchea” (PRK).<sup>206</sup> It took time before the international community condemned the former Khmer Rouge regime since the cold war was the political priority.<sup>207</sup> However, at the national level the rules imposed by the PRK led to the creation of three major resistance groups: the Front uni national pour un Cambodge indépendant, neutre, pacifique et coopératif (FUNCINPEC), The Khmer People's National Liberation Front (KPLNF) and the Party of Democratic Kampuchea (PDK), this last group being the new party of the Khmer Rouge under the presidency of Khieu Samphan.<sup>208</sup>

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203 *Ibid* at 17.

204 See UNIFEM, *Gender Profile of Cambodia* (2007) online:

<[https://www.jica.go.jp/english/our\\_work/thematic\\_issues/gender/background/pdf/e07cam.pdf](https://www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e07cam.pdf)>.

205 Wendy Lambourne, "Justice After Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia" (2014) 8:2 *Genocide Studies and Prevention: An International Journal* 7 at 30.

206 Lucy Keller, "UNTAC in Cambodia-from Occupation, Civil War and Genocide to Peace" (2005) 9 *Max Planck Yearbook of United Nations Law* at 134.

207 Lambourne, *supra* note 205.

208 Keller, *supra* note 206 at 135.

In 1982, these three groups formed the Coalition Government of Democratic Kampuchea (CGDK) and constituted a government in exile.<sup>209</sup> Behind the scene international interests were also involved. With the Cold War as a backdrop, the United States, the ASEAN member states, the People's Republic of China and the Soviet Union tried to promote and defend their own interests.

Until 1989, the attempts by the United Nations to find a solution to this crisis did not succeed due to the different political agendas of the member States. Finally, the Paris Peace Conference took place in 1989 from July to August,<sup>210</sup> leading to the signature of the Paris Peace agreement of 1991. Following this agreement, The Cambodian National Supreme Council (CNS), composed of representatives of the People's Republic of Kampuchea and the three parties of opposition, was declared the sole authority to ensure the sovereignty, independence and unity of Cambodia during the transition period.<sup>211</sup> The Security Council, for its part, established an administration called the "United Nations Transitional Authority in Cambodia (UNTAC)". UNTAC was created the 28<sup>th</sup> February 1992 and its role was to ensure the implementation of the Paris Agreement.<sup>212</sup> One of its main tasks was the restoration or establishment of effective state institutions. However, transitional justice and reconciliation were not on the agenda for democratic transition at the time. Besides, the organization was often criticised for being out of touch with the real concerns of the population, their priority being the organization of democratic elections while most people were farmers and living under the poverty line.<sup>213</sup> Here as well, political and civil rights were favoured over structural inequalities.

In May 1993, democratic elections were organized and 90% of Cambodians participated. The elections

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209 *Ibid*, at 136.

210 *Ibid*, at 144.

211 Lea Pelletier-Marcotte, *L'héritage de l'International: Démocratie, Primauté du Droit et Droits Humains au Cambodge 20 ans après l'APRONUC*, (2013) McGill, Thesis, at 8.

212 See website of the United Nations Transitional Authority in Cambodia, online:  
<<http://www.un.org/en/peacekeeping/missions/past/untac.htm>>.

213 Pelletier-Marcotte, *supra* note 211 at 12.

resulted in the victory of the FUNCINPEC and the writing of a new Constitution.<sup>214</sup> The mandate of the UNTAC officially came to an end on 24<sup>th</sup> of September 1993.

In 1997, Hun Sen, one of the two Prime Ministers in office between 1993 and 1997, launched a coup to take full control of the Government in Cambodia. The summary execution of FUNCINPEC ministers and the "systematic campaign of arrests and harassment" of political opponents followed.<sup>215</sup> His governance has been marked by corruption and several violations of human rights, but what is relevant for this thesis is the creation of the Extraordinary Chambers in the Court of Cambodia (ECCC), a hybrid Court working with domestic and international staff to condemn violations of human rights committed during the Khmer Rouge era. Negotiations to arrange for the trial of former leaders of the Khmer Rouge started in 1997, after Hun Sen assumed full power of the country. These efforts ended with an agreement between the Royal Government of Cambodia and the United Nations, signed on 6<sup>th</sup> of June 2003.

The transitional justice of Cambodia focused on retributive justice, and no TRC was created. So far, four cases have been brought before the ECCC.

In Case 001, Kang Kek Iew alias Duch was charged with crimes against humanity, grave breaches of the Geneva Conventions of 1949, and the domestic crimes of homicide and torture. The verdict of Case 001 was announced in July 2010 and Duch was sentenced to 35 years of imprisonment, reduced to 19 years because of time already served and compensation for prior illegal detention.<sup>216</sup>

The other four surviving senior Khmer Rouge leaders, Nuon Chea, Khieu Samphan, Ieng Sary and his wife, Ieng Thirith, were then to be tried together in a group trial as Case 002, which commenced in

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214 *Ibid*, at 14.

215 Secretary General Pierre Sane, *Open Letter to Second Prime Minister Hun Sen* (Amnesty International, 1997) Retrieved 13 February 2014.

216 Website of the ECCC, online: <<https://www.eccc.gov.kh/en/case/topic/1>>.

November 2011. The defendants were indicted on charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949 and genocide. The case includes charges of forced evacuations, forced marriage, torture, executions, enslavement and genocide against ethnic Vietnamese and Cham Muslim populations. However, in light of the complexity of the case and considering the elderly, frail condition of the accused, the Court decided to proceed with the case in a series of mini-trials, starting with charges associated with the forced evacuations of the population of Phnom Penh and other major urban centres. The charges for this stage of Case 002 were later amended to include the execution of Lon Nol leaders and loyalists at Toul Po Chrey immediately after the Khmer Rouge took power in April 1975. But the more significant charges for the victims relating to enslavement, forced marriage, torture, executions and genocide will not be considered until future mini-trials have taken place.<sup>217</sup>

Case 003 and 004 are still under investigation. Case 004 is of particular interest for this thesis as the Court may take into account the crime of rape outside the context of forced marriage.<sup>218</sup> These two cases are of particular sensitivity since the Prime Minister Hun Sen warned of the possibility of civil war if more former Khmer Rouge are made to stand trial.<sup>219</sup> Moreover, “[s]ome U.N. jurists have even accused their Cambodian counterparts of obstructing their work on cases 003 and 004.”<sup>220</sup>

The ECCC has provided the opportunity for numerous victims to testify about the crimes they endured under the Khmer Rouge regime. In addition to being able to appear as witnesses, victims of crimes, falling within the jurisdiction of the court, are able to lodge complaints with the ECCC, to be represented by prosecuting lawyers, and to claim collective and moral reparations. The rights of civil

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217 Website of the ECCC, online: <<https://www.eccc.gov.kh/en/case/topic/2>>.

218 Website of the ECCC, online: <<https://www.eccc.gov.kh/en/articles/international-co-prosecutor-requests-investigation-alleged-sexual-and-gender-based-violence>>.

219 Kuch Naren, “Hun Sen Warns Of Civil War If ECCC Goes Beyond ‘Limit’” (2015) *The Cambodian Daily*, online: <<https://www.cambodiadaily.com/archives/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/>>.

220 *Ibid.*

parties rights in terms procedure and representation are similar to those of the prosecution and defence before the ECCC. Therefore, civil parties are able to exercise a wide range of procedural rights.<sup>221</sup> However, the ECCC failed in taking into account the needs of women victims.

## 2. The Needs of the Victims and the Requirements of Due Process

There is evidence that populations emerging from conflict have a higher risk of developing mental disorders, as defined by the 5th Diagnostic Manual of Psychiatry (DSM-5) or the International Classification of Diseases in its 10th revision (ICD-10). Individuals living in post-conflict societies are thus more likely to develop Post-Traumatic stress disorders (PTSD) in particular.<sup>222</sup> Post-traumatic stress disorders are defined in DSM-5<sup>223</sup> as consequences of exposure to a threat of death, serious

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<sup>221</sup> Strasser, et al, *supra* note 25 at 29:

they can be interviewed during the investigating phase

the Trial Chamber can personally hear them, however given the high number of civil parties at the ECCC, there is only a limited number of civil parties who will give a statement in Court on the facts of the indictment and/or their sufferings.

They have full access to the electronic case files, including confidential parts, and can respond to all applications submitted by the other parties to raise any legal or factual matters proprio motu, thus by their own initiative./

civil parties have the right during the investigation phase to submit investigative requests to the Co-Investigating Judges in order to get cases of sexual violence addressed and investigated at the ECCC. The civil parties mainly used this right in Case 002 in order to get sexualized violence investigated. /

During the trial phase, the most important right of Civil Parties is the questioning of the accused, witnesses, other civil parties and experts through their lawyers./

Civil parties can also submit their own witness, civil party or expert lists to the Trial Chamber in order to ensure the civil parties are heard and other evidence is introduced. Questioning does not need to be linked to a specific personal interest either. Nevertheless, this right, which is unlimited in its application under both the applicable Cambodian Procedure Code and the Internal Rules, was restrained by the Trial Chamber in Case 001. The Trial Chamber ruled that civil parties are neither allowed to question witnesses who testify on the character of the accused, nor experts who examine the mental health of the accused and his culpability. The Trial Chamber determined the role of civil parties to foremost be about seeking reparations and, as a result, limited their participation rights to addressing only the guilt of the Accused but not on matters related to sentencing. The Trial Chamber limited the role of civil parties to making submissions only on matters for which they demonstrate a personal interest. Such matters include consideration of the proof of guilt of the Accused for their crimes and the issue of reparations.

<sup>222</sup> See Daryn Reicherter & Alexandra Aylward, “The Impact of War and Genocide on Psychiatry and Social Psychology” in Beth Van Schaack, Daryn Reicherter, Youk Chaang & Autumn Talbott, dir, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Volume on Cambodia's Mental Health, 2011) at 14.

<sup>223</sup> American Psychiatric Association, dir, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Washington,

injury or sexual violence, both as a direct victim and as a witness to the traumatic event. The symptoms are diverse but often manifested in the form of reliving the traumatic event, avoidance of stimuli related to trauma, blunting of general reactivity, and hypervigilance.<sup>224</sup> Although the legitimacy of the application of PTSD to other cultures is still questioned,<sup>225</sup> Professors Boehnlein and Kinzie note that the analysis of symptoms suffered by Cambodian refugees fleeing from the Khmer Rouge regime, using the version of Cambodian study of the "Harvard Trauma questionnaire", makes it possible to conclude that the notion of PTSD is valid in describing the disorders experienced by these persons.<sup>226</sup>

The DSM-5 also notes that certain parts of the population are at particular risk of developing these mental disorders. The manual emphasizes that women are more likely to suffer from post-traumatic stress disorder than men and generally suffer for longer. This is due in particular to the strong exposure of women to violent behavior such as rape and inter-personal violence.<sup>227</sup> In the case of Cambodian women, they faced two forms of stigmatization after the fall of the Khmer Rouge regime. On the one hand, in a society still qualified as patriarchal, they were often marginalized because of the shame of the sexual violence they underwent.<sup>228</sup> On the other hand, they had to deal with the shame of subsequently developing a mental disorder.<sup>229</sup> In the Khmer culture mental disorders being designated by the pejorative term "Ckuot" which means that someone is "disturbed" or "crazy."<sup>230</sup>

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Londres: American Psychiatric Publishing, 2013) *sub verbo* "Trauma-and Stressor-Related Disorders".

224 S Megan Berthold & Gerald Gray, "Post-Traumatic Stress Reactions And Secondary Trauma Effects At Tribunals: The ECCC Example" in Beth Van Schaack, Daryn Reicherter, Youk Chaang et Autumn Talbott, dir, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Volume on Cambodia's Mental Health, 2011) at 92.

225 M Eisenbruch, *From Posttraumatic "Stress Disorder to Cultural Bereavement: Diagnosis of Southeast Asian Refugees"* (1991) 33:6 Soc Sci & Med 673 92 at 95.

226 James K Boehnlein & J David Kinzie, "The Effect of the Khmer Rouge on the Mental Health of Cambodia and Cambodians" in Beth Van Schaack, Daryn Reicherter, Youk Chaang & Autumn Talbott, dir, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Volume on Cambodia's Mental Health, 2011) at 34.

227 American Psychiatric Association, *DSM-5*, *supra* note 223 at 265.

228 See Duong Savorn, *The Mystery of Sexual Violence under the Khmer Rouge Regime* (Phnom Penh: Cambodian Defenders Project, 2011).

229 See Daniel McLaughlin & Elisabeth Wicker, *Special Report: Mental Health and Human Rights in Cambodia*, (New York: Leitner Center for International law and Justice, 2012).

230 S Megan Berthold & Gerald Gray, *supra* note 224 at 103.

It is, therefore, important for these victims that the ECCC take into account their pain, and accompany them in their healing process by recognizing their experiences. Indeed, in the context of transitional justice, trials have an additional objective: the simple goal that "justice be done". They also help to care for the victims.<sup>231</sup> However, the ECCC is not always the best-suited mechanism of transitional justice for answering the needs of victims, as will be seen below.

## 2.1. The Psychological Support Given to the Victims

Victims who suffer from gender-related violence need to be supervised and protective measures are often the optimal solution. The ECCC can follow the example of what has been done in other international criminal courts. In the rules of procedure and evidence of the International Criminal Court (ICC) (at arts 87 and 88), specific measures for the protection of victims of sexual violence are set out, such as hearings behind closed doors. Moreover, no corroboration is needed for crimes of sexual violence according to the article 63(4), and the clerk of the Court should take measures to facilitate the participation of the victims of sexual violence at any stage of the procedure (art 16(1)(d)). Besides measures centering on the victims, the staff of the Court should be prepared to deal with gender-related violence. Therefore, the prosecutor should designate specialists in gender based violence in addition to a unit specialized in gender related crimes for victims and witnesses should be created (art 17).<sup>232</sup>

The Statute of Rome provides for parity in the composition of the Court and specifies that some judges should be specialized in certain areas of law, such as violence concerning women and children. According to the article 54, for the investigative or prosecution phases, the prosecutor must take into

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231 Kora Andrieu, "qu'est ce que la justice" (delivered at the IEJ of Strasbourg, 2014) at 37:40, online: [https://www.youtube.com/watch?v=oGUAY\\_xLbGA](https://www.youtube.com/watch?v=oGUAY_xLbGA).

232 UN Women, *supra* note 14 at 9-10, online: <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2012/10/wpssourcebook-06b-transitionaljusticework4women-fr.pdf>.

account the type of the victim and the crime to which the victim has suffered. A presence of women at every stage of the trial is important for the female victims as they will be more sensitive to the gender-related crimes. They will also be more accessible for talk and communication with women organizations. Finally, the rules of procedure and evidence of the ICTY also give protection to the victims of sexual violence. Article 69(A) allows for the non-disclosure of the identity of a victim or witness if he or she remains in danger. Article 75 allows witnesses to testify by using a camera.

Victims suffering from sexual violence must be mentored and accompanied throughout the legal process. This framework has been encouraged by the United Nations<sup>233</sup> and put in place by the International Criminal Court.<sup>234</sup> Before the ECCC, victims of sexual violence who seek to become civil parties have the same rights as the defence at the trial as seen above. However, equality of rights during proceedings is often insufficient to meet the needs of victims of sexual violence. Therefore, the ECCC set up a "Witness and Experts Support Unit" (WESU) and a Victims' Support Section (VSS). WESU assists all witnesses in court proceedings and, like the VSS, consults with the Co-Judges and the Chambers on the relevance of the measures to be adopted for the victims.<sup>235</sup> The VSS, however, is the main intermediary between the civil parties or their representatives and the Court. Among its other responsibilities, the VSS is responsible for supporting civil party participation in the trial.<sup>236</sup> Although

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233 *Report of the Special Rapporteur on Violence Against Women, Mission to Sierra Leone*, UNHRCOR, 2002, UN Doc E/CN.4/2002/83/Add; *Report of the High Commissioner for Human Rights, pursuant to Human Rights Council Resolution 9/11*, UNHRCOR, 2009, UN Doc A/HRC/12/19 paras 60-61.

234 Articles 16 to 19 Of the Rules of Procedure and Evidence of the International Criminal Court (ICC) set the tone by establishing the competence of the Victims and Witnesses Division. Article 16(1)(d) provides that: "En ce qui concerne les victimes, le Greffier assume les fonctions suivantes conformément au Statut et au Règlement: Dans le cas de victimes de violences sexuelles, prendre des mesures sexo-spécifiques pour faciliter leur participation à toutes les phases de la procédure."

235 Rule 29 of the internal rules of the ECCC, Rev 8, online: [https://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20\(R%20Rev.8\)%20English.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(R%20Rev.8)%20English.pdf).

236 John D Ciorciari & Anne Heindel, "Trauma in the Courtroom", in *Beth Van Schaack, Daryn Reicherter, Youk Chaang & Autumn Talbott, dir, Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Volume on Cambodia's Mental Health, 2011) 122 at 136.



the ECCC does not mention psychosocial support measures for victims,<sup>237</sup> in practice this work is undertaken entirely by the Transcultural Psychosocial Organization (TPO), which signed a Memorandum of Understanding with the Court in 2007.<sup>238</sup> TPO trains ECCC staff and provides victims with a psychological briefing prior to the procedure, monitors participants' mental health, provides emotional support during the trial, and interviews victims after the process is completed.

At the beginning of Case 001, there were no mental health professionals available in the courtroom because only TPO staff were allowed to be present during the testimony of some victims. Moreover, In Case 001, the supervision of victims suffering from PTSD was incomplete. Judges of the ECCC have had advanced access to legal training organized by the United Nations Development Program.<sup>239</sup> Unfortunately, they declined the offer of psychosocial training.<sup>240</sup> Nevertheless, such training appears to be paramount in enabling victims suffering from mental disorders to be better understood by judges when they testify before a tribunal.

However, after much criticism, TPO staff are now invited to sit beside the civil parties in the courtroom,<sup>241</sup> which will facilitate the testimony of rape victims in Case 002/02. The ECCC needs to take a step further by allowing these victims to testify anonymously when circumstances warrant it. The courts, in weighing the rights of victims with the rights of the accused, often denied victims the

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<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> See Suzannah Linton, "Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers" (2006), 4 *J Int'l Crim Just* 327.

<sup>240</sup> D Ciorciari & Heindel, *supra* note 236 at 135.

<sup>241</sup> Voir Judith Strasser, Julian Poluda, Chhim Sotheara & Phuong Pham, "Justice And Healing At The Khmer Rouge Tribunal: The Psychological Impact Of Civil Party Participation" in Beth Van Schaack, Daryn Reicherter, Youk Chaang & Autumn Talbott, dir, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Phnom Penh: Volume on Cambodia's Mental Health, 2011) at 158.

benefit of testifying anonymously.<sup>242</sup> Moreover, allowing victims of sexual violence to testify via videoscreen in order not to face their offender is often advised and is a practice widely used by other international tribunals.<sup>243</sup>

## 2.2. Determining the Guilt of the Accused

If international tribunals have included rape as a crime under international law, the fact remains that the definition is often variable and subject to debate. As seen above, *Akayesu* was the first judgment to define rape and sexual violence. It defines the act of rape as follows:

The central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. ... The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.<sup>244</sup>

This rather broad definition of rape has not always been followed. In the *Furundzija* decision of the ICTY, the judges defined rape using objective elements:

- I) The sexual penetration, however slight;
  - a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - b) of the mouth of the victim by the penis of the perpetrator;
- II) By coercion or force or threat of force against the victim or a third person.<sup>245</sup>

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242 D Ciorciari & Heindel, *supra* note 236 at 130.

243 Regarding the International Tribunal for the Former Yugoslavia: *Prosecutor v Delalic* (Celebici Judgment), IT-96-21, Judgment (29 April 1997) (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber); in the context of the Special Court for Sierra Leone: *The Prosecutor v Sesay*, SCSL-2004-15-T, (5 July 2004) (Special Court for Sierra Leone, Trial Chamber); and for the International Tribunal for Rwanda: *Prosecutor v Nsabimana*, ICTR-97-29A-T, (8 September 2000), para 42 (International Criminal Tribunal for Rwanda). In respect of the International Criminal Court, The ICC does not explicitly protect victims from a confrontation with the accused, but the rules of procedure and evidence require judges to be "vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation," particularly in cases of sexual violence.

244 *Akayesu*, *supra* note 28, paras 596 and 597.

245 *Furundzija*, *supra* note 30 para 185.

The ICTY, in its judgment *Prosecutor v. Kunarac*, concludes that:

In international law, the material element of the crime of rape comprises: sexual penetration, however slight: a) of the vagina or anus of the victim by the penis of the rapist or any other object used by him; or b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. The Consent for this purpose must be given voluntarily and must result from the exercise of the free will of the victim, assessed regarding the circumstances. The moral element is the intention to effectuate this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>246</sup>

The Chambers abandon the use of force against the victim, or the threat of force against the victim, in order to retain, as the *mens rea* component of the crime of rape, the absence of consent of the victim. These jurisprudential changes in the definition of the material and moral elements of the crime of rape do not always allow the victim to see her injury repaired. The current relevance of accounting for rape as a crime against humanity is evidenced by the differences between the early and later jurisprudence of the ICTY and ICTR on the scope of the concept.

Besides this debate on the scope of the definition of rape, articles 70 and 71 of the Rules of Procedure and Evidence of the International Criminal Court contain provisions regarding the consent of the victim and her past behaviour in cases of sexual violence.<sup>247</sup> Richard J Goldstone emphasizes that while evaluating the conduct of the victim in the light of a defence based on consent, the court should require some affirmative speech or action indicating consent from the victim, rather than be satisfied with inferences from passivity or acquiescence.<sup>248</sup> The court must, in addition, determine the age for which consent may be given properly. Decisions of the International Criminal Court demonstrate the

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<sup>246</sup> Kunarac, *supra* note 32 para 460.

<sup>247</sup> Richard J Goldstone & Estelle A Dehon, "Engendering Accountability: Gender Crimes Under International Criminal Law" (2003) 19 New Eng.J Pub Pol'Y 121 at 136: "It cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent."

<sup>248</sup> *Ibid*, at 133: "It is further hoped that in evaluating the conduct of the victim in the light of a defence of consent, the Tribunals will require affirmative speech or action indicating consent on the part of the victim, rather than be satisfied with an inference from passivity or acquiescence."

difficulties of the use of the notion of consent in times of conflict. The use of the concept in this context differs from in times of non-conflict. For example, the term “non-consensual sexual relationship” is a term that is interpreted more restrictively in times of conflict.<sup>249</sup> Moreover, it is sometimes difficult to obtain proof of the consent of the victim. Finally, in February 2008, the Special Court for Sierra Leone became the first international criminal tribunal to recognize “forced marriage” as a distinct crime.<sup>250</sup>

The ECCC took a while before recognizing that the crime of rape was committed under the Khmer Rouge regime. The widespread perception was that the Khmer Rouge did not legally permit this crime. Hence, the sexual gender-based violence was under-investigated in Case 001 and Case 002 and was not part of the prosecutorial strategy.<sup>251</sup> This lack of recognition of the crime of rape is also common in other international criminal tribunals. For example, according to one observer of the ICTR on the tenth anniversary of the Rwandan genocide: "The ICTR had delivered 21 judgments: 18 convictions and three acquittals. In 90 percent of those judgments, an overwhelming majority did not provide rape conviction. More worryingly, we see that there have been twice as many acquittals for rape as rape convictions. No rape charge has even been adopted by the Office of the Prosecutor in 70 percent of cases."<sup>252</sup>

In Case 001, only one charge of rape falling within the category of crimes against humanity was

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249 Laura Turano, *supra* note 8 at 1059.

250 *Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Appeal Judgment, SCSL-2004-16-A, (2008) (Special Court for Sierra Leone).

251 Strasser, et al *supra* note 25 at 31.

252 UN Women, *supra* note 14, at 8.

retained against Duch,<sup>253</sup> who was found guilty of the crime.<sup>254</sup> However, the detention centre S-21 was known as a place where many women had been sexually abused and tortured.<sup>255</sup> The Trial Chamber legally qualified this as a case of rape, and as a crime of torture falling within the definition of a crime against humanity.<sup>256</sup>

In Case 002/02, the crime of rape was taken into account in forced marriages.<sup>257</sup> In this case, the crime of rape outside forced marriages was not considered.<sup>258</sup> The Co-Prosecutors having reached the conclusion that "the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators,"<sup>259</sup> they could not be blamed for the regime's policy of committing mass rape. On January 13, 2011, the Pre-Trial Chamber followed the same reasoning as the Trial Chamber in Case 001. The Chamber ruled on the appeal filed by the defence against the Closing Order of the investigating judges and accepted the argument of the defence that "rape did not exist as a separate crime against humanity between 1975 and 1979."<sup>260</sup> Consequently, the Pre-Trial Chamber withdrew the term "rape" from

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253 Rape perpetrated by an interrogator of the detention centre S-21 against the former teacher of Dutch, Affaire No. 002/14-08-2006, ECCC Doc No D99, 8 August 2008, paras 105, 137.

254 *Judgment*, Affaire No 001/18-07-2007/ECCC/TC, Trial Chamber of the Extraordinary Chambers in the Court of Cambodia, Doc No *E188* (26 July 2010) at paras 366, 559 (Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online: ECCC  
<[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf)>

255 Chandler, *supra* note 201.

256 Strasser et al, *supra* note 25 at 32.

257 Theresa de Langis, "A Missed Opportunity, a Last Hope ? Prosecuting Sexual Crimes Under the Khmer Rouge Regime" (2014) 3 Cambodia Law and Policy Journal, see online at : <<http://cambodialpi.org/article/a-missed-opportunity-a-last-hope-prosecuting-sexual-crimes-under-the-khmer-rouge-regime/>> .

258 Katrina Natale, *I Could Feel My Soul Flying Away From My Body: A Study on Gender-Based Violence During Democratic Kampuchea in Battambang and Svay Rieng Provinces* (Phnom Penh: Cambodian Defenders Project, 2011) at 22.

259 *Case 002 Closing Order*, Case n° 002/19-09-2007-ECCC-OCIJ, Office of the Co-Investigating Judges, Doc n° *D427* (15 September 2010) at para 1429 (Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online ECCC <<https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>>.

260 *Decision de la Chambre preliminaire relative aux appels interjetes par Ieng Thirith et Nuon Chea contre l'Ordonnance de cloture*, Dossier n° 002/19-09-2007-ECCC/OCIJ, PTC 145 & PTC 146, Doc n° *D427/3/12* (13 January 2011) at para 11(2) (Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online: ECCC  
<[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427\\_3\\_12\\_FR.PDF](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_3_12_FR.PDF)>;

*Decision de la Chambre preliminaire relative a l'appel interjete par Ieng Sary contre l'ordonnance de cloture*, Dossier n° 002/19-09-2007-ECCC/OCIJ, PTC 75, Doc n° *D427/1/26* (13 January 2011) at para 72 (Extraordinary Chambers in

paragraph 1613 [alinea g) of the Closing Order as a crime against humanity. However, the judges found that international customary law did not prohibit rape as a crime against humanity if it fell within the category of other inhumane acts.<sup>261</sup> This definition of rape is the same as that used in the *Akayesu* jurisprudence. However, Co-Prosecutors have tried to extend the notion and have deplored its narrowness. They have argued that it would have been appropriate for the ECCC to retain the notion of rape as a separate crime against humanity, this definition finding its origins in international customary law.<sup>262</sup> They report that "although there was no universal codification of rape as a crime against humanity between 1975 and 1979, the information needed to reach the conclusion that rape was punishable as a crime against humanity under international customary law was public and easily accessible."<sup>263</sup>

The difficulty of agreeing on the extent of the notion of rape, after the act has taken place, means that the victim is often frustrated by the inadequacy of the punishment of the perpetrator in light of the suffering they endured.

### 2.3. The Proportionality of the Sanction

During the trial, Duch confessed, admitted responsibility, and sought forgiveness for his role in the running of S-21 and the crimes that were committed there. This is an excerpt from one of Duch's

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the Court of Cambodia, Pre Trial Chamber) online ECCC

[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427\\_1\\_26\\_FR.PDF](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_1_26_FR.PDF) ;

*Decision de la Chambre preliminaire relative a l'appel de Khieu Samphan contre l'Ordonnance de cloture*, Dossier n° 002119-09-2007-ECCC/OCIJ, PTC 104, Doc n° D427/4/7 (15 Novembre 2010) at para 2(2) ( Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online ECCC  
[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427\\_4\\_7\\_FR.PDF](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_4_7_FR.PDF).

261 *Ibid.*

262 See, *Réponse à la demande des co-procureurs relative à la requalification des faits constitutifs de viol*, Dossier n° 002/19-09-2007-ECCC/TC, Chambre de Première Instance, Doc n° E99/3 (22 July 2011) (Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online ECCC

[https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E99\\_3\\_FR-1.PDF](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E99_3_FR-1.PDF).

263 *Ibid.*, para 24.

apologies from 16 September 2009: “Please allow me to offer my apology to all the victims who were subjected to the utmost suffering at this place [S-21] until the day they lost their lives or until 7 January 1979. I would like to offer my apology to the victim’s families who have been living in pain for the past 33 years without their beloved family members and who have not yet obtained justice.”<sup>264</sup> However, the confession by itself is insufficient to help the victims going through the healing process.

Most of the civil parties needed reparations. However, claims for reparations were rejected because Duch was found to be old and weak in the first trial. Moreover, due to a lack of money, the Supreme Court Chamber also decided, on appeal, “to compile and post on the ECCC website all statements of apology and acknowledgement of responsibility made by Duch during the course of the ECCC proceedings.”<sup>265</sup> The Court’s first reparations award issued in May 2012 also provided for the names of the civil parties and immediate victims to be listed in the final judgement. Other collective reparations sought by the victims included access to free medical care and funding for educational programs about both S-21 and the Khmer Rouge, as well as the erection of memorials and pagoda fences. However, financial reparations were not granted to any victim. We see the same pattern in Case 002/01.<sup>266</sup>

Besides, it cannot be emphasized enough that sexual violence is not limited to rape. According to a report by the Transcultural Psychosocial Organization (TPO) and the United Nations,<sup>267</sup> many women suffered from mutilation, sexual humiliation and sexual abuse during the Khmer Rouge era. In terms of numbers, of the two hundred and twenty-two respondents, fifty-three of them witnessed sexual abuse

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264 See Lambourne, *supra* note 205.

265 See *Appeal Judgement case 001*, Affaire No 001/18-07-2007-ECCC/SC, Supreme Court Chamber of the Extraordinary Chambers in the Court of Cambodia (2012) (Extraordinary Chambers in the Court of Cambodia, Pre Trial Chamber) online:ECCC <<https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>>.

266 Judgement of the first trial for the case N°002, First instance Chamber of the Extraordinary Chambers in the Court of Cambodia, *affaire N° 002/19-09-2007/ECCC/TC* (2014).

267 See Strasser & Poluda, et al, *supra* note 241 at 149.

or humiliation. However, the jurisprudence of the ECCC, in line with the jurisprudence of international criminal tribunals, concentrates only on rape. This limitation excludes many victims of sexual violence, in the broad sense of the term, from the right to legal redress.<sup>268</sup> It also excludes women who were victims of other kinds of violence, such as structural violence and whose consequences are different from those faced by men because of the society in which they live.

Finally, the ultimate challenge is to find out *who* to sanction. According to an Indonesian victim “selective justice is not exactly Justice.”<sup>269</sup> In the context of an international trial, different challenges arise when it comes to designating the accused. First of all, in the context of mass violations of human rights, it is often difficult to designate only one person as responsible for the crimes committed. One way to judge everyone would be to divide the work between international courts and national courts. However, in the case of Cambodia, political and economic difficulties prevented the government from trying other persons involved in the Khmer Rouge genocide.<sup>270</sup>

Secondly, the autonomy of the suspect is not the same in the situation of a crime against humanity or a crime of genocide as for a domestic law crime. Often those who commit these crimes obey an order or succumb to social pressure, hence the issue of assigning responsibility.<sup>271</sup> Geoffroy de Lagasnerie notes that “the State and international criminal law respond by directing our gaze to individuals rather than collective phenomena.”<sup>272</sup> That is why accountability for serious violations of international

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268 This is an issue regarding international law. See *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l’homme et de violations graves du droit international humanitaire*, Res AG 60/147, UNAGOR, 2006, 60e sess, Doc NU 60/147.

269 Miriam Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice” (2002) 15 Hum Rts Q 39 at 54: “[it] will have to be a very selective justice and, of course, selective justice is not exactly justice.”

270 See Naren, *supra* note 219.

271 See Arendt, Hannah, *Eichmann in Jerusalem* (Penguin, 1963).

272 Geoffroy de Lagasnerie, “Le tribunal apparaît comme un des lieux les plus violents de la vie sociale”, *Libération*, (15



humanitarian law is always intensely political. Efforts to open a third case and try lower level leaders “have been thwarted by the Cambodian government and national ECCC prosecutors, although investigations are continuing in the hands of the international prosecution.”<sup>273</sup>

In addition, the temporal jurisdiction of the ECCC means it cannot prosecute crimes perpetrated by the Lon Nol government which preceded the Pol Pot regime, nor address the role of foreign governments in aiding the Khmer Rouge, nor crimes allegedly committed in subsequent years by Hun Sen and the government installed by the Vietnamese.

## **2.4. The Danger of Revictimization**

The role of a criminal tribunal is not to heal the victim but to determine whether the accused is guilty or not. The obstacles for victim testimony are many: the working language of the court is different from that used by the victim, the location of hearings is sometimes far from where the victim lives, and the cost of justice is often too high.<sup>274</sup> The questions put by the judge can be too insistent and go too far into the detail of what happened.

One of the symptoms of PTSD sufferers is a decrease in the ability to concentrate. This reduction has made it difficult for some victims to concentrate on the questions asked by judges or to defend themselves and provide a relevant response.<sup>275</sup> In addition, some victims are reluctant to remember the facts related to the traumatic event, which affects their ability to give full and detailed testimony.<sup>276</sup>

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January 2016), online: <[http://www.liberation.fr/debats/2016/01/15/geoffroy-de-lagasnerie-le-tribunal-apparaît-comme-un-des-lieux-les-plus-violents-de-la-vie-sociale\\_1426684](http://www.liberation.fr/debats/2016/01/15/geoffroy-de-lagasnerie-le-tribunal-apparaît-comme-un-des-lieux-les-plus-violents-de-la-vie-sociale_1426684)>.

273 Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* (Greenwood Publishing Group, 2005) at 182.

274 UN Women, *supra* note 14.

275 S Megan Berthold & Gerald Gray, *supra* note 224 at 102.

276 *Ibid* at 102.

Victims therefore had difficulty recalling precise details relating to the event (such as the date on which the rape took place or the exact location of the incident). One of the most striking examples, although not directly related to sexual violence, is that of Ly Hor, a civil party at the trial. At the time of testifying, Ly Hor was particularly confused and could not give a convincing account of events. Although material evidence – a written confession from the S-21 Detention Center – corroborated his testimony and proved that he had been a detainee at the centre, he was not taken seriously by the judges. Ly Hor had difficulty understanding the questions asked, in particular answering them in a sensitive way. Judge Silvia Cartwright lamented that the civil party was not sufficiently prepared for testifying at trial and the Trial Chamber dismissed the admissibility of Ly Hor's testimony.<sup>277</sup>

Faced with the coldness and incomprehension of the judges, additional trauma can be triggered in victims suffering from PTSD who see their version of the truth questioned. According to Jamie O'Connell: "Judicial proceedings may challenge victims' account of what happened, and they exacerbate their loneliness, alienation, confusion about what happened, and sense that they might be responsible for the horrors that befell them."<sup>278</sup>

Besides, the suspect has the right to face the person who accuses him or her.<sup>279</sup> This confrontation can result in mental harm to the victim. Several studies suggest that the confrontation between the victim and his or her offender during a trial may have a traumatic effect on someone already suffering from PTSD and related disorders. This is all the more so in cases of violence perpetrated by the accused himself on the victim,<sup>280</sup> as in the case of rape. Beyond the fear of retaliation, the testimony of the victim in such circumstances poses different problems. In the course of Duch's trial, many victims, at

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277 John D Ciorciari & Anne Heindel, *supra* note 236 at 131.

278 *Ibid* at 128.

279 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art 14(1); (entered into force 23 March 1996).

280 John D Ciorciari & Anne Heindel, *supra* note 236 at 127.

the time of testifying, were confronted with their offender for the first time after more than thirty years. This confrontation reactivated the symptoms associated with their post-traumatic stress disorder.<sup>281</sup> These symptoms did not allow some victims to give a coherent and convincing testimony, especially when the judges facing them became impatient of the lack of rigour of the evidence given. This sense of disability plunged these victims into greater helplessness and vulnerability than before the trial. The difficulty victims suffering from PTSD had in concentrating was often accompanied by untimely flashbacks provoked by the confrontation of the victim with the perpetrator.<sup>282</sup> Moreover, because the judgements came thirty years later, some accused persons died before the final judgement was rendered in Case 002/01, leaving the victims without the satisfaction of seeing the crime publicly recognized. Besides, the timing of the second mini-trial, Case 002/02, is in question because of a lack of funding. There are justifiable fears that the accused may not live long enough to be tried and convicted in this Case.

Therefore, many aspects of a fair trial cannot be changed without addressing the fundamental nature of the institution. Treating the wounds of witnesses and victims should not be a matter of trial only. Victims of gender-related violence need a person to listen to their own suffering, and not just an impartial arbiter who is responsible for establishing the facts. Here, the law that transitional justice recognizes is inadequate. It is therefore important to supplement judicial mechanisms by other, extra-judicial mechanisms not just to heal victims individually but also to heal the entire society.

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281 S Megan Berthold & Gerald Gray, *supra* note 224 at 100.

282 John D Ciorciari & Anne Heindel, *supra* note 236 at 130.

### **III. “Holistic” Transitional Justice**

In this Chapter, I will argue for a more gender-sensitive approach in the mechanisms of transitional justice. I will then consider how more effective holistic transitional justice could be accomplished.

#### **1. The Case for a Gender-Sensitive Approach in Transitional Justice**

The mechanisms of transitional justice must individually take into account the gender-violence suffered by the victims. But above all, they must give these victims tools to be able to look calmly towards the future. This includes both democratic and socio-economic reforms.

##### **1.1. Truth and Reconciliation Commissions**

In advance of the establishment of the TRC, women must participate in the setting up and drafting of the mandate of TRCs. Civil society can help challenge the norms and the structure of future TRCs. By ‘civil society’ I mean “the range of non-state actors that engage with justice discourses and processes and seek to influence them in some way, whether they are NGOs, civic associations, networks, social movements, media, or individuals that shape the public conversation.”<sup>283</sup> Women from civil society should be engaged in dialogue leading up to the establishment of a TRC. A dialogue which engages with them directly would allow future commissioners to learn more about their needs and expectations in the context of a post-conflict period. Encouraging women to participate in the transitional process is also recommended by the United Nations:

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283 Iavor Rangelov, *Transitional Justice and Civil Society: A Research Agenda* (London: report of London School of Economics and Political Science, and Co-Chair of the London Transitional Justice Network, 2013) at 3, online: <<http://www.securityintransition.org/wp-content/uploads/2013/10/TJ-and-CS-Disc-Paper-Iavor.pdf>>.

The need to include women in all aspects of post-conflict reconstruction and peace-building is a fundamental pillar of resolution 1325 (2000) of the Security Council. In addition to respect democratic principles of inclusion and representation, women's participation in the design of transitional justice programs is simply a good practice because it is not possible to design mechanisms that are effective without the contribution the beneficiaries concerned. The consultations themselves may also act as repair tool and empowerment. Indeed, the victimized populations are often those who have been marginalized by past regimes, and their inclusion may signal a new regime based on equality of citizens and the rule of law. In terms of gender disparities, the organization of women's groups for specific consultations sends a strong signal regarding equal rights for all.<sup>284</sup>

According to the International Center for Transitional Justice's guidelines for NGOs: "Engaging with truth commissions, civil society actors are "key interlocutors", often determining the commission's success. They can play a "vital role" by mobilizing public opinion and engagement, developing or enhancing the commission's mandate and operational structure, and ensuring its credibility and legitimacy."<sup>285</sup> However, in the case of South Africa, organizations representing women's interests were too busy engaging in the drafting of the new Constitution and participating in elections to properly engage in the process of establishing the TRC. The consequences were, as noted above, that the TRC struggled to take their interests into account, and failed to include them in what became a restrictive definition of "gross violation of human rights".

Once a TRC is established, Katie Reid offers many solutions on how to improve TRCs to make them more sensitive to women's rights issues,<sup>286</sup> basing her reflections on the work of Vasuki Nesiah. First of all, she points out that the scope of the definition of "gross human rights violation" is decisive in considering violence against women. Indeed, in the case of South Africa, the violence sanctioned by the TRC was very often limited to physical violence, leaving aside other types of violence that often

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284 UN Women, *supra* note 14.

285 Roger Duthie, *Building Trust and Capacity: Civil Society and Transitional Justice from a Development Perspective* (New York: International Centre for Transitional Justice, 2009) at 13.

286 See Katie Reid, *supra* note 75.

affected women more seriously, such as structural violence.

Once the definitions of the sanctioned crimes are clearly defined in the TRC's mandate, it is important that TRC staff be trained on issues relating to gender. This is why it is often advisable to ensure a certain level of parity in the staff of TRCs, including also the commissioners. It will be easier for female victims to testify before commissioners of the same sex. Besides, women commissioners will very often be more sensitive to gender-specific crimes.

In addition, it is essential that all commissioners be trained in the appropriate manner for dealing with victims. As seen above, in many patriarchal societies, female victims may avoid testifying about their own suffering. It is therefore necessary for the commissioners to engage in dialogue beyond the issues that are normally foreseen for other types of victims. Victims must be psychologically accompanied throughout the process in order to ensure that there will be no second trauma effect. Therefore, “thematic or individual hearings could be organized. 'In camera' hearing can also be put in the disposition of the victims when they feel ashamed, vulnerable or threatened.”<sup>287</sup>

Secondly, final reports should include a section explaining the general context in which these gender-specific crimes occurred. It is essential to provide an overview of the causes of this type of violence. The report must be written so as to be accessible to the entire population. This is especially true of countries such as South Africa or Cambodia, where many people speak different dialects or are illiterate. It is therefore important to work with civil society, which can establish the important link between the work of the TRC and the population.

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<sup>287</sup> *Ibid.*

## 1.2. Prosecutions

It was seen above in the context of Cambodia that the definition of rape is extremely important. Depending on the breadth of the interpretation adopted by judges, an accused may or may not be found guilty. Here, again, work with associations of victims in advance should be encouraged. It is often through pressure from civil society that judges have gradually incorporated the concept of rape as a separate crime into the definition of crimes against humanity, war crimes or genocide. “Civil society organizations can help prosecutors to map out trends of human rights violations.”<sup>288</sup> In the case of Cambodia, without the work of associations such as the TPO or the Cambodian Defenders Project (CDP), the crime of rape would not have even been considered by the investigating judges. It was only through their perseverance that the crime of rape in the case of forced marriages was taken into account in Case 002/02, and that the rape outside forced marriages will be taken into account in Case 004. Moreover, the composition of the courts plays an important role here. Navi Pillay has played a major part in the evolution of the now well-established international jurisprudence of *Akayesu*.<sup>289</sup>

In addition, it is essential that judges appreciate different types of memory, and equally, how the trauma can affect the memory of a victim.<sup>290</sup> This knowledge will allow them to have a greater understanding of how victims behave and testify at trial, including inconsistencies in testimony or the inability to recall information perfectly. Indeed, according to Gray, the so-called "normal" memory, in someone without PTSD, implies the relatively easy and elective construction of a verbal narrative of mundane events. The person is able to give a story about the events that includes a beginning, a middle and an end.

On the other hand, traumatic memories are usually evoked unintentionally, and are provoked or

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288 Duthie, *supra* note at 285 at 14.

289 See Navanethem Pillay, *supra* note 34.

290 S Megan Berthold & Gerald Gray, *supra* note 224 at 104.

triggered by things that remind the person of these events. The trigger may resemble only one aspect of the experience, such as a person's tone, voice or facial expressions. Memories are often more confused. In Judgment No 001 of the ECCC, the judges did not appear to be familiar with the symptoms of PTSD and how to deal with these witnesses or civil parties, since they had not had any training beforehand. While this is true for victims suffering from PTSD in general, this lack of recognition of past suffering is particularly evident for victims of sexual violence.<sup>291</sup>

Psycho-social training is also important for civil party lawyers. It is their responsibility to explain to their clients the rules of the trial and the conduct of the proceedings. A victim will thus be less likely to fall into the vicious circle of victimization if his lawyer explains that the crime has not been prosecuted on the basis of a lack of evidence, and not because the Court does not acknowledge the suffering endured.

### **1.3. Reparations**

“Research suggests that transitional justice can make important contributions to processes of development in a number of different ways.”<sup>292</sup> Reparations offer a path for moving towards this development and to challenge the structures of discrimination that can be left unaltered where the aim of reparation is simply to return the victim to the status quo ante.

Reparations, whether individual or collective, legal or administrative, must provide keys and tools for the future. In the case of female victims, it is important to respond with measures that can give them more autonomy and economic power, thus responding to structural inequalities rather than simply

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<sup>291</sup> *Ibid*, at 105.

<sup>292</sup> Duthie, *supra* note 285 at 4.



repairing sexual prejudice. In the cases studied above, this type of reparation is all the more important as women have suffered structural violence imposed by different regimes, and are affected much more severely than men.

In addition, psycho-social follow-up measures are important. This is especially pertinent in countries like Cambodia where psychological disorders are stigmatized and where it is difficult to find competent personnel. Where the country undergoing reconstruction does not have the right personnel, civil society can take over, as was the case with the TPO in Cambodia. Civil society is a source of support. Civil society “may be in a better position than a newly-formed government to publicize and administer reparations programs that distribute benefits in the form of medical and psychological services.”<sup>293</sup>

Finally, Reparations may include measures for the state to reform certain aspects of the legislation. One example is a strong criminal law, inspired by international law and treaties defending women's rights. Constitutional reform is sometimes also recommended, such as incorporating clauses ensuring equality between men and women in all aspects of society. Recommendations can also be made to give suggestions to the state on how to implement strong mechanisms for dealing with sexual offenders, such as centres for rehabilitation, healthcare service, legal aid , the decentralization of courts, and so on.

However, even if all of these mechanisms were improved such that they took into consideration sex-specific crimes, they would not be totally effective if implemented separately, as has been seen in this

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<sup>293</sup> Naomi Roht-Arriaza, *Civil Society in Processes of Accountability* (Ardsey: Transnational Publishers, 2002) at 109.

thesis. We have seen that a TRC alone leaves the women victims with a feeling of impunity for the crimes suffered. Moreover, the non-prosecution of wrongdoers often weakens the rule of law. Prosecution alone, however, does not provide a satisfactory answer to the needs of victims who often suffer from mental disorders such as PTSD. Besides, the rebuilding of new institutions cannot be fully accepted if the past is not dealt with, and if the victims do not have access to a process that enables reconciliation and the establishment of truth. Finally, reparations by themselves can be perceived by the victims as simply a way to bury the past if they are not accompanied by other measures or initiatives.<sup>294</sup> As a result, transitional justice should be holistic, and incorporate all of the mechanisms studied above.

## **2. Cooperation Between Mechanisms of Transitional Justice**

The mechanisms of transitional justice should cooperate to empower women. However, in several situations, a holistic justice cannot be reached. Therefore, civil society can take over where the mechanism of transitional justice fail to be effective.

### **2.1. Empowering Women**

Empowering women induce the need for a broader conception of transitional justice that would not only focus on political rights but that would also encompass economic, social and cultural human rights. Instead of a transitional justice that is focused on the past and limited to retributive and restorative justice, an empowerment based approach addresses fundamental inequalities in power distribution and issues related to distributive justice. According to Jon Elster: “distributive justice is alleviatory, meaning that it is oriented towards conflict-prevention, it is *forward-looking*.”<sup>295</sup> Therefore,

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294 Eric Brahm, “Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies” (2007) 9:4 International Journal of Not-for-Profit Law 62 at 66, noting that the Mothers of the Plaza de Mayo “rejected all proposals for reparations, dismissing it as blood money.”

295 See Jon Elster, *Justice Truth and Peace* (Oslo: PRIO, 2010) at 7.

regarding gender-related crimes, transitional justice should not only focus on the crimes committed during the conflict, but also on the roots of these crimes. In South Africa, for instance, the crimes directed towards women were rooted in a long-lasting culture of discrimination and patriarchy. Women suffered from economic inequalities much more harshly than men during Apartheid. To acknowledge these crimes is a step in the healing process, but efforts should not stop there. The question then becomes: how can transitional justice have a more direct impact on reducing social and economic inequalities?

Women should feel empowered in various contexts, something only holistic transitional justice can provide. By combining all of the mechanisms, transitional justice can bring a more consistent answer to the needs of women and help them be part of and benefit from the establishment of peace.<sup>296</sup> Indeed, gender-sensitive transitional justice focuses too often on sexual violence without considering other type of violence. However, as it has been seen through the case of South Africa and Cambodia, women suffer mainly from structural violence. Sexual abuses are intertwined in a broader socio-economic structure that maintain inequalities and discriminations. Punishing the crimes of sexual violence is needed but transitional justice should not stop there and should go further in challenging the underlying reasons of marginalization. This way transitional justice can contribute to prevent sexual crimes to be committed again but can also prevent violence to continue in the private sphere, taking the form, as an example, of domestic violence or marginalization.

For that purpose, the need of a TRC to complement the work of other mechanisms of transitional justice, such as prosecution, to deal with gender-related violence is now beyond doubt. TRCs could be

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<sup>296</sup> Susan Harris Rimmer, *Gender and Transitional Justice: The Women of East Timor* (London and New York: Routledge Contemporary Southeast Asia Series, 2010) at 146.

mandated to consider other crimes than those usually dealt with before international criminal courts such as genocide, crimes against humanity or war crimes. Crimes against economic, social or cultural human rights can also be addressed and women victims can find reparations for the suffering endured. This mechanism is more adapted to acknowledge the broader scope of women's experiences during armed conflict and address structural violence since it does not have to follow the due process requirements.

Prosecution is however essential within the framework of transitional justice since the trial is no longer limited to establishing the guilt of the accused, but also serve the purpose of recognizing the suffering endured by victims. This recognition is an important element in the healing process. This way tribunals can respond to the need for prosecution but also for the need to heal. However, if the scope of the definition of rape is to be broadened, then an official tribunal or a court will be inadequate to redress claims of different types of violations and suffering. Indeed, if women suffer from sexual and gender-related violence in a greater extent than men during war time or a crisis, it is often because of a pre-existing inequality between the two in the societies concerned by this study.

It is imperative to address reparations and institutional reform within the framework of transitional justice. Institutional reform can be achieved through reforming political and judicial institutions and through legislative reforms. It is a peculiar importance for women since law can protect them from certain abuses such as sexual violence. This mechanism of transitional justice allow the victims to look forward in their healing process and to have legal guarantees for the future. It can also contribute to bringing about attitudinal shift towards concerning gender discrimination. As seen above, the work of the TRC in South Africa was a trigger that contributed to changes in legislation relating to sexual

violence. In addition to this, economic reparations within the transitional justice framework can also provide redress to women victims of heinous crimes, who are often poor and marginalized.

I posit that all transitional justice mechanisms should be able to address the five core pillars of prosecution, truth recovery, institutional reform, reparations, reconciliations, along with economic empowerment, in order to challenge structural inequalities. All stakeholders must continue to work together to pave a way for structural changes in transitional societies. Civil society, media and other non-state actors have a vital role to play along with state institutions to educate and inform people and forge partnerships between state and community actors to realize collective goals of transitional justice<sup>297</sup>. However, if the work of all the mechanisms of transitional justice is needed, it is only very rarely that a holistic transitional justice is possible.

## **2.2. Challenges**

Transitional justice processes require significant economic resources. States undergoing transition usually do not have sufficient resources and as a result, may favour one mechanism of transitional justice over others. They therefore are highly dependent on contributions from the international community, such as from the UN or other regional organisations, in addition to bilateral contributions. Work between donors and those providing technical assistance is crucial to enhancing the results and possible impact of transitional justice processes. Creative ways of generating funds should be considered. “These could include tax incentives to encourage private sector businesses to contribute to a specific post-Truth and Reconciliation Commission Fund. The economic and social implications of a

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297 Lawyer Without Borders emphasizes on outreach sessions where every mechanism of transitional justice should work together; see Avocats Sans Frontière, *Towards a Comprehensive & Holistic Transitional Justice Policy for Uganda: Exploring Linkages Between Transitional Justice Mechanisms* (Avocats Sans Frontières, 2013), at 27 online: [http://www.asf.be/wp-content/uploads/2014/05/ASF\\_UG\\_TJ-Linkages-Paper\\_201308.pdf](http://www.asf.be/wp-content/uploads/2014/05/ASF_UG_TJ-Linkages-Paper_201308.pdf). / Outreach is defined by the ICTJ as: “a multifaceted set of activities that includes public consultation, media engagement, dissemination of information, and, in general, strategies to engage the public.”; see ICTJ Website, section “outreach”, online: <https://www.ictj.org/our-work/research/outreach>.

time-limited taxation levy on wealthier South Africans' earnings also need to be considered.”<sup>298</sup>

Sometimes, where there is a lack of means, civil society can take over. The ICTJ report notes that “[i]n Southern African countries, for example, civil society organizations have acted both as pressure groups and service providers in response to the 'failure of states to implement sustained, integrated, widely accepted, and effective reconciliation programmes.’”<sup>299</sup>

In South Africa there were many examples of organisations, individuals, artists and events that used creative approaches to begin to address the issues of healing and reparation, since the TRC did not have the financial resources to give a proper reparation to every victim. “One such example is a theatrical play called ‘The story I’m about to tell.’ This was (and still is) an initiative using acting, audience participation, real-life recollections of violations and an improvised script that was true to life events.”<sup>300</sup> “An individual who gave testimony at Commission hearings, Mr Duma Khumalo (a former death row prisoner), says that audiences seem to open up more and travel much further into the past than occurred at the formal Commission hearings. Members of audiences have expressed their difficulties about opening up and speaking of the past, which they had often kept secretly to themselves.”<sup>301</sup> In addition, means other than art can be employed, such as workshops like those organized by the Institute of Healing of Memories in South Africa or the Cambodia Hearing Sessions, which will be considered below.<sup>302</sup>

In the cases studied, the implementation of all mechanisms of transitional justice has often been

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298 Report of the Reparation & Rehabilitation Committee, Vol 6 sect 2 chap 1, at 162, online:

<[http://www.justice.gov.za/trc/report/finalreport/vol6\\_s2.pdf](http://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf)>.

299 Duthie, *supra* note 285 at 12.

300 Report of the Reparation & Rehabilitation Committee, Volume six section 2 chapter 1, see online at:

<[http://www.justice.gov.za/trc/report/finalreport/vol6\\_s2.pdf](http://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf)> at 156.

301 *Ibid*, at 157.

302 *Ibid*, at 158-159.

delayed or avoided altogether for political reasons. Nevertheless, solutions can be found, and here again these solutions are found in civil society. In Cambodia, for example, facing the lack of establishment of a TRC, the TPO, in collaboration with the Victims' Support Section (VSS) and the Cambodian Defenders Project (CDP), organized hearings of women victims who could testify to their suffering outside the context of a court.<sup>303</sup> Therefore hearings for women victims is an initiative that was created by non-governmental organizations (NGOs) to fill a void left by the ECCC and the Cambodian government. In 2011,<sup>304</sup> the CDP organized the first women's hearings in Cambodia followed by two more in 2012 and 2013 with different themes each year.<sup>305</sup> Each of them adhered to the same format with survivors giving public testimony before a jury. While the jury in 2011 and 2012 was made up of national and international legal experts, the jury in 2013 was staffed by students from various Cambodian universities.<sup>306</sup> These hearings were followed each year by a public statement with recommendations for the Cambodian government and the ECCC and were attended by more than 1,000 participants from various backgrounds.<sup>307</sup>

As part of these hearings, victims of sexual violence received psychological support throughout the process, which helped them in their personal healing process. Just as with judicial trials, the hearings represented a cathartic space because it allowed the victims to have access to a sense of justice, relief but also solidarity with other survivors. However, unlike the trial, the hearings focused on the victims

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303 Beini Ye, "Transitional Justice Through the Cambodian Women's Hearings", Cambodia Law and Policy Journal, see online at : <[http://gbvkr.org/wpcontent/uploads/2015/05/DCCAM\\_CLPJ\\_Ye.pdf](http://gbvkr.org/wpcontent/uploads/2015/05/DCCAM_CLPJ_Ye.pdf)>.

304 *Report on the Proceedings of the 2011 Women's Hearing on Sexual Violence Under the Khmer Rouge Regime* (Phnom Penh: Cambodian Defenders Project, 2012) online: <[http://gbvkr.org/wp-content/uploads/2013/01/Report-on-2011-Womens-Hearing\\_Phnom-Penh.pdf](http://gbvkr.org/wp-content/uploads/2013/01/Report-on-2011-Womens-Hearing_Phnom-Penh.pdf)>.

305 Beini Ye, *2013 Women's Hearing with the Young Generation on Gender-Based Violence during the Khmer Rouge Regime* (Phnom Penh: Rochelle Braaf, 2014) see online at: <<http://gbvkr.org/wpcontent/uploads/2014/05/WomenHearingEng.pdf>>.

306 *Ibid.*

307 *Ibid.*

and allowed subjective discourse outside the strict framework of the judicial process. They also took into account other forgotten victims of sexual violence in the ECCC. Finally, the victims were able to testify without being confronted with the accused, which allowed them to express their suffering in clearer terms and without the risk of reliving the initial trauma.

Besides, “where governments are unwilling to investigate human rights violations, civil society groups sometimes go beyond documenting wrongdoing and conduct truth commission-like investigations of their own.”<sup>308</sup> Amnesties, judicial obstacles, or military intransigence can be overtaken by civil society's initiatives. Other venues for prosecution can be found. The Gacaca court system in Rwanda provides an excellent illustration. To remedy the incapacity of the civil courts to adjudicate every cases after the genocide, the Gacaca courts were established. They were “administered by respected local leaders, typically elders, and traditionally resolved property disputes, including land and cattle ownership, marital conflicts, questions of inheritance rights, loans, and accusations of petty theft.”<sup>309</sup>

Finally, civil society can pressure the State and promote the implementation of every mechanism of transitional justice: “Even after the form(s) of transitional justice are selected, civil society often continues to play an important role. Groups pressure governments to continue investigations, to fund truth commissions and reparations programs, and to fully cooperate with investigations.”<sup>310</sup>

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308 Brahm, *supra* note 294 at 67.

309 Avocats Sans Frontière, *supra* note 297.

310 Brahm, *supra* note 294 at 65.



# Conclusion

The study of the two cases above showed us that the legal, but also, the social and economic empowerment of women are necessary to give them the opportunity to challenge patriarchal norms and to actively engage with the processes of transitional justice. Justice should be reconceptualized to encompass systemic and structural injustices in the context of transitional justice. Justice should not be merely seen as recognition of past committed crimes against political and civil human rights. Justice should also be understood as redistribution of power and resources to achieve substantive equality.

The five goals of transitional justice, prosecution, truth recovery, institutional reform, reparations and reconciliation, are all key components in the aim of achieving complete justice in post-conflict society. Prosecution helps strengthen the rule of law and indicate that such atrocities will not be tolerated again.<sup>311</sup> In South Africa, the end of Apartheid and the sense of impunity that followed did not allow for the development of a strong culture of rejection of sexual violence. However, prosecution by itself faces structural problems too. In a country like Cambodia, women victims can deplore the lack of resources and the politicization of the ECCC. Above all, the rules of due process focus on the guilt of the accused rather than helping victims in their healing process and in empowering women.

For that purpose, TRCs respond better to the needs of the women victims thanks to their flexibility. They encourage social healing, reconciliation but can also address structural inequalities. However, they often have less impact than prosecution in the eyes of the public. If prosecution does not complement TRC in transitional justice, the population can develop a sense of impunity.

Finally, reparations play an important role in alleviating the consequences of an illegal act. However its main goal cannot only be to restore the situation to that of the past, since for women such a strategy

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311 International Center for Transitional Justice website under the section 'Criminal Justice', online: <<http://ictj.org/our-work/transitional-justice-issues/criminal-justice>>.

would mean a step backwards in their struggle for equal rights. Reparations can be a tool for moving forwards and for challenging structural inequalities. Nevertheless, if administrative reparations are implemented on their own, they can be perceived as buying the silence of the victims.

That is why, I advocate for a holistic transitional justice, in order to bring appropriate relief to women victims. Retributive, restorative and distributive justice should complement each other in a mutually reinforcing manner. In practice, this holistic justice is not always possible and must face many challenges. Civil society can help achieving the five goals noted above. Its role as an advocate of the rights of women and as a facilitator of fostering a climate of partnership between community and the state is critical in effective realization of transitional justice. It can promote a gender-sensitive approach in each mechanism of transitional justice, but can also complement the work of institutions such as the ECCC in Cambodia or the TRC in South Africa. The impact of transitional justice instruments on women depends to a large extent on the interactions of civil society with these processes and mechanisms. Unfortunately, Brahm notes that “civil society is often weak, disorganized, and lacking independence in post-conflict nations.”<sup>312</sup> However, where it comes to women's interests, the relative strength of human rights groups and victim groups in pressing the mechanisms of transitional justice cannot be denied. Resolution 1325<sup>313</sup> was meant to alleviate the gap between women's activism in peace at the community level and more formal processes. But despite its adoption and subsequent resolutions, this call for the inclusion of civil society has remained mainly unanswered. This thesis therefore also advocates for an increase in civil society participation not only in the decision-making in UN institutions, but within the State more generally, concerning all aspects of transitional justice.

Along with Transitional Justice, the government and the civil society must work to shift societal attitudes on gender relations. They can do so through “outreach” that can be public education

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312 Brahm, *supra* note 294 at 62.

313 Resolution 1325 (2000), *supra* note 16.

campaigns or working with community and religious leaders. By sensitizing society to violence against women, and its root causes. Doing so, they empower female victims and give them the tools they need to seek justice.

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