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"From Civil War to Fragile Democracy: The Role of the UN in Post-conflict Peace building in Cambodia"

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Introduction

You have no doubt followed the opening of the trial two days ago (17 Feb 2009) of Kaing Guek Eav (Khang Khék Ieu), 66, (aka Duch (pronounced DOIK)) – indicted August 12, 2008, for crimes committed while he was governor of Toul Sleng prison, where an estimated 14-16,000 people were tortured in the late 1970s, of whom only seven or ten are known to have survived. Khang Khék Ieu, who converted to Christianity, admitted guilt, but contends that everything he did was by order of others. The verdict not expected until October.

In 1992-93, the United Nations established a Transitional Administration in Cambodia (UNTAC) as part of a peace agreement (the Paris Agreements, 1991), which referred to ensuring that "the policies and practices of the past shall never be allowed to return."

Why did it take 18 years after this agreement and 30 after the regime responsible for the crimes was overthrown to start the first trial?

What has been the role of the UN in this process?

What has the UN done not only in relation to the tribunal that is trying Duch (known as the Extraordinary Chambers in the Courts of Cambodia), but more broadly in bringing Cambodia from civil war to fragile democracy?

This case is of particular significance since it was one of the first of a new beginning for the UN, a return to the collective security function as envisaged by the Charter and to a large extent suspended during the Cold War. UNTC was a poster case of the Agenda for Peace strategy. It has involved a *peacemaking* role in the Paris Conference, a *peacekeeping* role in the UNTAC operation, a *peace building* role in the transition from UNTAC to economic and institutional development support, and even a *preventive diplomacy* role in attempting to provide for accountability—with a 30 year delay—to prevent the return of “the policies and practices of the past” and support for indigenous human rights action.

I. The UN as peace-maker

The transition from civil war to a fragile democracy resulted from the implementation, under United Nations supervision, of an international treaty by which the four contending Cambodian parties¹ and eighteen other countries, including the five permanent members of the Security Council and the principal regional powers,² agreed to detailed conditions for a "comprehensive political settlement of the Cambodia conflict," the terms used in the Paris Agreements.³

The Agreements on a Comprehensive Political Settlement of the Cambodia Conflict

- signed in Paris on 23 October 1991 at the final meeting of the Paris Conference on Cambodia
- Culmination of more than a decade of negotiations

¹ These four parties were the Cambodian People's Party (CPP), previously known as the People's Revolutionary Party of Kampuchea (PRPK), which headed the People's Republic of Kampuchea (PRK), since 1989 called State of Cambodia (SOC); the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (FUNCINPEC); the Khmer People's National Liberation Front (KPLNF), also known as the Buddhist Liberal Democratic Party (BLDP) since May 1992; and the Party of Democratic Kampuchea (PDK) or Khmer Rouge (KR). It is important to keep in mind that the distinction between SOC and the functioning government structure and CPP as a political party was more of a fiction than a reality since the party controlled the state.

² The eighteen other signatories are Australia, Brunei, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand, the USSR, the UK, the US, Viet Nam, and Yugoslavia. On the background of the Agreements, see Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 *American Journal of International Law* 1 (hereinafter cited as “Ratner”), at 2-8. See also Steven R. Ratner, “The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?,” in Damrosch (ed.), *Enforcing Restraint. Collective intervention in Internal Conflicts*, Council on Foreign Relations Press, 1993, at 241 (1993).

- United Nations deeply engaged in the process from the outset.
- Invited the Security Council to establish the United Nations Transitional Authority in Cambodia (UNTAC), which it did in its resolution 718 (1991) of 31 October 1991 and requested the Secretary-General to prepare a detailed plan of implementation.

The Agreements and the United Nations Transitional Authority in Cambodia (UNTAC), established pursuant to the Agreements, did much to establish the basis for such a settlement. However, they did not and could not achieve that result completely. The implementation of the Agreements was particularly unsuccessful with respect to disarmament, demobilization and cantonment of forces, prevention of cease-fire violations, access to all territories, and maintenance of a neutral political environment. The failure to implement the military provisions of the Agreements was a calculated risk by the United Nations in order to proceed with the elections. Indeed, the most positive result of the UN's efforts to implement the Agreements was the massive participation of the Cambodian people in a free and fair election.⁴ Although the May 1993 elections were a defining moment of the mission, they were not an end in themselves but rather a means to a broader end, namely, the drafting and adoption of a new national constitution, as a precondition to setting up a democratic government.

II. The UN as peace-keeper: UNTAC

Duration: March 1992 - September 1993

Strength: Approximately 22,000 military and civilian personnel

Fatalities: 78 (4 military observers, 41 other military personnel, 14 civilian police, 5 international civilian staff and 14 local staff).

Expenditures: US\$1.62 billion (UNAMIC and UNTAC combined)

The transition was in large part the work of the international community, in the form of the contact group, the regional powers, the permanent members of the Security Council, the co-chairs of the Paris Conference, and the UN secretariat. The SNC and especially its president, Prince Norodom Sihanouk, represented Cambodian sovereignty.

⁴ As the Special Representative of the UN Secretary-General, Yasushi Akashi, explained, "[w]hat UNTAC was endeavouring to achieve in Cambodia was sowing some of the seeds for the growth of democracy which the Cambodian people themselves had to nurture after our departure." Yasushi Akashi, "UNTAC in Cambodia: Lessons for U.N. Peace-Keeping," Third Charles Rostov Lecture on Asian Affairs, The Paul H. Nitze School of Advanced International Studies, John Hopkins University. Manuscript provided by the Nitze School, at 6. Akashi characterized the mission "as a most comprehensive and complex of the classic, Chapter 6 type of peace-keeping operation, and at the same time, as the beginning of the second generation of United Nations peace operations because of its extensive authority over matters which normally belong to national sovereignty." *Id.*, at 22. Within this framework, his overview clearly stresses the holding of the elections as the cornerstone of the operation.

Because the SNC was only the nominal seat of sovereignty, the peace process was primarily in the hands of the international community, but the constitution making phase was primarily the work of Cambodian political leaders. Let me make some observations on the role of the UN and of specific governments in both the peace process and the constitution making process will illustrate the role of the international community.

UNTAC's role in the overall transition was defined in the Secretary-General's report of February 19, 1992, to the Security Council,⁵ which was approved by the Security Council on February 28.⁶ While it set out detailed guidelines for the **seven components** of the mission, especially regarding **demobilization and cease-fire, assuring public security, organizing elections and promoting and monitoring human rights, it did not specify any particular role for UNTAC in the constitution drafting process.** This, once again, is regrettable since it offered little or no guidance to the Cambodians on the design of the process, and did not secure for the UN a firm basis for assisting with the design and management of the process.

Nevertheless, the Electoral Component, headed by highly experienced constitutional lawyer Reginald Austin, consulted widely with experts in constitution drafting and compiled significant amounts of information on the style and content of constitutions for the use of the Cambodian parties. He presented these materials in various settings, including to an SNC meeting. The Electoral Component convened several working sessions on constitutional matters with party representatives and a few outside experts, but without the participation of either Sihanouk or Akashi. The most significant event of this type was the Constitutional Seminar held from March 29 to April 3, 1993. All Cambodian parties and many Cambodian NGOs were invited to participate in discussions centered on presentations made by UNTAC staff and several Cambodian and outside experts. These efforts all focused exclusively on substantive constitutional issues. While helpful in deepening participants' awareness of comparative approaches on key issues of governance and constitutional structure, the Seminar did not appear to have much of an impact on the persons who actually drafted the text.

As my former colleague in Cambodia, Ken Cain, wrote in that scholarly treatise on UN peace operations *Emergency Sex and Other Desperate Measure: A True Story from Hell on Earth*: "The UN is sponsoring the election in May to create a legitimate, democratic government. If we can do it in one of the worst places in the world, then we can do it anywhere. That makes us the center of the New World Order. At least until June." (New York: Miramax Books, 2004, p. 49)

The Human Rights Component of UNTAC:

- Encouraged SNC to ratify relevant international human rights instruments,
- Conducted an extensive campaign of human rights education,
- Supported the emergence and development of human rights NGOs

⁵ Report of the Secretary-General on Cambodia, containing his proposed implementation plan for UNTAC, S/23613 of 19 February 1992.

⁶ S/RES/745 (1992) of 28 February 1992.

- Investigated allegations of human rights abuses and
- Exercised general oversight of human rights aspects of every component of UNTAC.
- Redirected its human rights education program during the post-election period towards "constitutional literacy"⁷

When UNTAC arrived, there was an exaggerated expectation by the population that the UN would bring peace. There was bound to be a let down, and indeed there was. Regarding the constitution making process, Akashi tended to leave it to the Cambodians, but Sihanouk's shifting attitude undermined the effectiveness of the process and the ability of the UN to make a positive contribution. On August 31, 1993, he wrote from North Korea that he would agree to be king if the Assembly insisted but four days later he asked not to be considered, saying, "We have already found the ideal formula: Cambodia is an independent, neutral and non-aligned state, neither a Kingdom nor a Monarchy. It is simply a Cambodian Cambodia."⁸ It was in this context that he became furious at the UN, alleging that UNTAC told the BBC that he wanted the restoration of monarchy. On September 4, 1993, he wrote to Akashi that he was breaking off all relations with UNTAC and asked Akashi not to make a scheduled trip to Beijing. While he subsequently toned down his furor against UNTAC, he remained suspicious of perceived UN meddling in the constitution drafting process.

In hindsight, perhaps there might have been less hypersensitivity on the part of the Cambodian leadership vis-à-vis the issue of UN meddling, had the UN's efforts focused more on process than on substance. In this way, the international community could have been perceived as a more neutral and supportive agent in designing a process that would have allowed the Cambodians themselves to make key substantive choices. This is true particularly in light of the fact that, as noted in the previous section, the Cambodians appeared to be open to whatever process the international community might suggest. The final assessment of the role of the UN in the transition overall must certainly be positive for having held the election and repatriated refugees, even though the UN can be faulted for having failed the military phase of the process. As an exercise in peace-making, this must certainly be seen as a success. However, while the UN's efforts enabled the constitution to be drafted, its direct role in that element of the process was negligible.

⁷ We provided Cambodian NGOs and the general public with information on popular participation in constitution drafting, drawing upon other Asian examples, and a basic understanding of constitutional concepts. Audio-visual materials were prepared and disseminated, discussion groups set up with NGOs, and a "constitutional forum" was organized during which three Cambodian activists (a monk, a representative of women's organizations, and a head of an indigenous human rights organization) participated in a panel with three Asian experts who had been active with popular organizations during the drafting of other constitutions in the region. The audience of over 100 activists engaged in an animated discussion showing an intense interest in political participation and in strong human rights provisions in the constitution. The Cambodian groups requested the UN meeting room for closed sessions the following day. At the conclusion of a full day's efforts, they had formed a coalition of 14 groups called *Ponleu Khmer*, mentioned above.

⁸ William Shawcross, *Cambodia's New Deal*, Carnegie Endowment for International Peace, 1994, p. 33.

III. The UN as peace builder

A. Historical Setting

Rebuilding Cambodian society and economy must be seen in the context of Cambodia's ancient, colonial and recent history. To dwell exclusively on the impact of the civil war would overlook that of the two other major historical influences. Like many countries in Southeast Asia, Cambodia's political traditions derive primarily from:

- Indian culture and absolute rule of god-kings, as well as from
- Buddhist beliefs.⁹

The existence of a legal system and of a formal constitution defining the functions and powers of national institutions only came with French colonialism and the realization of independence.

Attitudes towards the constitution and law in general continue, nevertheless, to be affected by the traditions of the past. These traditions date from the age of the Khmer empire that ruled from Angkor from the ninth to the fifteenth centuries. As the eminent historian of Cambodia, David Chandler, explains, "**a Cambodian king**, like most Chinese emperors, could rule only by extending networks of patronage and mutual obligations outward from his palace, at first through close associates and family members but becoming diffuse--and more dependent on local power-holders--at the edges of the kingdom."¹⁰ The king was distant from the people, who rarely saw him. Even in the nineteenth century villagers had only a vague idea about the king. They generally believed the king to have the power to influence the weather, to "dispense true justice" and to be "the only political source of hope among peasants."¹¹ François Ponchaud explains that

[i]n the traditional mindset, the king, at the national and even universal planes was the key for the "preservation of harmony with the elements,"...[I]t was incumbent upon him to have the power and duty to rule over the broad universal expanses, and even "to master the earth spirits"... The absence of a sovereign implied the lack of effective

9 George Coedès, *The Indianized States of Southeast Asia* (Honolulu: Univ. Hawaii Press, 1986) (English edition).

10 David Chandler, *A History of Cambodia*, second edition (Chiang Mai, Thailand: Silksworm Books, 1993), 48. See also Mahesh Kumar Sharan, *Political History of Ancient Cambodia, from 1st cent. A.D. to 15th cent. A.D.* (New Delhi : Vishwavidya Publishers 1986); Michael Vickery, *Kampuchea: Politics, Economics, and Society*, (Boulder: Lynne Rienner, 1986).

11 Chandler, *History*, at 107. Chandler also notes that the "Cambodian king, at the pinnacle of society, was remote from his subjects. Scholars have argued that this remoteness was expected of an Asian king; he was to rule by his largely invisible example, just as the sun shone, and he was to act as the custodian of a fund of merit and power--viewed perhaps as an interlocking, expendable commodity--that he had accumulated in previous existences en route to the throne." *Id.*, at 112.

communication between the celestial powers and the world of men; without him you have complete chaos.¹²

Patronage and clientship at the village level remained an essential part of the social structure up to the nineteenth century as the "rectitude and permanence of these relationships had been drummed into people from birth."¹³ Chandler cites Cambodian proverbs and didactic literature that "are filled with references to the helplessness of the individual and to the importance of accepting power relationships as they are." In addition to the King, his high-ranking officials (*okya*), and the village leaders (*chaovay sruk*), members of the royal family were an influential force between the people and their king.¹⁴

Justice in Angkor appears to have been a matter of royal prerogative with particularly brutal forms of determining responsibility and meting out punishment.¹⁵ Reminiscent of practices in medieval Europe, justice in the days of Angkor's glory does not appear to provide much of a model for human rights. More generally, the social structures of the past, and the place of the individual in the Khmer cosmology were adapted under the influence of modern ideas of government, but were not entirely eliminated by the introduction of constitutions in the mid-twentieth century.

The Angkor tradition is reflected in three features of the 1993 Constitution. First, in paragraphs 1, 2, and 3 of the Preamble, the Constitution refers to Cambodia's "grand civilization of a prosperous, powerful, and glorious nation whose prestige radiates like a diamond" and to "the prestige of Angkor civilization." Second are the constitutional provisions, particularly in articles 68-71, concerning the preservation, dissemination and teaching of Khmer languages and culture. The third dimension of Cambodia's ancient past reflected in the constitution is the restoration of monarchy. One

12 François Ponchaud, "Social change in the Vortex of Revolution," in Jackson, *Rendezvous with Death*, at 176, quoting A. Forest, *Le Cambodge et la colonisation française: Histoire d'une colonisation sans heurts (1897-1920)*, 1980.

13 Chandler, *History*, at 105. See also Marie-Alexandrine Martin, "La paysannerie Khmère et le processus démocratique, in *Les Cambodgiens face à eux-mêmes, Dossier pour un débat*, Fondation pour le progrès de l'homme, No. 4, 1993, pp. 127-142, quoted in Maurice Gaillard, *Démocratie Cambodgienne. La Constitution du 24 septembre 1993*, L'Harmattan, Paris, 1994, p. 25.

14 *Id.*, at 111.

15 The practice of justice is included in the account of customs in Angkor in the last days of the Khmer Empire, written around 1312 by a Chinese embassy official who had spent a year in Angkor. In determining rights and obligations in civil matters, "[p]oints of dispute, however trifling, are taken to the ruler." When two men have a dispute over a matter, "[e]ach of the contestants is forced to be seated in one of the [twelve little stone towers in front of the palace] with his relatives standing guard over him. They remain imprisoned two, three, or four days. When allowed to emerge, one of them will be found to be suffering some illness--ulcers, or catarrh, or malignant fever. The other man will be in perfect health. Thus is right or wrong determined by what is called 'celestial judgement'. Thus is shown supernatural strength of the God of this country." In criminal matters, an accused thief who denies the charge is forced to plunge his hand in boiling oil. "If he is truly guilty, the hand is cooked to shreds; if not, skin and bones are unharmed. Such is the amazing way of these barbarians." Other criminal punishments included, for serious crimes, placing the criminal in a ditch and "earth and stones are thrown back and heaped high, and all is over." "Lesser crimes are dealt with by cutting off feet or hands, or by amputation of the nose." Chou Ta-Kuan (Zhou Daguan), *The Customs of Cambodia*, Bangkok: The Siam Society, Second ed., 1992, at 33.

constitutional scholar has observed, “monarchy has witnessed the most glorious moments of Khmer civilization. Its millennial embedding makes it the principal feature of the political tradition that still prevails among the peasant masses.”¹⁶

The colonial period also strongly influenced the constitution and, in fact, provided the model on which the drafters drew most heavily. The struggle for independence, which Cambodia gained on November 9, 1949, resulted in both a strong influence of French legal tradition and a firm commitment to national sovereignty and non-alignment. Thus, the 1993 Constitution contains many elements of the 1947 Constitution, as well as a reaffirmation of the kingdom’s position, already in the constitutions of Democratic Kampuchea and the People’s Republic of Kampuchea, as an “independent, sovereign, peaceful, permanently neutral and non-aligned country.”¹⁷

Beyond these influences, the termination of the conflict was a precondition for the constitution making process. Cambodia had been in a civil war virtually since 1970, when Lon Nol came to power following a coup, to be overthrown in 1975 by the DK, who destroyed the economy and the society until the Vietnamese invaded in 1978 and installed the People’s Republic of Kampuchea in 1979. The latter was resisted by the royalist party (FUNCINPEC), the Buddhist party (KPLNF), and the Maoist movement (DK) for a decade until the Paris Conference on Cambodia was convened and eventually succeeded in getting all four factions to agree to a peace process centering around an election.

B. The new constitution

In this sense, it is most accurate to describe the essence of the process as an exercise in **political self-determination through a United Nations-managed transition to a democratic form of government**. The new system was based on a constitution that both acknowledges Cambodian tradition and current political forces and establishes a parliamentary form of government under a relatively powerless monarchy, with a relatively robust bill of rights but weak mechanisms for protecting those rights. UNTAC would have failed if the elections – however free and fair – had not resulted in the adoption of a constitution and the transfer of sovereignty to the new government under that constitution.¹⁸ The process leading to the adoption of the constitution and the installation of the new government has been analyzed from the perspective of post-

16 Maurice Gaillard, *Démocratie Cambodgienne. La Constitution du 24 septembre 1993*, L’Harmattan, Paris, 1994, p. 25.

17 Constitution of 23 September 1993, article 1, para. 2.

18 Technically, this outcome was a condition precedent for the termination of the transition period of UN authority. Article 1 of the Paris Agreement provides that the transitional period shall “terminate when the constituent assembly elected through free and fair elections, organized and certified by the United Nations, has approved the constitution and transformed itself into a legislative assembly, and thereafter a new government has been created.”

conflict nation building;¹⁹ however, few works have addressed the constitutional process itself or the legal system.²⁰

The final product of the work of the Constituent Assembly contains, in spite of a disappointing process, a **reasonable blueprint for democratic governance**. Nevertheless, the path of Cambodian democracy has not been a smooth one. The secession of several provinces under Prince Chakrapong following the election immediately threatened the entire process and required the creation of a Provisional National Government. An unstable power-sharing arrangement between CPP and FUNCINPEC and the continued military confrontation with the DK weakened the application of the constitution in the mid 1990s. These developments culminated in the coup of July 1997 and the consolidation of power around Hun Sen, followed by the troubled election of 1998 and the suspension of foreign aid, and the difficulty in forming a government after the 2003 election. The Constitution has not functioned as initially drafted, with unacceptable delays in creating the Constitutional Court and the Supreme Council of the Magistracy and in adopting amendments to establish a Senate. Violence and corruption mar the democratic process, and yet the essential structures of Cambodian democracy are in place, civil society continues to be vigorous and courageous, and the economy is improving.

Cambodia's new Constitution is the defining event in the implementation of the Paris Agreement's commitment to establish a "liberal democracy on the basis of pluralism." The United Nations deployed over twenty thousand civilian and military personnel and spent two billion dollars to assist Cambodia through a transitional period, the end of which was defined as the adoption of the Constitution and the establishment of the first government pursuant to it. Without the Constitution, UNTAC would have failed in an essential aspect of its mission, although its role in the actual drafting process was minor. Like El Salvador, the Cambodian operation made constitutional reform and integral part of the comprehensive political settlement, with the United Nations keeping the process on course.

To what extent did the Constitution established a "liberal democracy" and what are the prospects for sustainable democracy in Cambodia?

It has been suggested that "in circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people's choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in that country."²¹ In the case of Cambodia, there is good reason to speculate on that question.

¹⁹ See *supra*, note 1.

²⁰ See Maurice Gaillard, *Démocratie Cambodgienne. La Constitution du 24 septembre 1993*, L'Harmattan, Paris, 1994; Siphana Sok and Denora Sarin, *Legal System of Cambodia*, Cambodian Legal Resources Development Center, Phnom Penh, January 1998; Koy Neam, *Introduction to the Cambodian Judicial Process*, The Asia Foundation, 1998; Stephen P. Marks, "The New Cambodian Constitution: From Civil War to a Fragile Democracy," *Columbia Human Rights Law Review*, vol. 26, No. 1, pp. 45-110 (Fall 1994).

²¹ W. Michael Reisman, "Comment: Sovereignty and Human Rights in Contemporary International Law," 84 *AJIL* 866, 871.

It should be clear that the formal inclusion of the key language of the Paris Agreement and its Annex 5 regarding liberal democracy and human rights in the Constitution **did not change the power structure of Cambodia**. It is evident that "[t]he provisions of the formal constitution concerning the selection of members of the ruling group and the right to individual liberties are not the ultimate determinants of the distribution of effective power in the political system, much less in the political society as a whole..."²² Cambodia is an example of the truth that "[n]o matter how careful the constitutional drafting process reestablishing democratic rule, and no matter how bitter the memory of past experience, the dependent political economies and swollen states characteristic of the Third World raise profound structural challenges to the success of democratic constitutions."²³

It may be useful in conclusion to **consider separately** the extent to which this constitutional monarchy is "**democratic**" (i.e. establishes government for and by the people) and "**liberal**" (i.e. protects certain liberties). Walter Murphy insists on the distinction between "democratic theory" and "constitutionalism" to understand constitutional democracy. While both democratic theorists and constitutionalists favor human dignity and equality, the former stress the *process* by which people freely choose their representatives, who, in turn, enact whatever laws they deem necessary on behalf of the people; while the latter, suspicious of the process, set *limits* on what the people, through their representatives, may do. Put succinctly,

constitutionalism tries to limit risks to liberty and dignity by lowering the stakes of politics. Democratic theory tries to limit those risks by promoting, directly and indirectly, the right to participate in governmental processes. The basic differences between the two theories lie not in any dispute about the importance of human dignity and autonomy, but in how best to express as well as protect those twin values.²⁴

In this sense, the new Constitution is "**democratic**" to the extent that the people's interests are genuinely reflected by their duly elected representatives, with real power to further those interests. On the negative side are the defects in the constitutional arrangement of structures of government and the marginalization of the Assembly in practice. Recent developments suggest that the parliament may, in time, become more responsive to its constituencies and act independently of parties. Even if this were to occur, the democratization that will have taken place would not represent a high level empowerment of the population in general. It would be "political liberalization," which

²² Nelson Kasfir, "Popular sovereignty and popular participation: mixed constitutional democracy in the Third World," 13 *Third World Quarterly* 587, at 595 (1992).

²³ Walter F. Murphy, The 19th John M. Tucker, Jr. Lecture in civil Law: Civil Law, Common Law and Constitutional Democracy, 52 *La. L. Rev.* 91, 100-114 (1991). (Hereinafter cited as "Murphy.") Another way of expressing this distinction is by reference to "liberalism" (or "liberal egalitarianism") and "democratic authority," the former acting to protect individuals from the tyranny of the latter. See, for example, Amy Gutmann, "How Liberal is Democracy?," Douglas MacLean & Claudia Mills (eds.), *Liberalism Reconsidered*, Rowman & Allanheld 25 (1983).

²⁴ Murphy, 109.

"implies a process of political change controlled from the top down, as a means of preserving most of the *status quo*."²⁵ According to one author this democratization at the top is a "**game élites play** to manage the granting of very carefully selected concessions. It is a cosmetic exercise and does not install the fundamentals of democratization."²⁶ There are promising **signs of deeper democratization** occurring in Cambodia with the emerging civil society, some elements of which were described above. The fact that a coalition of human rights and development NGOs continues to put pressure on the Assembly is in part responsible for the relatively rapid development of the Commission on Human Rights of the Assembly. For these activists, the Constitution affords some protection, which they could not have expected under the previous regime.

The "**liberal**" character of Cambodia's new Constitution is a function of the clarity and thoroughness with which rights and procedures for their implementation are set out in the Constitution. We have seen that the drafters did little more than graft the monarchical provisions of the 1947 Constitution on a liberalized version of the 1989 SOC text, without taking advantage of the opportunity to incorporate international standards, except for a general -- and potentially significant -- reference to them. Nevertheless, the continuing validity of the Transitional Provisions and the legal authority for interpreting the constitutional declaration of rights by reference to international standards expand considerably the scope of the enumerated rights. The constitutionally established procedures for effective remedies are particularly weak. A vast program of legal training and institutional reform is needed, including rapid adoption of several organic laws currently under consideration and allocation of resources. The UN's special representative for human rights, Justice Kirby, and the staff of the Phnom Penh office of the UN Centre for Human Rights are acutely aware of these needs, which appear to be acknowledged by the key officials in the Royal Government, as well. The text of the Constitution is disappointing in this regard, but gives a legal basis for such a broad program of reform.

Thus, Cambodia's new Constitution established a **weak democratic structure with limited liberalization**. This result must not be judged too harshly, however, considering the devastation of the country and the intensity of the conflict from which it has yet to emerge entirely. The end of the Cold War removed from the Cambodian transition its original significance in the struggle against Soviet influence. The CPP today, as heir to a communist-type party and state structure, without the Marxist references, continues to dominate political and administrative life in spite of a Constitution purporting to establish a "liberal democracy."

The Constitution has, nevertheless, provided the legal basis for power sharing between the previously warring FUNCINPEC (and KPLNF), on the one hand, and the CPP, on the other. The text makes it the policy of the royal government of Cambodia to advocate "a national reconciliation policy in defense of national unity."²⁷ At the

²⁵ Shahid Qadir, Christopher Clapham & Barry Gills, "Sustainable democracy: formalism vs substance, 14 *Third World Quarterly* 415, at 416 (1993).

²⁶ *Id.*

²⁷ Constitution of September 21, 1993, Article 52.

ceremony following the promulgation of the constitution, Mr. **Akashi** was perhaps a bit too optimistic in declaring that "Cambodia has proved to the world that an insoluble conflict can be settled and that **apparently irreconcilable points of view can be reconciled.**"²⁸

The viability of the Constitution is not so much a matter of how it is drafted as it is a question of conditions that allow for the **consolidation of democracy**, including historical experience with democracy, a developing economy and a peaceful transition.²⁹ Cambodia has had **virtually no previous experience with democratic governance**, although there is no doubt about the enthusiasm with which Cambodians participated in the elections and aspire to enjoy human rights and honest government.

Prospects may be brighter for the long-term advance towards **democratization from below**, through the empowerment of people to participate in government. Democratization requires unfettered development of the civil society (through genuine freedom of association and expression, political space being given diverse segments of the community, respect for privacy and independent media); periodic elections, especially at the local-level with voter education; meaningful recourse and effective redress through judicial and administrative remedies, open to ordinary people (citizens and non-citizens); and access to official information, to members of parliament and to public officials. The first signs of popular involvement in politics, appeared during the May 1993 elections and the constitutional drafting process, as well as after the proclamation of the Constitution. This process has in many ways been a spectacular beginning but will indeed take generations to become embedded in the political culture of Cambodia.

The wave of new democracies since the end of the Cold War presents, as Bruce Russett argues,

an opening for change in the international system more fundamental even than at the end of other big wars -- World Wars I and II and the Napoleonic Wars. . . This global democratic wave may crest and fall back, as earlier ones have done. But if the chance for wide democratization can be grasped and consolidated, international politics might be transformed.
³⁰

Cambodia is emerging from chaos and destruction with many unsolved problems. The promise of a Constitution that would guarantee human rights with effective enforcement has not been kept, although the new Constitution reaffirms most human rights and calls for some basic institutions necessary for a liberal democracy respectful of human rights. In the last analysis, it is not much better than previous communist or

²⁸ Quoted by Christian Chaise in "Le prince Sihanouk promulgue la Constitution 'la plus démocratique qui soit'", Agence France Presse, September 24, 1993 (LEXIS-NEXIS, September 24, 1993). [author's translation from the French]

²⁹ See, for example, Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman: University of Oklahoma Press, 270-279 (1991).

³⁰ Bruce Russett, *Grasping the Democratic Peace. Principle for a Post-Cold War World*, Princeton University Press 138 (1993).

republican versions on which it is largely based. Power, however, is beginning to be exercised more broadly and certain checks are being placed on the arbitrary exercise of power. Cambodia has not yet entirely emerged from civil war and its democratic foundations are fragile. The new Constitution, for all its defects, is the cement of that foundation.

IV. The UN’s preventive role regarding the “policies and practices of the past”

The role of the UN was conceived in the Cold War to end a stalemated regional conflict opposing Soviet- and American-supported factions. For the UN, it was also a critical imperative of international peace and security. History moved fast and the Soviet-American rivalry in the region abruptly ended, leaving the UN with a peace agreement to implement in the spirit of a new agenda for peace and a historical mission, in the words of the Paris Agreements, to ensure that “the policies and practices of the past shall never be allowed to return.” The role shifted to creating, as a preventive strategy, a stable society in which the economy would grow, democracy would be consolidated and impunity for human rights violations would end. Only in such a society could there be a reasonable expectation that these policies and practices could not return.

Cambodia is faltering on all three fronts but has not failed. It is, as I said, a fragile democracy, not a failed state.

A. Development

Cambodia’s economic indicators appear promising, with GDP (2007): \$8.6 billion, and an annual growth rate (2007): 10.2%.³¹

31 Natural resources: Timber, gemstones, some iron ore, manganese and phosphate, hydroelectric potential from the Mekong River, unknown quantities of oil, gas, and bauxite. Agriculture (29% of GDP, 2007): About 4,848,000 hectares (12 million acres) are unforested land; all are arable with irrigation, but 2.5 million hectares are cultivated. *Products*--rice, rubber, corn, meat, vegetables, dairy products, sugar, flour. Industry (27% of GDP, 2007): *Types*--garment and shoe manufacturing, rice milling, tobacco, fisheries and fishing, wood and wood products, textiles, cement, some rubber production, paper and food processing. Services (39% of GDP, 2007): Tourism, telecommunications, transportation, and construction. Central government budget (2006): *Revenues*--\$814 million; *expenditures*--\$973 million; *foreign financing*--\$213 million. Trade: *Exports* (\$4.1 billion, 2007)--garments, shoes, cigarettes, natural rubber, rice, pepper, wood, fish. *Major partners*--United States, Germany, U.K., Singapore, Japan, Vietnam. *Imports* (\$5.4 billion, 2007)--fuels, cigarettes, vehicles, consumer goods, machinery. *Major partners*--Thailand, Singapore, China, Hong Kong, Vietnam, Taiwan, United States. Economic aid received: Pledges of \$698.2 million in grants and concessional loans for calendar year 2007. *Major donors*--Asian Development Bank (ADB), UN Development Program (UNDP), World Bank, International Monetary Fund, Australia, Canada, China, Denmark, the EU, France, Germany, Italy, Japan, Sweden, Thailand, the U.K., and the U.S.; 100% of the \$601 million pledged by donors for 2006 was actually disbursed, according to the Cambodia Aid Effectiveness Report 2007. Principal foreign commercial investors: Korea, China, Russia, Thailand, the U.S., and Vietnam. Exchange rate (2007): 4,006 riel per U.S. \$1. Rapid growth in overseas development

However, Per capita GDP (2007): \$606. Inflation (2007): 10.8%, with about 40% of population below the poverty line (living on \$1 per day) and nearly 78% of the population at \$2 per day. The country has the highest prevalence of HIV in Asia.

There are 18 bilateral donors, 16 UN agencies, the World Bank (WB), the IMF, the Asian Development Bank (AsDB) and the EC providing assistance to Cambodia. The Council for the Development of Cambodia (CDC) was established to coordinate all external investment (ODA and FDI).

The big issue stifling human development is corruption. "Impoverished Cambodia must stamp out rampant corruption if it is to succeed in an increasingly competitive world," World Bank chief James D. Wolfensohn said in 2005. "Fighting corruption, fighting corruption, fighting corruption," Wolfensohn told a conference when asked what were the three things the Cambodian government should be doing. "This is Cambodia's problem. If you do not move, no one will cry over Cambodia," he told a conference attended by businessmen and officials of a government that promises crackdowns on corruption but has yet to pass a law to deal with it. "If you do not become a credible competitor, it will be because of Cambodians, not because of the international community," he said, calling corruption the country's core problem.³²

B. Democracy

State Department reports:³³ "Compared to its recent past, the 1993-2003 period was one of relative stability for Cambodia. However, political violence continued to be a problem. In 1997, factional fighting between supporters of Prince Norodom Ranariddh and Hun Sen broke out, resulting in more than 100 FUNCINPEC deaths and a few Cambodian People's Party (CPP) casualties. Some FUNCINPEC leaders were forced to flee the country, and Hun Sen took over as Prime Minister. FUNCINPEC leaders returned to Cambodia shortly before the **1998 National Assembly elections**. In those elections, the CPP received 41% of the vote, FUNCINPEC 32%, and the Sam Rainsy Party (SRP) 13%. Due to political violence, intimidation, and lack of media access, many international observers judged the elections to have been **seriously flawed**. The CPP and FUNCINPEC formed another coalition government, with CPP the senior partner.

"Cambodia's **first commune elections were held in February 2002**. These elections to select chiefs and members of 1,621 commune (municipality) councils also were marred by political violence and **fell short of being free and fair** by international standards. The election

assistance (ODA) supported the reconstruction efforts of the Royal Government of Cambodia (RGC) until 1996. Civil unrest in 1997-98 lowered the volume of aid and disrupted budget support operations. Since 1999, net ODA has gradually increased. The increasing bilateral share of gross ODA was 63 percent in 2002. Loans, as a percentage of ODA, have increased from 17 percent in 1999 to 26 percent in 2001. Budget support has not returned to its levels prior to 1997. On average, the disbursement/commitment ratio is around 75 percent. The top 10 donors are AsDB, Australia, EC, France, Germany, IDA, IMF, Japan, Sweden and, US.

³²

<http://www.tiscali.co.uk/news/newswire.php/news/reuters/2005/02/11/world/corruptioniscambodiarsquosmainproblem.html>, dated 11/02/2005

³³ <http://www.state.gov/r/pa/ei/bgn/2732.htm>

results were largely acceptable to the major parties, though procedures for the new local councils have not been fully implemented.

“National Assembly elections in July 2003 failed to give any one party the two-thirds majority of seats required under the constitution to form a government. The CPP secured 73 seats, FUNCINPEC 26 seats, and the SRP 24 seats. As a result, the incumbent CPP-led administration continued in power in a caretaker role pending the formation of a coalition with the required number of National Assembly seats to form a government. On July 8, 2004, the National Assembly approved a controversial addendum to the constitution in order to require a vote on a new government and to end the nearly year-long political stalemate. The vote took place on July 15, and the National Assembly approved a new coalition government comprised of the CPP and FUNCINPEC, with Hun Sen as Prime Minister and Prince Norodom Ranariddh as President of the National Assembly. The SRP, with support from various non-governmental organizations (NGOs), asserted the addendum was unconstitutional and boycotted the vote.

“On October 7, 2004, King Sihanouk abdicated the throne due to illness. On October 14, the Cambodian Throne Council selected Prince Norodom Sihamoni to succeed Sihanouk as King. King Norodom Sihamoni officially ascended the throne in a coronation ceremony on October 29, 2004.

“In February 2005, the National Assembly voted to **lift the parliamentary immunity** of three opposition parliamentarians, including SRP leader Sam Rainsy, in connection with lawsuits filed against them by members of the ruling parties. One of the MPs, Cheam Channy, was arrested and later tried, while **Sam Rainsy went into self-imposed exile**. In October 2005, the government arrested critics of Cambodia's border treaties with Vietnam and later detained four human rights activists following International Human Rights Day in December. In January 2006, the political climate improved with the Prime Minister's decision to release all political detainees and permit Sam Rainsy's return to Cambodia.

“Following public criticism by Hun Sen, Prince Ranariddh resigned as President of the National Assembly in March 2006. He later broke with FUNCINPEC and founded a new party, the Norodom Ranariddh Party (NRP). In 2007, Ranariddh was convicted of corruption by a Cambodian court and fled to Malaysia to avoid imprisonment. In October 2008, he received a royal pardon and returned to Cambodia. Shortly afterward, he announced that he was withdrawing from politics.

“Cambodia's **second commune elections were held in April 2007, followed by National Assembly elections in July 2008**. In both cases, there was little of the pre-election violence that preceded the 2002 and 2003 elections. Both polls resulted in victories for the Cambodian People's Party, with the Sam Rainsy Party emerging as the main opposition party and the royalist parties showing weakening support. The new Assembly inaugurated in September 2008 is led by a coalition of the CPP (90 seats) and FUNCINPEC (2 seats). The NRP (2 seats) remains independent but does not identify itself with the opposition. The SRP (26 seats) and the Human Rights Party led by Kem Sokha (3 seats) are in opposition. The CPP-led coalition retained Hun Sen as Prime Minister, as well as most of the key leaders from the previous government, and all ministers are from the CPP.

So the electoral and political party dimension of democracy stumbles along, with opposition actually gaining seats and violence and fraud present but declining.

C. Human rights accountability

1. On-going monitoring

Before leaving Phnom Penh, we drafted a resolution, which the Commission on Human Rights adapted, calling for the creation of an human rights office of the UN and a special representative of the SG

OHCHR/Cambodia works through its main office in Phnom Penh and a small regional office in Battambang, and is in regular contact with the Office of the High Commissioner in Geneva. The management structure consists of the Chief's office, a technical cooperation programme, a protection programme, and the administration unit. The UN regular budget covers the Office's operational expenses, including the salaries of 7 international and 18 national staff members. Project expenses are met by voluntary contributions through a separate trust fund.³⁴

Threats to UN: Legitimacy of UN presence has been most recently threatened since Special Representative Yash Ghai's report of the human rights situation in Cambodia in February 2008 (<http://daccess-ods.un.org/TMP/2971007.html>). In this report, Ghai underscored "... the increasing inability of courts to settle disputes in a fair manner will produce problems of law and order, aggravate tensions and conflicts and the risk of violence and responses of public defiance that will be hard to manage." (Ghai 28 Feb 2008, p. 17)

Hun Sen's repudiated Yash Ghai in 2006 and again in 2008: "The UN should take all this budget to victims in areas such as Kenya, Sudan, Somalia, Iraq, Afghanistan, or other countries facing crises, rather than wasting money in Cambodia," Hun Sen said. "He rides in airplanes and stays at hotels; where does the money come from? This money is more than a salary. This money is still the UN's money, and we are also a member of the UN that must also pay membership dues to the UN. We have a duty to appeal for saving the budget, to be spent in other areas, rather than having Yash Ghai traveling to Cambodia."³⁵

This language escalated during 2008 and has possibly resulted in a larger threat against civil society in general, particularly against INGOs and indirectly the LNGOs that benefit from them, in the form of the proposed NGO law. In September 2008 Hun Sen publicly proposed such a law that would give the government control over an unspecified amount of NGO activity. (Minutes from meeting at CCC Conference on NGO Law, January 2009)

"...According to the Asian Human Rights Commission's annual Human Rights Report for 2008, the proposed introduction of a new law to monitor NGOs, the downgrading of the UN mandate and a failed legal system as the key factors behind the back-sliding

34 <http://cambodia.ohchr.org/aboutus.aspx>.

35 <http://www.voanews.com/Khmer/archive/2008-01/2008-01-28-voa2.cfm>.

rights record. Ou Virak, president of the Cambodia Centre for Human Rights, said the most concerning marker on Cambodia's 2008 record was the introduction of the NGO law. **"Democratic space is now more limited, and it is obvious the government wants to control this space even more with the introduction of the NGO law," he said. "Things will definitely get worse in 2009 if the NGO law as it stands is passed."**³⁶

2. "Impunity for the 'policies and practices of the past'"

Yash Ghai has explained the principal justifications for the trials by ECCC as follows:

- “(a) provide accountability to the millions of Cambodians for the crimes of the Khmer Rouge;
- (b) have a deterrent effect by demonstrating that there can be no impunity for violations of human rights;
- (c) enhance people’s understanding of justice and the rule of law; and
- (d) the jurisprudence and practices of the ECCC would be absorbed by the rest of the Cambodian system of justice.”³⁷

However, he also believes that **“The impact of ECCC will remain marginal unless the Government takes steps to end impunity for gross serious human rights violations of the recent past (since, for instance, 1991). Cambodian judicial authorities seem unable, whether through lack of resources or for political reasons, to act to combat comprehensively such recent violations of human rights. It is particularly ironic that the international community should spend so much effort and money to end the impunity of old and broken persons for crimes committed 30 years ago while turning a blind eye to the present violations of rights.”**³⁸

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There is a wide range of perspectives on the functional competence and legitimacy of the ECCC, with opinions varying on both sides of the local and international camps.³⁹

36 <http://www.phnompenhpost.com/index.php/2008121923300/National-news/Int-l-body-slams-government-s-record-on-human-rights.html>.

37 *Report of the Special Representative of the Secretary-General for human rights in Cambodia, Yash Ghai*, UN Doc. A/HRC/7/42, 29 February 2008, para. 75.

38 A/HRC/7/42, para. 89.

39 International NGO Perspective on ECCC: **Bridges Across Borders Southeast Asia – Cambodia Justice Initiative** Since the project began in January 2005, the Cambodia Justice Initiative has been bringing international technical advisors to Cambodia to work with NGOs and the Government Task Force on the Khmer Rouge Tribunal. Our hope is that the experience of experts from other international and hybrid courts-dealing with atrocities in East Timor, Rwanda, Sierra Leone, and the former Yugoslavia-can help Cambodia incorporate the best lessons and practices from those courts into the ECCC. The visits also provide an opportunity for us to collaborate with Cambodian NGOs and officials, and to gather information on local needs concerning the ECCC. The primary recipients of technical support to date have been local NGOs interested in the ECCC and the government task force charged with preparing for the trials. (Bridges Across Borders Southeast Asia, <http://www.babsea.org/programs/ccp/cji/cJiHighlights.htm>)

Local NGO Perspective on ECCC: ADHOC – Cambodian Human Rights and Development Association

“As in the previous year the Extraordinary Chambers in the Courts of Cambodia (ECCC) encountered significant problems that hampered its progress. The **failure to transparently address persistent corruption allegations on the Cambodian side** of the court increased tensions within the hybrid court, led to donors delaying promised funds and impeded attempts to ensure that the courts long-term budget needs were met.

Victims of the Khmer Rouge expressed frustration at the slow progress towards trials, with the expected start of the trial of “Duch” head of Toul Sleng detention centre pushed back to 17th February 2009. There were no further judicial investigations into additional suspects and no further arrests of suspects.⁴⁰

At year’s end **divisions between International and Cambodian Co-Prosecutors on whether to press for further suspects to be investigated** became public, with the International Co-Prosecutor filing a Statement of Disagreement asking for the Pre-Trial Chamber to resolve the dispute. Some civil society monitors expressed concern that the ECCC may face external pressures that would affect the independence of the tribunal.⁴¹

Conclusions

Yash Ghai’s conclusion of his report of last year is devastating:

⁴⁰ **Indictments to date (5): Khang Khék Ieu (aka Duch)** – indicted August 12, 2008 (trial commenced 17 Feb 2009, verdict not expected until October), he used to be the governor of Toul Sleng prison, a centre of torture. In the late 1970s, an estimated 16,000 people were tortured there, of whom only seven or ten are known to have survived. Khang Khék Ieu, who converted to Christianity, admitted guilt, but contends that everything he did was by order of others. **Nuon Chea** - On September 19, 2007, the chief political ideologist of the Khmer Rouge and right-hand man of Pol Pot was arrested and put in the custody of the Tribunal. He was brought to Phnom Penh and charged with war crimes and crimes against humanity. **Ieng Sary & Ieng Thirith** - Former Foreign Minister and Deputy Prime Minister Ieng Sarh, and his wife, former Minister of Social Affairs Ieng Thirith, were taken from their home in Phnom Penh by police and by officials of the Tribunal. Both are charged with crimes against humanity, Ieng Sary with war crimes as well. According to a filing by the prosecutors of July 18, 2007, of which The Associated Press obtained a copy, Ieng Sary, "promoted, instigated, facilitated, encouraged and/or condoned the perpetration of the crimes" when the Khmer Rouge held power. His wife, Ieng Thirith, is believed to have participated in "planning, direction, coordination and ordering of widespread purges ... and unlawful killing or murder of staff members from within the Ministry of Social Affairs". **Khieu Samphan** – The Former Chief of State was arrested on 19 November, 2007, in Phnom Penh when he left the hospital where he had been treated for a stroke he reportedly suffered on 13 November, 2007. He was charged with crimes against humanity and war crimes. (online sources:

<http://www.eccc.gov.kh/english/default.aspx>,

<http://www.cambodiatribunal.org/index>,

<http://www.krtrial.info/?language=english>, www.wikipedia.org/ECCC)

⁴¹ ADHOC 2008 report,

http://www.adhoc-chra.org/article.php?language=english&art_id=55¤tpage=1&actionsearch=front.

“Year after year, the Special Representative’s predecessors and others have addressed the problems of the legal and judicial system in Cambodia and made numerous recommendations, to no avail. The Government has no incentives for reform, as the international community continues to make large financial contributions regardless of widespread violations of human rights.”⁴²

The experience of the UN in Cambodia continues to be one of frustration with a slow progress toward realizing the promise of a relatively democratic constitution and aspirations from below for poverty elimination and respect for human rights. The UN without doubt was instruments in moving Cambodia away from civil war but is mired in the messy business of supporting a fragile democracy.

⁴² Id., para. 99.