

Sexual and gender-based violence: the case for transformative justice in Cambodia

Abstract

This article aims to advance the idea of transformative justice by building on and expanding the notion of ‘justice’ beyond that traditionally offered by transitional justice discourse and practice. The need for a paradigm shift is warranted by the continued high levels of sexual and gender-based violence (SGBV), directed predominantly towards women, experienced in post-conflict contexts. Using the example of Cambodia, we argue that the scale of SGBV in a post-conflict country can be an indicator of the extent of ‘transformative’ change taking place, and, thus, of the success of transitional justice processes and democracy consolidation, particularly regarding gender equality. Gender equality is essential for democratisation, as democracy should be both a political and a social project. Thus, democracy- and peace-building efforts require challenging entrenched power hierarchies and deep-rooted gender inequality, of which SGBV is symptomatic.

Keywords: transformative justice; transitional justice; sexual and gender-based violence; gender equality; Cambodia; democratisation

Introduction

*Democracy without women is no
democracy*

[The First Independent Women's Forum
of the Soviet Union, 1991]

The opening quote can be attributed to the First Independent Women's Forum of the Soviet Union,¹ which was organised to discuss women's issues and marked an important step for a women's movement in post-Soviet Russia.² Although the extent to which the movement has been successful in achieving gender equality in the post-Soviet context remains debatable, it entreats us to consider how we might move from (however enticing) slogans to actual social transformations that benefit entire societies, rather than certain groups or individuals. Thus, this slogan signifies something obvious, yet difficult to achieve in a transitional context: to involve different groups effectively in post-conflict reconstruction, give voice to those within these different groups, and achieve better representation and inclusion of these groups, especially marginalised ones. This is difficult, as it requires not only addressing systemic and structural inequalities, but also avoiding the reinforcement of essentialism, which necessitates acknowledging these groups' different needs and agendas. Such attempts must also not be considered as confirmative of some groups being more passive and thus requiring institutional forms of encouragement to realise their potential, including participation. Contrary to often-held assumptions, social identifiers – such as gender and class – are not explanations of

¹ The First Independent Women's Forum of the Soviet Union, 'Itogovyi otchet o rabote Pervogo Nezavisimogo Zhenskogo Foruma' (Dubna, Russia, March 29–31, 1991).

² Cynthia Cockburn, 'Democracy Without Women Is No Democracy: Soviet Women Hold Their First Autonomous National Conference', *Feminist Review* 39, no. 1 (1991): 141–8.

vulnerability; rather, they are factors of vulnerability, particularly if they form the grounds for discrimination within a society. Thus, making women's voices heard should not be viewed as an act of 'assistance' or 'protection' mandated by this group's 'vulnerability', but rather as an attempt to realise democratic change by creating conditions conducive for individuals to participate in the making and shaping of society in a meaningful and impactful way. This, however, requires shifting existing unequal power relations that cause gender inequality, which result in violations of women's rights in times of conflict and which often continue in transitional situations.

In this article, we critically explore the issue of gender equality in the context of Cambodia. We use sexual and gender-based violence (SGBV) as a lens for analysing the current state (and projected future) of gender equality, and thus democracy, in Cambodia. In this context, we assess the 'transformative' impact of transitional justice and democratisation processes on the achievement of one pillar of democracy: gender equality. Broadly situated within Deweyan ethical pragmatism, democracy is an ethical project where participation, rather than representation, is key.³ As democracy is a social arrangement, it requires revisiting entrenched power hierarchies and deep-rooted gender inequality, of which SGBV is symptomatic.

The following research is based on the reasoned conjecture that addressing disparities between groups based on expectations – which affect various aspects of life and differ across cultures – requires deeper shifts, including in relation to inequalities in opportunity. Changing social relations by altering social structures is not easy, especially when social changes are rapid and large scale, which is often the case in transitional societies moving from a past built on abusive relations towards an expectedly more democratic and stable future. Transitional

³ John Dewey, *The Public and Its Problems* (New York: Holt, 1927). See also Robert B. Westbrook, *John Dewey and American Democracy* (Ithaca and London: Cornell University Press, 1991).

justice measures, therefore, face the challenging task of bringing about accountability for past mass violations and, simultaneously, implementing positive societal changes that would make these societies less prone to future conflicts. The impacts of transitional justice mechanisms on improvements in human rights and democratisation processes in transitional societies are still debated among scholars and practitioners.⁴ However, it is widely accepted that transitional justice plays an important role; thus, its effect on human rights and democracy should be further studied.

However, human rights establishment and democratic consolidation are not achieved merely through creating an institutional framework of norms and standards. It requires implementing processes and practices to facilitate the protection of rights and increase inclusiveness, which are indispensable for attaining development goals and agendas. Human rights are part of the democratising ethos⁵ because the ‘discursive elaboration’ surrounding human rights⁶ creates potential for social change.

The opening quote also signifies that non-discrimination and equality between different groups, albeit in practice hard to achieve fully in stable societies, are significant indicators of the democratisation of political processes and social relations. On the other hand, an existing or even deepening (political, economic and/or social) gender gap might indicate that transformations are not complete or do not sufficiently address all underlying social problems. Cambodia – a post-conflict society going through a difficult process of transformation from its violent past – exemplifies this well.

⁴ See, for example, Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, ‘The Justice Balance: When Transitional Justice Improves Human Rights and Democracy’, *Human Rights Quarterly* 32 (2010): 980–1007.

⁵ J. Hoover, *Reconstructing Human Rights: A Pragmatist and Pluralist Inquiry into Global Ethics* (New York: Oxford University Press, 2016).

⁶ Natalia Szablewska and Krzysztof Kubacki, ‘A Human Rights-Based Approach to the Social Good in Social Marketing’, *Journal of Business Ethics* (2017).
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In the World Economic Forum's Global Gender Gap Index,⁷ focusing on the relative gaps between women and men across four key areas (health, education, economy and politics), Cambodia has improved its score since 2016 and is currently ranked 99 out of 144 countries, but it is still below neighbouring Thailand (75), Viet Nam (69) and Lao PDR (64). Further interrogation of the Index suggests that even though the correlation between gender equality and democratic (or non-democratic) regimes is less straightforward, closing the gender gap is perceived as key for democratisation, even if women's participation in democratic movements differs across countries and regions. The level of democratisation can also have a different impact on the realisation of (political, social and economic) women's rights.⁸

Given Cambodia's transitional status, it warrants further examination of whether and how transitional processes impact transformative changes. In 2014, the *Asian and Pacific Ministerial Declaration on Advancing Gender Equality and Women's Empowerment* was adopted by over 40 states in the region, urging them to achieve gender equality and women's empowerment through a transformative and comprehensive approach.⁹ There has been a call for a better realisation of women's rights, which reaches beyond transitional justice mechanisms and takes SGBV as an indicator of the scale of transformations taking place in a country. It has been widely accepted that promoting gender equality leads to the reduction of violence against women. Thus, developing international and national legal frameworks facilitating the promotion of gender non-discrimination plays an important role in violence

⁷ World Economic Forum, 'Cambodia', <http://reports.weforum.org/global-gender-gap-report-2017/dataexplorer/#economy=KHM> (accessed February 1, 2017).

⁸ Shirin M. Rai, *International Perspectives on Gender and Democratisation* (Basingstoke: Palgrave Macmillan, 2000).

⁹ United Nations, 'Report of the Asian and Pacific Conference on Gender Equality and Women's Empowerment: Beijing+20 Review, Bangkok, Thailand, 17–20 November 2014'. [http://www.unescapsdd.org/files/documents/Beijing%2B20%20Conference%20Report%20\(Web%20version\).pdf](http://www.unescapsdd.org/files/documents/Beijing%2B20%20Conference%20Report%20(Web%20version).pdf) (accessed December 5, 2017).

prevention:¹⁰ a link that is even more pronounced in post-conflict societies where the scale of the required or actual transformative change is vast.

From ‘transitional’ to ‘transformative’ justice

Addressing conflict-related SGBV forms an important part of transitional justice,¹¹ and a range of tools are available to achieve this, including judicial proceedings (both international and domestic), truth-seeking, and rehabilitation and/or reparation programmes. The effective implementation of these processes allows not only for a better understanding of the gendered nature of conflicts and the role of SGBV in them but also for victims’ personal stories and experiences to be recorded, officially acknowledged and – in accordance with the aims of transitional justice – effectively remedied. However, there is an increasing recognition within the transitional justice field that post-conflict efforts should not only focus on reconciling the past and addressing the challenges of the transitional period between the conflict and sustainable peace but should also facilitate more-transformative social change.¹²

As a study in peace and security indicates, there is a positive correlation between high-level gender discrimination and (inter- and intra-state) conflicts, in that those countries with more-equal gender relations tend to be more stable and peaceful.¹³ This is because gender (in)equality informs, as well as is reflective of, the general level of social interaction. Thus, the

¹⁰ See, for example, World Health Organization (WHO), ‘Promoting Gender Equality to Prevent Violence Against Women. Series of Briefings on Violence Prevention: The Evidence’ http://www.who.int/violence_injury_prevention/violence/gender.pdf (accessed December 5, 2017).

¹¹ UN Human Rights Council, *Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice* (Geneva: Office of the High Commissioner for Human Rights, 2014).

¹² UN Human Rights Council, *Analytical Study*; CEDAW Committee, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations* (Geneva: CEDAW Committee, 2013).

¹³ Valerie M. Hudson, Bonnie Ballif-Spanvill, Mary Caprioli and Chad F. Emmett, *Sex and World Peace* (New York: Columbia University Press, 2012).

links among democratisation, peace-building and gender equality require closer scrutiny.

Even if transitional justice processes and mechanisms might not directly entail (also for pragmatic reasons) social transformations, by their very nature, they create opportunities for societal change, including in the realm of gender justice. As noted earlier, democracy- and peace-building efforts need to be inclusive, requiring the meaningful participation of all sections of society. Thus, emboldening the status of women in post-conflict societies must be seen as an integral part of transitional justice. Consequently, gender justice is very much a part of transitional justice processes, as building more-peaceful and -stable societies depends on promoting women's rights and achieving gender equality.¹⁴ The focus on the issue of SGBV in transitional justice settings, and as promoted by the international women, peace and security framework, is part of a more holistic approach to democracy- and peace-building.

SGBV, international law and transitional justice

In international human rights law, there has been firm recognition that SGBV constitutes a human rights violation and a form of discrimination against women.¹⁵ More recently, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) highlighted the importance of preventing SGBV not only as a root cause of conflicts but also as an obstacle in women's full and equal participation in conflict resolution and post-conflict reconstruction.¹⁶ Importantly, the Committee noted that '[f]or most women in post-conflict environments, the violence does not stop with the official ceasefire or the signing of the peace

¹⁴ See also Wendy Lambourne and Vivianna Rodrigez Carreon, 'Engendering Transitional Justice: A Transformative Approach to Building Peace and Attaining Human Rights for Women'. *Human Rights Review* 17 (2016): 71–93.

¹⁵ CEDAW Committee, *General Recommendation No. 19 on Violence Against Women* (Geneva: CEDAW Committee, 1992); *Velásquez Rodríguez v. Honduras*, (Ser. C) no. 4 (1988), Inter-American Court of Human Rights (IACrtHR), July 29, 1988, para.172.

¹⁶ CEDAW Committee, *General Recommendation No. 30*, para. 29.

agreement and often increases in the post-conflict setting'.¹⁷ This statement holds true for many societies emerging from conflicts, including Cambodia. Gender-based violence in its various forms (including physical, psychological, economic or structural) notoriously continues in post-conflict situations.¹⁸ In the case of Cambodia, nearly 40 years after the Khmer Rouge regime officially ended, the rise of domestic and sexual violence against women (as discussed below) continues and is emblematic of such dynamics.

However, and despite the prevalence of SGBV in modern conflicts, the recognition of sexual and gender-based crimes by and through transitional justice processes has been relatively slow and, arguably, insufficient. Establishing accountability for war crimes and crimes against humanity involving SGBV has been largely limited to international criminal prosecutions, with only occasional successful prosecutions taking place in domestic courts in the aftermath of conflicts. It was only in 1998 that an international court, the International Criminal Tribunal for Rwanda (ICTR), prosecuted rape as a crime against humanity and genocide, with further successful convictions for conflict-related SGBV crimes taking place before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC).¹⁹ However, addressing sexual violence is challenging, whether in international or national contexts, and the problems accounted at the national level are often multiplied and further exacerbated in the international arena by the sheer scale and intricacy of the factors involved in the prosecution of such crimes. As such, prosecuting the SGBV committed during mass atrocities brings a

¹⁷ Ibid., para. 35.

¹⁸ Rashida Manjoo and Colin McRaith, 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas', *Cornell International Law Journal* 44 (2011): 11–31.

¹⁹ *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T (September 2, 1998); *Prosecutor v. Furundžija*, Judgment, IT-95-17/1T (December 10, 1998); *Prosecutor v. Sesay, Kallon, Gbao (RUF)*, Judgment, SCSL-04-15-T (March 2, 2009); *Situation in the Central African Republic: Prosecutor v. Jean Pierre Bemba*, Judgment, ICC-01/05-01/08-3343 (March 21, 2016).

range of challenges, not least related to procedural and evidentiary matters, political will, and assumptions regarding SGBV in conflict.²⁰ The latter has been particularly notable in relation to the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC), where the initial work of the court has been largely influenced by the common belief that the conflict in Cambodia did not involve commission of sexual and gender-based crimes. This initial approach adopted by the ECCC has significantly impacted the competency of this institution in delivering gender justice. Valerie Oosterveld and Patricia Sellers note the rather mixed (at best) legacy of the ECCC to date, pointing to the court's limited record of prosecuting SGBV crimes, as well as its narrow conceptualisation of rape as a crime against humanity.²¹ The disappointing record of the ECCC in relation to the prosecution of gender-based crimes committed during the Khmer Rouge regime was noted in 2013 by the CEDAW Committee that urged Cambodia to provide effective redress to the victims of these crimes.²²

Outside the realm of international criminal law, the UN Women, Peace and Security (WPS) agenda established by UN Security Council Resolution (UNSCR) 1325 (2000) marked an important step towards recognising the importance of addressing SGBV in post-conflict contexts. UNSCR 1325 and subsequent WPS resolutions²³ have directed public opinion towards this important issue. Whilst placing issues concerning women, peace and security

²⁰ ICTR, 'Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor of the International Criminal Tribunal for Rwanda', http://w.unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf (accessed December 5, 2017).

²¹ Valerie Oosterveld and Patricia Viseur Sellers, 'Issues of Sexual and Gender-Based Violence at the Extraordinary Chambers in the Courts of Cambodia', in *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* (The Hague: TMC Asser Press, 2016), 321-51.

²² CEDAW Committee., *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Cambodia* (Geneva: CEDAW Committee, 2013).

²³ UNSCR 1820 (June 19, 2008) UN Doc. S/RES/1820; UNSCR 1983 (June 7, 2011) UN Doc. S/RES/1983; UNSCR 1888 (September 30, 2009) UN Doc. S/RES/1888; UNSCR 1889 (October 5, 2009) UN Doc. S/RES/1889; UNSCR 1960 (December 16, 2010) UN Doc. S/RES/1960; UNSCR 2106 (June 24, 2013) UN Doc. S/RES/2106; UNSCR 2122 (October 18, 2013) UN Doc. S/RES/2122; UNSCR 2242 (October 13, 2015) UN Doc. S/RES/2242.

within the UN Security Council (UNSC) agenda can be viewed as a significant political achievement, the WPS resolutions and the three pillars of the WPS agenda (prevention, protection and participation) can be criticised for lacking the ‘legal bite’ and monitoring and enforcement measures needed to ensure the realisation of their transformative potential.²⁴

The WPS resolutions offer little in the way of putting words into action and, as such, largely forego the opportunity to make a meaningful change through the implementation of the goals of UNSCR 1325. The changes envisaged by these instruments apply to the international setting, as well as to national policies and practices. However, and despite calls in UNSCR 1325 and in subsequent resolutions for the equal participation of women at all decision-making levels (including in peace processes, conflict resolution and post-conflict reconstruction), women remain in the minority of the many actors engaged in such processes.²⁵ In addition, the lack of a bespoke mechanism to monitor states’ compliance with National Action Plans on WPS and the lack of funding to further the goals of the WPS agenda at international and local levels are contributing to the currently limited impact of the WPS agenda on transforming women’s lives in post-conflict situations. Furthermore, the WPS resolutions appear to focus on sexual violence only (rather than sexual *and* gender-based violence) and offer somewhat limited understanding of the diverse nature and role of SGBV in conflict and post-conflict situations. To that end, whilst the WPS resolutions call for greater accountability for conflict-related SGBV, an effective remedy for gender-based crimes (including transformative

²⁴ See also Diane Otto, ‘Power and Danger: Feminist Engagement with International Law through the UN Security Council’, *Australian Feminist Law Journal* 32, no. 1 (2010): 97–121.

²⁵ UN Women, ‘Women’s Participation in Peace Negotiations: Connections Between Presence and Influence’, <http://reliefweb.int/sites/reliefweb.int/files/resources/03AWomenPeaceNeg.pdf> (accessed December 5, 2017). A study by UN Women shows that out of 31 peace negotiations conducted between 1992 and 2011, women accounted for only 4% of signatories, 2.4% of chief mediators, 3.7% of witnesses and 9% of negotiators.

reparations) and the prevention of SGBV, as well as the allocation of adequate resources for furthering the domestic implementation of the WPS agenda, is left to the discretion of states. The limitations of such an approach can be observed in Cambodia, where the government has so far failed to enact a National Action Plan for the implementation of UNSCR 1325 and has not confirmed support for taking such steps in the near future.

Furthermore, even where formal mechanisms addressing past widespread and systematic atrocities are implemented, they struggle to (re)define the nature and scope of conflict-related SGBV crimes.²⁶ Despite many accounts of formal judicial practices creating a form of public and historical record aiding remembering (which offers positive changes in the personal lives of survivors and affected societies at large),²⁷ there are many more voices of disappointment. These criticisms focus on how such processes often dehumanise and traumatise survivors and witnesses.²⁸ The shortcomings of these processes disproportionately affect women, who make up the majority of SGBV victims. That, however, might not be particularly surprising, as, and despite gender mainstreaming being the key strategy in promoting gender equality within the UN system at all levels,²⁹ the international system in

²⁶ Kate Ogg and Natalia Szablewska, 'A Feminist Legal Analysis of the Interface Between Refugee Law and the Mandates of Truth and Reconciliation Commissions', in: *Current Issues in Transitional Justice: Towards a More Holistic Approach* (New York: Springer, 2015), 209–34.

²⁷ See, for example, Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).

²⁸ Patricia M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court', *Washington University Journal of Law & Policy* 5 (2001): 87–118.

²⁹ Further critiqued by Anne-Marie McGauran, 'Gender Mainstreaming and the Public Policy Implementation Process: Round Pegs in Square Holes', *Policy and Politics* 37, no. 2 (2009): 215–33; Maxine David and Roberta Guerrina, 'Gender and European External Relations: Dominant Discourses and Unintended Consequences of Gender Mainstreaming', *Women Studies International Forum* 39 (2013): 53–62; Petra Meier and Karen Celis, 'Sowing the Seeds of Its Own Failure: Implementing the Concept of Gender Mainstreaming', *Social Politics* 18, no. 4 (2011): 469–89; Fionnuala Ní Aoláin, Diana Francesca Haynes and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford University Press, 2011).

general – and international law in particular – has been criticised for being overly gender blind.³⁰ As transitional justice processes are already at the fringes of global and domestic political processes,³¹ they are particularly prone to pushing ‘women’s rights and gender justice [to] the margins of the margins of international law’.³²

Post-conflict accountability for SGBV: towards ‘transformative’ justice

Transitional justice measures directed towards addressing SGBV have been the subject of growing criticism.³³ One criticism is that transitional justice approaches often do not adequately deal with prosecuting those responsible and remedying the victims, as well as fail to facilitate more-sustainable and long-term social and cultural changes addressing gender inequality in post-conflict societies. Whether due to the truth and reconciliation commissions lack of adequate fora for women’s testimonies and stories to be heard and acknowledged or due to international tribunals failing to produce a narrative of wartime atrocities that reflect women’s experiences,³⁴ transitional justice measures continue to fail in pursuing and achieving ‘gender justice’ in transitional contexts. As Susanne Buckley-Zistel and Ruth Stanley rightly point out in relation to the early days of the transitional justice field, ‘its gendered dimensions

³⁰ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

³¹ Susan Harris Rimmer, ‘Sexing the Subject of Transitional Justice’, *Australian Feminist Law Journal* 32 (2010): 123–47.

³² Ramona Vijayarasa, ‘Review Essay: Women at the Margins of International Law: Reconceptualizing Dominant Discourses on Gender and Transitional Justice’, *International Journal of Transitional Justice* 7 (2013): 358–69, p. 359.

³³ Kirsten Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia’, *International Journal of Transitional Justice* 1, no. 3 (2007): 411–32; Fionnuala Ní Aoláin, ‘Advancing Feminist Positioning in the Field of Transitional Justice’, *International Journal of Transitional Justice* 6, no. 2 (2012): 205–28; Catherine O’Rourke, *Gender Politics in Transitional Justice* (London: Routledge, 2013).

³⁴ Julie Mertus, ‘Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women’s Agency’, *International Feminist Journal of Politics* 6, no. 1 (2004): 110–28.

were largely unrecognized and they have remained under-researched'.³⁵ Even though the literature and research addressing the gendered nature of transitional justice have multiplied since its formulation, it has not prevented gender stereotyping of transitional justice practices. The shortcomings include the prevalent popular discourse on the 'types' of violence experienced by different groups³⁶ or the 'categories' of victims before and after mass violations.³⁷

Consequently, the theoretical and practical aspects of transitional justice have been criticised for treating the symptoms rather than the causes of conflicts, including ignoring 'the complexities of societies in transition' and not facilitating conditions for 'the necessary deep transitions to take place'.³⁸ There are also those who criticise the transitional justice framework for adopting predominantly state-focused approaches and lenses.³⁹ This has led many to view 'the performance and impact of transitional justice mechanisms [to] have been at best ambiguous and at times disappointing'.⁴⁰ Thus, in more recent years, scholars and practitioners have raised the need for more-'transformative' justice, or, as argued by Paul Grady and Simon Robins, a concept and practice involving

³⁵ Susanne Buckley-Zistel and Ruth Stanley, 'Introduction', in: *Gender in Transitional Justice* (Basingstoke: Palgrave Macmillan, 2011), 1-33, p. 2.

³⁶ See also Fionnuala Ní Aoláin, 'Advancing Feminist Positioning'. Such an approach further sidelines a range of (structural) harms and violations experienced by women in conflict and transitional periods, and, as Ní Aoláin posits, 'a persistent blind spot for transitional justice has been the entrenched habit of zoning in on specific violations to the individuals' (Ibid., p. 27), which, even though practically favourable, has far-reaching implications for achieving 'justice' for all.

³⁷ Doris Buss, 'Rethinking Rape as a Weapon of War', *Feminist Legal Studies* 17, no. 2 (2009): 145–63.

³⁸ Natalia Szablewska and Sascha Bachmann, 'Current Issues and Future Challenges in Transitional Justice', in: *Current Issues in Transitional Justice: Towards a More Holistic Approach* (New York: Springer, 2015), 339–61. p. 342.

³⁹ Lucy Hovil and Moses Chrispus Okello, 'Editorial Note, Special Issue: Civil Society, Social Movements and Transitional Justice', *International Journal of Transitional Justice* 5, no. 3 (2011): 333–44.

⁴⁰ Paul Grady and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice', *International Journal of Transitional Justice* 8, no. 3 (2014): 1–23, p. 2.

transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.⁴¹

This is not to suggest that ‘transformative’ justice needs to replace ‘transitional’ justice but rather that there is a need for a paradigm shift in the understanding of ‘justice’ post-conflict. As Erin Daly argues, ‘transition’ and ‘transformation’ in the context of a post-conflict society are not the same: *transition* indicates moving from one state of being to another (e.g. from non-democratic to democratic political systems), whereas *transformation* is a more radical change.⁴² Thus, there is a call for justice processes in a post-conflict context to become more *transformative* in their reach to offer better scope for transforming these societies. This necessitates transitional justice to reach beyond accountability towards a range of political and social goals.⁴³ This shift speaks also to the ongoing debate on the very notion of ‘justice’ that implies more than its legal or jurisprudential forms. Considerations of (gender, social, economic and/or cultural) inequalities in post-conflict societies should, therefore, drive the transitional justice framework,⁴⁴ which would offer more scope for social transformation.⁴⁵

As Wendy Lambourne and Vivianna Rodrigez Carreon argue, gender-sensitive/-responsive or even inclusive approaches are not sufficient to address the scope of the transformative changes that take place in women’s lives following mass atrocities.⁴⁶ It requires

⁴¹ Ibid.

⁴² Erin Daly, ‘Transformative Justice: Charting a Path to Reconciliation’, *International Legal Perspectives* 12, no. 1/2 (2002): 73–183.

⁴³ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’, *International Journal of Transitional Justice* 3, no. 1 (2009): 5–27.

⁴⁴ Christine Chinkin and Hilary Charlesworth, ‘Building Women into Peace: The International Legal Framework’, *Third World Quarterly* 27 (2006): 937–57.

⁴⁵ Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘Justice Discourses in Transition’, *Social and Legal Studies* 13, no. 3 (2004): 305–28.

⁴⁶ Lambourne and Rodrigez Carreon, ‘Engendering Transitional Justice’.

a gender transformative approach to transitional justice that ‘focuses on transforming psychosocial, socioeconomic and political power relations in society as a means to attaining human rights for women and building a sustainable peace’.⁴⁷ ‘Justice’, in its varied forms beyond its legal character, has long been perceived as crucial for achieving sustainable peace.⁴⁸ Post-conflict peace-building thus needs to be seen as a ‘change process based on relationship building’,⁴⁹ rather than simply a political or legal matter. Placing social relations at the centre of transformative justice efforts involves a more comprehensive examination of the different types of violations taking place across time: before, during and after conflict.

The far-reaching (re)conceptualisation of the nature of these processes is warranted, particularly in the context of the social injustice (or structural violence) that leads to, or is a consequence of, a conflict. Issues such as poverty, marginalisation, exclusion and (gender and economic) inequalities require more-structural changes than what can be achieved by conventional transitional justice mechanisms.⁵⁰ The rationale for this lies in addressing local needs not only to increase prospects for preventing future conflicts but also to support development strategies, which are critical for successful transitional processes.⁵¹ Nonetheless, the issue of development is often not addressed satisfactorily within the framework of transitional justice.⁵²

⁴⁷ Ibid, p. 73.

⁴⁸ See, for example, Rama Mani, ‘Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies’, *International Peacekeeping* 5, no. 3 (1998): 1–25; Wendy Lambourne, ‘Transitional Justice and Peacebuilding After Mass Violence’, *International Journal of Transitional Justice* 3, no. 1 (2009): 28–48.

⁴⁹ John Paul Lederach, ‘The Challenge of the 21st Century: The Justpeace’, in: *People Building Peace: 35 Inspiring Stories from Around the World* (Utrecht: European Centre for Conflict Prevention, 1999), 35.

⁵⁰ On a similar note, see Fionnuala Ní Aoláin, ‘Expanding the Boundaries of Transitional Justice’, *Ethics & International Affairs* 22, no. 2 (2008): 213–22.

⁵¹ Pablo De Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: International Center for Transitional Justice, 2009).

⁵² Roger Duthie, ‘Toward a Development-Sensitive Approach to Transitional Justice’, *International Journal of Transitional Justice* 2, no. 3 (2008): 292–309; Rama Mani, ‘Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional

In the context of transformative gender justice, Jelke Boesten and Polly Wilding argue that the key goal of transformative processes needs to lie in addressing unequal power relations at a societal level, which ‘includes the intersecting domination of gender, race, and class as determining vectors of inequality and vulnerability to violence’.⁵³ The focus on public violence – to the detriment of addressing private forms of violence, including domestic and everyday violence against women – is one of the main criticisms of formal discourses on gender equality.⁵⁴ Traditional transitional justice mechanisms hardly ever aim to empower the vulnerable and destitute. This significant limitation has global implications, especially in developing countries, where women’s rights are often weak and their socio-political and cultural participation is curtailed. Subsequently, when the systemic marginalisation and povertisation of certain groups in a society continue, the prospects for more-sustainable peace for all remain frail. Whilst the idea of transformative justice is not new, its application to transitional justice has been relatively recent and arguably not yet fully theorised or adequately operationalised. Optimistically, though, this gap has been acknowledged; following Rosemary Nagy, ‘[t]he question today is not whether something should be done after atrocity but how it should be done’.⁵⁵ In keeping with this ongoing debate, in the following sections, we focus on how the traditional transitional justice mechanisms in Cambodia have attempted to deal with its turbulent past, then show the shortcomings of these processes on the *transformation* taking place in the society, particularly in relation to gender equality.

Justice and Development’, *International Journal of Transitional Justice* 2, no. 3 (2008): 253–65.

⁵³ Jelke Boesten and Polly Wilding, ‘Transformative Gender Justice: Setting an Agenda’, *Women’s Studies International Forum* 51, no. 1 (2015): 75–80, p. 4.

⁵⁴ See, for example, Wenona Giles and Jennifer Hyndman, ‘Introduction: Gender and Conflict in a Global Context’, in: *Sites of Violence: Gender and Conflict Zones* (Berkeley, CA: University of California Press 2004), 3–23.

⁵⁵ Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’, *Third World Quarterly* 29, no. 2 (2008): 275–89, p. 276.

Addressing Cambodia's past and the role of transitional justice

Despite the relatively brief rule by the Khmer Rouge during the Democratic Kampuchea period (1975–1979),⁵⁶ Cambodian society experienced unprecedented violence and mass killings during this regime, where an estimated 2.5 million people were executed or died of malnutrition and starvation.⁵⁷ This conflict is often perceived as ‘unique’, as ethnic differences were not the main cause of the widespread atrocities, nor were women particularly targeted or discriminated against by state policies. However, more-recent evidence points towards gendered aspects of the violations committed under the Khmer Rouge. Thanks to the courage of the victims and survivors willing to speak out, as well as the work of civil society organisations, these myths have been debunked, making it evident that the previously underestimated complexity of the Cambodian conflict necessitates more-inclusive ways of addressing its consequences. This, in turn, raises the question of the extent and adequacy of the measures taken towards addressing gender injustice and its impact on democratisation processes in Cambodia today.

Sexual crimes committed under the Khmer Rouge pose a particular difficulty, as, until relatively recently, it was believed that they did not occur because the regime was perceived as being puritanical and relying on a ‘moral code of conduct’ for cadets and others. If there had been recognition that ‘moral offences’ (as defined under Code No. 6) had occurred, the perpetrators would have been severely punished.⁵⁸ More contemporarily, a growing body of research demonstrates something rather different: both women and men were victims of sexual violence on a much larger scale, and there had been much wider impunity for these crimes.⁵⁹

⁵⁶ ECCC, ‘Constitution of Democratic Kampuchea’ (DK government legal documents), <https://www.eccc.gov.kh/en/document/court/dk-government-legal-documents-entitled-constitution-democratic-kampuchea> (accessed December 5, 2017). Democratic Kampuchea signified ‘a State of the people, workers, peasants, and all other Kampuchean labourers’.

⁵⁷ Bruce Sharp, ‘Counting Hell: The Death Toll of the Khmer Rouge Regime in Cambodia’, <http://www.mekong.net/cambodia/deaths.htm> (accessed December 5, 2017).

⁵⁸ Michael Vickery, *Cambodia 1975–1982* (Boston: South End Press, 1984).

⁵⁹ Kasumi Nakagawa, *Gender-Based Violence During the Khmer Rouge Regime: Stories of Survivors from the Democratic Kampuchea (1975–1979)* (Phnom Penh: Cambodian

The range of crimes committed included sexual assaults, forced nudity and sexual enslavement;⁶⁰ the exchange of sex for food or medicine by starving victims;⁶¹ sexual violence against ethnic minorities;⁶² and sexual mutilation, gang and mass rapes, and rapes of male victims.⁶³ A certain particularity of the regime's policy was the institution of group marriages, where up to 300 couples, who often had not met each other before, would be joined in matrimony in a ceremony lasting only a few minutes.⁶⁴ The rationale behind this policy was to ensure full compliance and loyalty to *Angkar* (the 'Organisation' or 'Centre') and to replace any familial or individual ties in an attempt to regulate fully the relations between individuals. Such couples were then prescribed to engage in sexual intercourse with each other,⁶⁵ the purpose of which was to regulate births to increase the revolutionary population.

Despite the short reign of the Khmer Rouge regime, the scale of the mass crimes and violations that took place during that time is enormous. This has had implications for the operation of the ECCC, which was set up in 2006 after nearly ten years of negotiations to prosecute the most-senior leaders of the ruling regime and those responsible for the worst atrocities committed between 17 April 1975 and 6 January 1979.⁶⁶ The ECCC has so far

Defenders Project, 2008); Trudy Jacobson, *Lost Goddesses: The Denial of Female Power in Cambodian History* (Copenhagen: NIAS Press, 2008); Peg LeVine, *Love and Dread in Cambodia: Weddings, Births and Ritual Harm Under the Khmer Rouge* (Singapore: National University of Singapore Press, 2010).

⁶⁰ Documentation Centre of Cambodia, *Sexual Abuse Cases Under the Democratic Kampuchea (the Khmer Rouge) Regime*, trans. Tieng Sopheap Vichea (Phnom Penh: DC-Cam, 1999).

⁶¹ Nakagawa, *Gender-Based Violence During the Khmer Rouge Regime*.

⁶² Rochelle Braaf, *Sexual Violence Against Ethnic Minorities During the Khmer Rouge Regime* (Phnom Penh: Cambodian Defenders Project, 2014).

⁶³ 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).

⁶⁴ See, for example, Duong Savorn, *The Mystery of Sexual Violence Under the Khmer Rouge Regime* (Phnom Penh: Cambodian Defenders Project, 2011).

⁶⁵ LeVine, *Love and Dread in Cambodia*.

⁶⁶ United Nations Treaty Collection, 'Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 June 2003',

adjudicated two cases: Case 001 (against the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh) and Case 002 (against the former Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea, and the former Head of State of Democratic Kampuchea).⁶⁷ The second case was split in 2011 into Case 002/01 (which found against the defendants) and Case 002/02 (where additional charges, including forced marriage and rape, were added against the two accused). Gender-based and sexual crimes were added as additional charges, rather than being raised at the beginning of the second trial. The *Introductory Submission of the Office of the Co-Prosecutors*, submitted in 2007, included no references to crimes involving SGBV, including forced marriage.⁶⁸

As outlined above, the initial invisibility of the charges of SGBV can be explained by the common belief that no such crimes were committed under the Khmer Rouge. These are, therefore, positive developments as far as legal justice and addressing historical crimes are concerned. However, the purpose of transitional justice mechanisms should not only be about investigating past crimes and prosecuting those responsible for their commission. If transitional justice strives for ‘achieving the broader objectives of prevention of further conflict,

<https://treaties.un.org/doc/Publication/UNTS/Volume%202329/Part/volume-2329-I-41723.pdf> (accessed December 5, 2017). The ECCC has a complex hybrid structure, combining both national and international characters. It was formed according to the provisions of the ECCC Law 2001, implementing the agreement between the UN and the government of Cambodia of October 27, 2004. On the evaluation of the success or otherwise of the ECCC see, for example, David Scheffer, ‘The Extraordinary Chambers in the Courts of Cambodia’, in: *International Criminal Law*, 3rd ed. (Leiden, Netherlands: Martinus Nijhoff Publishers, 2008); John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, MI: University of Michigan Press, 2014); Thomas Hamilton and Michael Ramsden, ‘The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia’, *International Criminal Law Review* 14, no.1 (2014): 115–47.

⁶⁷ Initially against four accused, but one was found unfit to stand trial and one died in 2013.

⁶⁸ Introductory Submission, *Nuon Chea and Others* (002/19-09-2007/ ECCC-D3), Office of the Co-Prosecutors (July 18, 2007).

peacebuilding and reconciliation’,⁶⁹ it must contribute to addressing the root causes of conflicts to prevent them from re-occurring. The slow recognition of SGBV crimes through the ECCC proceedings reaches beyond its failure in providing justice to the (past) victims.

The policies under the Khmer Rouge, along with the pre-existing traditional cultural and social norms, can be linked to current developments in Cambodia, including legal and social (in)equalities. Gender and other social norms, based on traditional Khmer and Buddhist beliefs, would have been exacerbated by the conflict. As women tend to be more exposed to the hardships of conflicts, that exposure to harm carries on into post-conflict realities.⁷⁰ In addition, as studies elsewhere have indicated, due to the normalisation of violence during conflict, an increase in domestic violence occurring post-conflict is notable.⁷¹ Whether such violence occurs prior to or flowing from conflicts, by exposing the inequalities occurring during conflicts, transitional justice processes create opportunities to revisit and address the deep-seated inequalities affecting women and men alike in a much wider context.⁷² Thus, transitional justice mechanisms create a window of opportunity to make lasting improvements in the lives of the most vulnerable and disfranchised by working to transform the root causes of inequalities and by making decision-makers accountable.

⁶⁹ United Nations, ‘Guidance Note of the Secretary General: United Nations Approach to Transitional Justice’, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed December 5, 2017), p. 3.

⁷⁰ Carol Cohn and Sara Ruddick, ‘A Feminist Ethical Perspective on Weapons of Mass Destruction’, in: *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (Cambridge: Cambridge University Press, 2004), 405–35.

⁷¹ Vesna Kesić, ‘Muslim Women, Croatian Women, Serbian Women, Albanian women’, in: *Balkan as Metaphor: Between Globalisation and Fragmentation* (Cambridge, MA: MIT Press, 2002), 311–22.

⁷² See also Bell et al., ‘Justice Discourses in Transition’; Elish Rooney, ‘Women’s Equality in Northern Ireland’s Transition: Intersectionality in Theory and Place’, *Feminist Legal Studies* 14 (2006): 353–75; Niamh Reilly, ‘Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women’s Human Rights Approach’, *International Journal of Law in Context* 3, no. 2 (2007): 155–72.

The Human Security Report Project rightly asserts that sexual violence taking place during armed conflicts is often ‘both partial and often deeply misrepresentative’.⁷³ In the context of Cambodia, the advantage of ‘talking’ about the SGBV committed under the Khmer Rouge, as facilitated to some extent by the transitional justice processes, is mainly that it has created opportunities for challenging societal perceptions of violence, including domestic violence, and of gender roles. The fact that there are parallels between conflict and peacetime interventions into SGBV cannot be denied. Bridging the gap between the public and private spheres, leading to better understanding of the causes and effects of violence in both, is paramount for developing policies and strategies that can effectively address the root causes of gender inequality, rather than only its consequences. Even though, as clarified earlier, some of the sexual crimes committed under the Khmer Rouge affected both women and men, the following section focuses on the victimisation of women in particular as a group disproportionately impacted.

Gender (in)equality in Cambodia today

Given the ECCC’s limited record of dealing with SGBV,⁷⁴ non-judicial avenues of truth-seeking and recording the sexual and gender-based crimes committed under the Khmer Rouge have been pursued. For instance, in 2011 and 2012, two Women’s Hearings took place in Cambodia, where victims (both women and men) publicly spoke about their experiences of SGBV during the Democratic Kampuchea period, as well as the long-term impact on their lives.⁷⁵ This process, albeit non-judicial and therefore not legally binding, forms an important

⁷³ Human Security Report Project, *Sexual Violence, Education, and War: Beyond the Mainstream Narrative* (Vancouver: Human Security Press, 2012), p. 20.

⁷⁴ This was also noted by the CEDAW Committee in *Concluding Observations*.

⁷⁵ Cambodian Defenders Project, ‘Women’s Hearing: True Voices of Women Under the Khmer Rouge. Report of the Proceedings of the 2011 Women’s Hearing on Sexual Violence During the Khmer Rouge Regime’, http://gbvkr.org/wp-content/uploads/2013/01/Report-on-2011-Womens-Hearing_Phnom-Penh.pdf (accessed December 5, 2017).

step in deploying a full range of justice- and truth-seeking measures.⁷⁶ The hearings provided a formal record of the occurrence and scale of the SGBV under the Khmer Rouge, as well as unveiled the nature and level of control that the regime exercised over society (including the ultimate control of people's sexuality). Most importantly, though, the hearings provided an opportunity for the victims to tell *their* stories of SGBV under the Khmer Rouge, which until recently had been silenced due to political and socio-cultural constraints, including that rape and other types of sexual violence continue to be perceived as more shameful to the victims and their families than to the perpetrators.⁷⁷ Thus, the compounding effects of the policies under the Khmer Rouge along with the enduring pernicious traditional beliefs relating to gender norms and standards (not eradicated by the Communist regime) continue to shape contemporary Cambodian society. The 'code of behaviour for women', the *Chbab Srey*,⁷⁸ influences the perceptions of SGBV victims and thus the reporting of SGBV (as explained in more detail below).⁷⁹ The *Chbab Srey* portrays women as inferior to men and outlines a number of female virtues (e.g. virginity, sexual innocence, self-control and softness of behaviour), as well as the behaviour considered 'appropriate' for women. These attitudinal traits are accompanied by the stereotypical gender roles of both protectors and perpetrators that are attributed to Cambodian men, which Mona Lilja links to

the violent history of the country [which] has produced men as subjects that exercise violence not only within the public arena (the armed forces, the soldiers and the

⁷⁶ Beini Ye, 'Transitional Justice Through the Cambodian Women's Hearings', *Cambodia Law and Policy Journal* 3, no. 2 (2014): 23–38.

⁷⁷ Amnesty International, 'Breaking the Silence: Sexual Violence in Cambodia', <https://www.amnesty.org/en/documents/asa23/001/2010/en/> (accessed December 5, 2017).

⁷⁸ In 2007, the Ministry of Education, Youth and Sports in Cambodia revised the *Chbab Srey* and removed some of the passages from the educational curriculum in schools, with the remainder of the code of conduct for women to be still taught in school grades 7 to 9.

⁷⁹ See also CEDAW Committee., *Consideration of Reports Submitted by State Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Cambodia* (Geneva: CEDAW Committee, 2011).

bodyguards) but also within the private sphere (domestic violence, rape, including gang rape, sexual violence against sex workers and trafficking).⁸⁰

Consequently, the link between the past and the present within a transitional context is not only confined to achieving ‘justice’ in the sense of ensuring accountability for large-scale past abuses but also entails recognising the implications of those past violations for current social relations. Therefore, in today’s Cambodia, the evaluations of approaches to gender equality need to be read and considered within the wider social, political, cultural, legal and historical contexts. The reality of Cambodia’s criminal justice system is such that the formal pathways are not sufficiently developed or indeed effective to deal with the most serious of crimes. Moreover, the concept of gender-based violence has not been formally recognised and fully developed within the Cambodian legal system. Discrimination against women in Cambodia, in both private and public spheres, continues. This has been noted in the CEDAW Committee’s *Concluding Observations on Cambodia*, highlighting the lack of a ‘comprehensive definition of discrimination that prohibits both direct and indirect discrimination’.⁸¹

This is not, however, unusual or unique for Cambodia, as many other post-conflict societies share similar experiences. Christine Chinkin and Hilary Charlesworth rightly observe that, in relation to post-conflict situations, ‘the forms and locations of violence may change at the cessation of active conflict, but violence against women is likely to be a continual phenomenon’.⁸² As Nahla Valji further contends, in the context of transitional justice, there is a need to ‘move beyond a focus on individual incidents of sexual violence in conflict to

⁸⁰ Mona Lilja, *Resisting Gendered Norms: Civil Society, the Juridical and the Political Space in Cambodia* (New York: Routledge, 2013), p. 31.

⁸¹ CEDAW Committee, *Consideration of Reports*, para. 10.

⁸² Chinkin and Charlesworth, ‘Building Women into Peace’, p. 941.

addressing the context of inequality which facilitate these violations'.⁸³ This requires (re-)emphasising that the abuses that take place during armed conflicts are not simply outcomes of the conflicts but have their roots in pre-existing and continuous inequalities, including power hierarchies and discriminatory gender norms. This particular dynamic, which can be characterised as a recurring cycle of violence, is unsurprisingly, but regrettably, observed also in contemporary Cambodia. Moreover, recent studies into domestic violence in Cambodia have shown that violence against women remains widely accepted and tolerated.

Following the adoption of the Law on the Prevention of Domestic Violence and the Protection of the Victims (2005), the Ministry of Women's Affairs (MoWA), with the support of its development partners, conducted a baseline survey on violence against women in Cambodia.⁸⁴ In 2009, a follow-up survey was conducted to explore whether relative changes in behaviour and attitudes towards violence against women, in particular domestic violence, had occurred.⁸⁵ The 2009 survey reported that 15% of men agreed that men were entitled to different rights than women (an over twofold increase from 2005), with 20% of women holding that view across both surveys, thus reporting no change in perceptions. The follow-up survey also provides insights into the level of acceptance of violence against women in Cambodian society, with 30% of males indicating that certain types of life-threatening violence were sometimes acceptable, whilst two in five males aged 13–17 and more than one in three males aged 18–24 endorsed a husband's use of physical violence under one or more circumstances.

⁸³ Nahla Valji, 'Gender Justice and Reconciliation: Occasional Paper', *Dialog on Globalisation*, No. 35 (Berlin: Friedrich Ebert Stiftung, 2007), p. 4.

⁸⁴ Ministry of Women's Affairs (MoWA), *Violence Against Women: A Baseline Survey*, sponsored by GTZ Promoting Women's Rights Project (PWR), EWMI Human Rights in Cambodia Project (HRCP) and UNIFEM CEDAW South East Asia Programme (Phnom Penh: MoWA, 2005).

⁸⁵ Ministry of Women's Affairs (MoWA), *Final Study Report. Violence Against Women: Follow-Up Survey*, sponsored by GTZ PWR, United Nations Population Fund (UNFPA), United Nations Development Program (UNDP) under the Partnership for Gender Equity (UNDP/MoWA/PGE), UNIFEM and AusAID (Phnom Penh: MoWA, 2009).

The survey also indicated that nearly two in five females aged 13–17 and one in three females aged 18–24 believed that it was acceptable for a husband to hit his wife under one or more circumstances. In a similar vein, the Partners for Prevention (P4P) Study on men’s use of violence against women reports that 32.8% of women and 27% of men in Cambodia agree that there are times when a woman deserves to be beaten.⁸⁶ The levels of acceptance of violence against women differ across socio-cultural contexts, and, as in Cambodia, women often hold less-equitable views than men. This indicates that gender norms are deeply entrenched in unequal gender relations, driving attitudes among both men and women towards accepting such forms of violence.

Due to the lack of public access to criminal proceedings or official statistics, it is difficult to provide accurate estimates of the level of reporting of violence in Cambodia. However, in the 2009 survey, only 4% of women reported approaching courts or the police about their abuse, with 81% (an increase from 52% in 2005) indicating that their response to violent domestic behaviour was to ‘keep quiet / do nothing’.⁸⁷ Further anecdotal evidence suggests that the widespread corruption of the police and other authorities is a significant factor in victims not coming forward and seeking justice through the formal channels. In the most extreme cases of violence, 87% of the respondents reporting direct involvement in a rape incident reported seeking no help. Although Cambodia is not unique in this regard,⁸⁸ it is often the victims who bear the stigma of sexual violence. Despite Cambodia’s Penal Code criminalising rape and other forms of sexual assault, justice is often left to community leaders to order financial compensation or even marriage between the victim and the perpetrator to

⁸⁶ Emma Fulu, Xian Warner, Stephanie Miedema, Rachel Jewkes, Tim Roselli and James Lang, *Why Do Some Men Use Violence and How Can We Prevent It? Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific* (Bangkok: UNDP, UNFPA, UN Women and UNV, 2013).

⁸⁷ Ministry of Women’s Affairs. , *Final Study Report*.

⁸⁸ See Valji, ‘Gender Justice and Reconciliation’, discussing the case of Rwanda.

preserve family reputations. In line with the Khmer proverb that ‘men are gold and women are white cloth’, the general perception continues that once a woman is sexually abused, it ‘stains’ her for the rest of her life and she is perceived to be of less value. It is also not uncommon for the families of the sexually abused to experience some level of discrimination and/or marginalisation, which further reinforces the silencing of victims.⁸⁹

The scope for transformative justice in Cambodia

The scale of transformative justice in Cambodia is currently far from satisfactory. Whilst some transitional justice mechanisms have been deployed, albeit largely limited to the work of the ECCC and the Women’s Hearings, the transformative impact of these measures on creating substantive equality (both *de jure* and *de facto*) remains doubtful. With high levels of SGBV taking place, including socioeconomic abuse against women, and the persisting attitudes towards SGBV, achieving transformative gender justice is certainly not an easy task.

Arguably, at a normative level, Cambodia is reasonably well equipped to work towards achieving transformative gender justice, as a party to relevant international law instruments (particularly the CEDAW). These legal instruments can provide a solid basis for the commencement of transformative changes and redefining the existing unequal power relations. On the other hand, Cambodia’s commitment to the WPS agenda is still lacking. Thus far, Cambodia has not yet enacted a National Action Plan on the implementation of UNSCR 1325, nor has it expressed any clear commitment to do so.⁹⁰ As such, and unsurprisingly, one of the key challenges facing Cambodia today lies in the effective implementation of (international and domestic) policies and legal frameworks.

⁸⁹ Cambodian Human Rights and Development Association (ADHOC), *Rape: Attitudes and Solutions in Cambodia* (Phnom Penh: ADHOC, 2004).

⁹⁰ Information correct as of January 2018.

Cambodia ratified the CEDAW in 1992 but its implementation has been slow, and only more recently have gender equality efforts gained momentum. The MoWA and the Cambodian National Council for Women (CNCW) were established to support the national strategy of promoting gender equality and the empowerment of women. The MoWA developed its Gender Strategic Plan, *Neary Rattanak*, resulting in a five-year strategic plan for 1999–2003, which aimed at building women’s capacity. The MoWA’s responsibilities also lie in promoting the CEDAW implementation and mainstreaming gender equality in policy frameworks. Further, the 2003–2005 National Poverty Reduction Strategy (NPRS) was launched to better the living conditions of rural people, including the reduction of gender inequalities. In December 2014, the government adopted the Second National Action Plan on Violence Against Women (2014–2018), focusing on prevention and moving beyond awareness-raising to concrete actions. The MoWA recently launched its 4th Gender Strategic Plan, *Neary Rattanak IV* (2014–2018), continuing the efforts to promote gender equality and the empowerment of women in Cambodia.

In addition, there has been a perceived shift in attitudes towards sexual violence (as alluded to briefly above), mainly due to the work of civil society and non-governmental organisations targeting vulnerable communities and educating about victims’ rights, along with the government’s attempts to address gender inequality at the national level. Nonetheless, the prevalence of rape, especially gang rape (*bauk*), in Cambodia continues to be widespread.⁹¹ One of the perceived reasons for this has been the (traditional) concept of masculinity contributing to violence and oppression or the perceived dominance of men over women. Addressing sexual violence requires changing the social norms relating to the acceptability of violence and the subordination of women, including ending impunity for those who commit

⁹¹ See Ministry of Women’s Affairs (MoWA), *National Survey on Women’s Health and Live Experiences in Cambodia* (Phnom Penh: MoWA, 2015).

sexual crimes,⁹² as well as addressing the underlying and consequential poverty and economic inequality. Changing constructions of femininity and masculinity, and the ascribed gender roles and consequential gender stereotyping, is not an easy task in any society, let alone one emerging from a conflict. The WPS agenda and the CEDAW can be effective tools in achieving transformative gender justice. Article 5(a) of the CEDAW offers an agenda for social and cultural transformation and paves the way for the contracting parties to modify social and cultural gender stereotypes to protect women from violence deriving from such gender norms. That being said, the realisation of this obligation is by no means straightforward, as it requires deep-reaching changes in the root causes of gender-based violence.

As in so many other post-conflict societies, Cambodia faces a significant challenge: to address its past and, at the same time, to continue on the road to development and democracy. Whilst these processes take place, choices are made as to which areas to focus attention and limited resources. Within a post-conflict context, democracy, human rights and the rule of law are perceived as ‘interlinked and mutually reinforcing’.⁹³ However, making one conditional on the other does not, by itself, automatically lead to them emerging in a virtuous circle; thus, setbacks and challenges are to be expected. The democratisation process facilitates reflection and dialogue – thus aiding the attainment of the objectives of transitional justice – but it reaches beyond the reconciliatory approach to past experiences. Cambodia’s democracy index has fluctuated and in 2008–2017 experienced a regress.⁹⁴ This affects society in a much wider sense than only in relation to gender equality: it is symptomatic of the interrelatedness of the

⁹² Fulu et al., *Why Do Some Men Use Violence?*

⁹³ United Nations General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (A/RES/67/1, 2012), para. 5.

⁹⁴ Based on the Economist Intelligence Unit Index, which takes into account five criteria: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture (<http://www.eiu.com/topic/democracy-index>) (accessed July 6, 2018). In 2017, Cambodia was ranked below other post-conflict countries, such as Timor-Leste, Colombia and Liberia.

different processes taking place in post-conflict societies, as well as attesting the complexity of political, institutional and deeper structural transformations.

There is no denying that Cambodia has made a significant leap from being a war-torn country to a society that attracts foreign investment and where, at least on the surface, the living conditions of ordinary citizens have been gradually improving. The questions that need to be asked though are at what expense these changes take place and who might be losing out in the process. Despite the ECCC-related outreach programmes on promoting national debate about justice and truth-seeking, the impact of raising awareness of sexual violence in Cambodia has been modest. There is no denying the importance of the ECCC trials in facilitating the national debate on the sexual violence committed under the Khmer Rouge. Arguably, though, insufficient effort has been put into translating these into defying the current social norms in Cambodia that lead to continuous gender stereotyping which, in turn, increases the risk of violence against women and inhibits their ability to seek support and justice.⁹⁵

Linking transitional justice with transformative changes is not only desirable but also necessary if the aims of transitional justice are to be achieved: to transform societies and build their capacity for more-peaceful societal relations. There is an ongoing disagreement between scholars and practitioners of transitional justice about the impact and (long-term) legacy of transitional justice processes and mechanisms. Increasing women's participation and capacity is often part of outreach programmes. However, has enough been done to translate changes relating to post-conflict inequalities? Arguably, transformative gender equality can be achieved through focusing on strengthening and securing women's social and economic rights (in

⁹⁵ WHO, 'Promoting Gender Equality'.

addition to civil and political rights), therefore allowing them to fully and equally participate in post-conflict societies.⁹⁶

Another avenue that could support the transformation of society's perception of and attitude towards SGBV is the education of Cambodia's youth. The focus of the reconciliation and outreach programmes has been mainly on the older generations,⁹⁷ with the youth being only marginally made part of these processes; when they are, the aims are predominantly for preserving history and acknowledging the past. Undeniably, these are important aspects of transitional justice toolkits.⁹⁸ However, perhaps more could be done in educating younger generations about the roots of the crimes committed in the past and their continued impact on modern society, including in relation to gender norms and (in)equality. Accordingly, transformative learning⁹⁹ should involve recognising and challenging taken-for-granted attitudes and assumptions by creating opportunities to examine the complex effects of conflict and mass violence on the lasting forms of (gender) inequality, the lack of inclusiveness and thus the prospects for sustainable peace and development in Cambodia.

Conclusions

⁹⁶ Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict', http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf (accessed December 5, 2017).

⁹⁷ The outreach programmes focusing on young people include the 'Youth for Peace and Reconciliation Project'. For more, see: <http://yfpcambodia.org/index.php?p=submenu.php&menuId=3&subMenuId=36> (accessed July 6, 2018).

⁹⁸ See Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazard, *Voices for Reconciliation: Assessing Media Outreach and Survivor Engagement for Case 002 at the Khmer Rouge Trials* (Stanford, CA: WSD HANDA Center for Human Rights, 2016); Heinrich Böll Stiftung, 'Cambodia: Women's Hearing with the Young Generation' <https://kh.boell.org/en/2014/08/14/womens-hearing-young-generation> (accessed December 5, 2017)..

⁹⁹ Jack Mezirow, 'Perspective Transformation', *Adult Education Quarterly* 28, no. 2 (1978): 100–10; Robert D. Boyd and Gordon J. Myers, 'Transformative Education', *International Journal of Lifelong Education* 7, no. 4 (1988): 261–84.

It must be acknowledged that gender inequality does not only, or even predominantly, denote (conflict-related and non-conflict-related) sexual violence but also affects the lives of women in all aspects, ranging from political participation to cultural and economic empowerment. Even though in this paper we have focused on SGBV in the context of a transitional society, we accept that the discrimination against women in modern Cambodia cannot be addressed only from the perspective of crimes relating to sexual violence. However, sexual violence, past and present, is an outcome of deeply imbedded gender inequality and structural discrimination. Thus, in order to disrupt the patterns of discrimination and SGBV – and to enable the transformative change to gender equality in Cambodia – a conceptual and practical shift in thinking about SGBV and gender equality is required. As Madeleine Rees and Christine Chinkin accurately observe, transformative gender equality is often mistakenly interpreted to mean ‘women’s participation’,¹⁰⁰ but simply ‘adding women’ does not ultimately solve the challenge of working towards transformative gender equality. Similarly, enacting laws protecting from violence, whilst important in the normative sense, does little to advance women’s social, economic and cultural rights. Nevertheless, securing and effectively realising these rights can be a major driver in the pursuit of transformative gender equality. To that end, we argue that it is important that women are not merely ‘protected’ from violence but, rather, are empowered in all aspects of their lives to be able to raise their cultural, social and economic status. As studies in other areas have shown, protectionist approaches to violence against women often lead to their rights being restricted in the name of that protection without much positive impact on minimising the occurrences of violence.¹⁰¹

¹⁰⁰ Madeleine Rees and Christine Chinkin, ‘Exposing the Gendered Myth of Post-Conflict Transition: The Transformative Power of Economic and Social Rights’, *New York University Journal of International Law and Politics* 48, no. 4 (2016): 1211–26.

¹⁰¹ See, for example, Bradley and Szablewska discussing the protectionist laws affecting the safety and rights of sex workers in Cambodia: Clare Bradley and Natalia Szablewska, ‘Anti-Trafficking (Ill) Efforts: The Legal Regulation of Women’s Bodies and Relationships in Cambodia’, *Social & Legal Studies* 25, no. 4 (2016): 461–88.

There is scope for transforming (political and socioeconomic) structures through traditional transitional justice mechanisms. Undeniably, though, there are limits to how much this can be achieved by or facilitated through legal or quasi-legal mechanisms alone. Thus, the purpose of post-conflict processes must be to address not only the legacy of large-scale past abuses (a role predominantly taken by transitional justice processes) but also the wider issues of social justice and gender equality (through transformative approaches). Attaining justice for SGBV victims under the Khmer Rouge is welcomed, but it is only partially successful if justice is denied to such victims today. Without a much wider and more comprehensive approach leading to long-lasting and deep-reaching societal transformations, the impact and legacy of transitional justice will necessarily remain partial.

Gender roles are habituated in social and cultural practices; thus, changes to these require long-term interventions and commitments. Unless challenged and subverted, the inequalities and gaps that led to the conflict in the first place will remain in place and will continue to affect future generations. Transitional justice processes are well positioned to interrogate the root causes of conflicts and build foundations for addressing these to prevent future conflicts. That, however, requires investing in programmes that not only educate about the past but also raise awareness about the ongoing inequalities and their causes to create opportunities to transform social norms and normative beliefs regarding gender (in)equality. Despite being an ambitious aim, unless the past is linked to the present, and thus its impact on the future evaluated, the lessons learnt and the deterrent impact of transitional justice processes will remain limited. Based on the past and ongoing experiences of post-atrocity societies, transitional justice needs to evolve by either taking on more of a ‘transformative’ role or being supplemented by ‘transformative’ justice measures, which requires addressing not only the consequences of the violence committed during the conflict but also the structural context of the inequalities and discrimination enabling violations to occur before, during and after the

conflict. Transformation, therefore, implies processes beyond the initial transitional period, and the practical implications thereof denote the need for practices that are attuned and responsive to the local idiosyncrasies and contexts of post-conflict societies. These long-term strategies are embedded in and subject to continuous dialogues with the different groups, including the most marginalised and disempowered.

If attaining peace and societal stability within post-conflict societies is what transitional justice aspires to, then safeguarding gender equality is an integral part of this process. As indicated in the opening quote, democracy is more than having political parties, elections, and checks and balances. It is also about securing the (active) participation and inclusion of different groups, including the most vulnerable and disempowered. As Frances Raday aptly notes, ‘women’s right to equality is condition-precedent for democracy and not merely a result of democratic recognition’.¹⁰² As such, women’s rights and gender equality are essential for the *quality* of democracy¹⁰³ in any country, particularly those in transition. Peering into the future, if the levels of and responses to modern-day SGBV are taken as indicators of the transformative and democratisation processes taking place in Cambodia, the picture is far from optimistic. The Cambodian government and civil society should be congratulated on their efforts so far, but far more needs to be done to ensure that the gender norms embedded in traditional Khmer socio-cultural value systems, and historically conditioned, continue to be re-evaluated so that they do not undermine the positive changes in challenging the acceptance, normalisation and rationalisation of SGBV. As the example of Cambodia indicates, achieving ‘transformative’ justice might be an even more ambitious project than instituting ‘transitional’ justice, but it is an indispensable step for the future of post-conflict societies.

¹⁰² Frances Raday, ‘Gender and Democratic Citizenship: The Impact of CEDAW’, *International Journal of Constitutional Law* 10, no. 2 (2012): 512–30, p. 515.

¹⁰³ Larry Diamond and Leonardo Morlino, eds., *Assessing the Quality of Democracy*. (Baltimore: Johns Hopkins University Press, 2005).

