

PART III

ASIA AND THE PACIFIC



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The Process of Creating a New Constitution in Cambodia

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The process of drafting the constitution of the Kingdom of Cambodia, which entered into force on September 24, 1993, was a striking case of peacebuilding and national reconciliation and was a major feature of Cambodia's transition from civil war to fragile democracy. It was the culmination of a transitional period during which Cambodia was under the authority of the United Nations. Cambodia's mandate was, first, to elect a constituent assembly, which it did in May 1993; that body was to transform itself into a new national assembly, in accordance with articles 1 and 12 of the Paris Agreements, which had settled Cambodia's twenty-year conflict.¹ Cambodia is one of the most extraordinary cases in international efforts to promote democratic transitions in the post-Cold War era.² The country's democratic transition ended one of the most brutal chapters of twentieth-century barbarity, during which over a million people out of a population of some eight million perished through civil war, mass murder, starvation,

and repression, especially while the country was under the control of the Party of Democratic Kampuchea (PDK or DK, the latter acronym being used throughout this chapter), popularly known as the Khmer Rouge.³

The transition from civil war to a fragile democracy resulted from the implementation, under UN supervision, of an international treaty by which the four contending Cambodian parties⁴ and eighteen other countries, including the five permanent members of the Security Council and the principal regional powers,⁵ agreed to detailed conditions for a "comprehensive political settlement of the Cambodia conflict," the terms used in the Paris Agreements.⁶ The agreements and the UN Transitional Authority in Cambodia (UNTAC), established pursuant to the agreements, did much to lay the groundwork for such a settlement. However, they did not and could not achieve their goals completely. The agreements' implementation was particularly unsuccessful in disarming, demobilizing, and cantoning

forces; preventing cease-fire violations; accessing all territories; and maintaining a neutral political environment. This failure to implement the military provisions of the agreements was the result of a calculated risk by the United Nations, which sought to proceed with the elections. This calculation was not unwarranted, as the Cambodian people did participate massively in free and fair elections. However, though the May 1993 elections were a defining moment of the mission, they were not an end in themselves, but rather a means to drafting and adopting a new national constitution as a precondition to setting up a democratic government.

It is most accurate to describe the essence of the Cambodian process as an exercise in political self-determination through a UN-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.⁷ The process leading to the constitution's adoption and the installation of a new government has been analyzed from the perspective of post-conflict nation building⁸; however, few works have addressed the constitutional process itself or the legal system.⁹

Despite a disappointing process, the final product of the constituent assembly's work contains a reasonable blueprint for democratic governance. Nevertheless, the path to Cambodian democracy has not been smooth. The secession of several provinces under Prince Chakrapong following the election immediately threatened the entire process and re-

quired the creation of a provisional national government. An unstable power-sharing arrangement between the Cambodian People's Party (CPP) and the royalist National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (FUNCINPEC by its French acronym) and the continued military confrontation with the DK weakened the application of the constitution in the mid-1990s. These developments culminated in a coup in 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 a constitutional court and Supreme Council of the Magistracy and in adopting amendments to establish a senate. Violence and corruption mar the democratic process. Yet the essential structures of Cambodian democracy are in place, civil society continues to be vigorous and courageous, and the economy is improving.

This chapter reviews the historical background leading up to the process of conflict resolution and addresses the structure of the constitution-making process, public participation in the process, the post-conflict role of the political parties, the timing and duration of the constitution-making process, the role of the international community, the role of international law, and key substantive issues dealt with in the process. The conclusion draws attention to negative outcomes, such as the lack of transparency at critical moments, manipulation of the process by Prince Norodom Sihanouk (who was restored to the throne), and the consolidation of authoritarian personal power by Hun Sen. Those outcomes are then weighed against the positive achievements of putting in place the legal and institutional basis for democratic governance—the constitution and the

separate branches of government—and providing a degree of democratic empowerment of civil society.

Historical Background

Influence of Cambodia's History on the Constitution-Making Process

Cambodia's ancient, colonial, and recent history all influenced the constitution, and to dwell exclusively on the impact of the civil war overlooks the two other major historical influences. Like many countries in Southeast Asia, Cambodia's political traditions derive primarily from Indian culture and the absolute rule of god-kings, as well as from Buddhist beliefs.¹⁰ A legal system and formal constitution defining the functions and powers of national institutions only arrived with French colonialism and the realization of independence. Attitudes toward the constitution and law in general continue, nevertheless, to be affected by past traditions, which date from the age of the Khmer empire that ruled from Angkor from the ninth to the fifteenth centuries. As an 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 powerholders—at the edges of the kingdom."¹¹ The king was distant from the people, who rarely saw him. Even in the nineteenth century, villagers had only a vague idea of the king, generally believing him to have the power to influence the weather, to "dispense true justice," and to be "the only political source of hope among peasants."¹² François Ponchaud explains that

in the traditional mindset, the king, at the national and even universal planes was the key for the "preservation of harmony with the ele-

ments" . . . it 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 communication between the celestial powers and the world of men; without him you have complete chaos.¹³

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."¹⁴ 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 connection between the people and their king.¹⁵

Justice in Angkor appears to have been a matter of royal prerogative, with particularly brutal forms of determining responsibility and meting out punishment.¹⁶ Reminiscent of practices in medieval Europe, it 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 modern ideas of government but 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 is the restoration of monarchy. As one con-

stitutional 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.”¹⁷

The colonial period also strongly influenced the constitution, providing 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 nonalignment. 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.”¹⁸

Beyond historical and colonial 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, only to be overthrown in 1975 by the DK, who destroyed economy and society until the Vietnamese invaded in 1978 and installed the People’s Republic of Kampuchea in 1979. The latter was resisted by FUNCINPEC, the Buddhist party Khmer People’s National Liberation Front (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.

Impact of the Civil War

Twenty years of civil war created hardened and virtually irreconcilable ideological and political postures among the U.S.-supported anticommunist resistance, the Soviet Union–

supported pro-Vietnamese government, and the China-supported DK. After years of deadly warfare and high stakes geopolitics, it seemed very unlikely that the groups’ leaders would engage on their own initiative in a process of reconciliation and construction of national institutions for power sharing. The end of the Cold War severely weakened the political support each faction received from the outside, but the divides among them showed no signs of narrowing.

The impact of the civil war and its resolution on the constitution begins with the mutually hurting stalemate that led all four factions to recognize that none could win militarily, that they could no longer rely on outside support, and that they had to work something out. The earlier initiatives in the 1980s for a negotiated settlement by Vietnam, the Soviet Union, the Coalition Government of Democratic Kampuchea (CGDK), Indonesia (the Jakarta Informal Meeting, or JIM and JIM2), and the Paris International Conference on Cambodia (PICC) were unsuccessful because the situation was not ripe, but the efforts did create a decade of proposals on a wide range of issues. By the time of Gareth Evans’s Australian Plan in 1989, picking up on proposals by U.S. Congressman Stephen Solarz, the parties were more convinced that they had to accept a settlement,¹⁹ though the Cambodian factions and other concerned parties focused more on withdrawal of Vietnamese forces and delineating the transitional powers of the UN and the Supreme National Council (SNC)—the interim representative body created by the Paris Agreement—than on the role of a constitution or the preferred process for producing one. The shape of the constitutional arrangement was not really agreed upon until the fourth SNC meeting in New York in September 1991, at which it was decided that the peace process would lead to an electoral system of proportional representation by province and a per-

manent system of liberal democracy.²⁰ When the PICC reconvened at the end of October 1991, it adopted four final agreements, including an annex containing constitutional principles.²¹

The Influence of the Paris Agreements

The Paris Agreements required the constituent assembly to produce a constitution that “shall declare that Cambodia will apply a liberal democracy, based on pluralism.”²² The term “liberal democracy” has been attributed to Prince Sihanouk, who had called for Cambodia to be a liberal democratic state during earlier negotiations.²³ It seems likely that he used this term in the context of the negotiations because he assumed it was what the U.S. representatives and other key participants in the Paris Conference wanted to hear. The concept certainly does not reflect the principles of government he applied when he was king or prime minister in the 1950s,²⁴ and questions remain regarding the adaptability of the western political theory of liberalism to the conditions of a Buddhist, extremely poor, and agrarian society such as Cambodia. The Paris Agreements do not define the term, although they enumerate eight elements of an electoral process that the constitution must mention and that, presumably, are part of the definition of liberal democracy. First, elections must take place regularly, which one can assume to mean that the terms of national assembly members must be limited and that members must either be re-elected or a new candidate elected to occupy a seat in the assembly after the term expires. Second, elections must be “genuine,” presumably meaning that the process must be free of manipulation. This criterion is close to the concept of fairness in an election. Third and fourth are the rights to vote and to be elected. Fifth, suffrage must be universal. Sixth, and closely related to universality, is the concept

of equal suffrage, meaning that every vote has the same value. Equal and universal suffrage supposes nondiscrimination. Seventh, ballots must be secret. Finally, Annex 5 requires that the constitution provide for full and fair possibilities to organize in order to participate in the electoral process. This requirement relates to the formation and functioning of political parties, the essential feature of pluralism, and the possibility of conducting a campaign to attract voters. The eight elements cover the formal aspects of what is understood by “liberal democracy, on the basis of pluralism.”

The Paris Agreements properly dealt with all of the main post-conflict issues—cease-fire, repatriation, restored sovereignty and unity, transitional arrangements, and rehabilitation and reconstruction—except for the issue of responsibility for past abuses. The unwillingness to address the latter issue went so far as to exclude the word “genocide”²⁵ from the text of the Paris Agreements, which referred instead to ensuring that “the policies and practices of the past shall never be allowed to return.” Moreover, none of the various drafts of the constitution referred to prosecutions or truth and reconciliation; they did not even mention the policies and practices of the past.²⁶ The need to include the DK and China in the agreement and the Buddhist belief in reconciliation and love without retribution are strong arguments in favor of such silence, but impunity continues to be a major concern of Cambodian justice. Perhaps alienating the DK during the PICC was not an option and the Chinese vote was needed in the UN Security Council. But DK refusal to respect the Paris Agreements and continued violence would have justified a harder line at the time of the constitution’s drafting.

In any event, the product of the constitution-making process in 1993 was essentially a reversion to previous constitutions—combining elements of the 1947 and 1989 constitutions, with some liberalizing

improvements—rather than a newly structured constitution built on Annex 5. This illustrates how Cambodian politics tended to outweigh the United Nations' role as guarantor of the integrity of the Paris Agreements. Mixing the 1947 and 1989 constitutions, that is, combining the royalist electors' conception of stable government with CPP and State of Cambodia (SOC) habits as de facto government, makes sense in Cambodian politics. However, the starting point of the agreements was an internationally agreed-upon definition of what was meant constitutionally by a liberal democracy on the basis of pluralism. UNTAC judged unwisely that it should respect Cambodian ways by allowing, first, the DK to behave contrary to the letter and the spirit of the agreements, and second, FUNCINPEC and the CPP to resolve a disputed election through pure politics. Its merits notwithstanding, the constitution was a victim of that politicization.

One can argue that the constitution is better grounded in Cambodian culture than would have been the case if the United Nations had succeeded in making the parties comply strictly with the ideas of constitutionalism agreed to in Paris, or provided more guidance on constitution making beyond the guidelines for an electoral process that were contained in the Paris Agreements. However, restoring politics as usual allowed for much political violence, extreme delays in creating the Supreme Council of the Magistracy, continued impunity for the DK and other politically protected perpetrators of abuse, restrictions on press freedoms, and the lack of an independent judiciary. These problems would not have been eliminated merely by adopting a constitution that met the overly optimistic claim of Chem Sngoun, former minister of justice, who died in 1999, that it was "neither monarchical, nor republican, but a democratic constitution."²⁷ But a constitution-making process and constitution that were closer to what was achieved

in South Africa might have encouraged less brute politics and more democracy.

Structure of the Process

During Cambodia's transition in 1992–93, though the constitution-making process was guided by the United Nations, sovereignty remained theoretically vested in the representatives of the Cambodian people. For this purpose, the Paris Agreements created the SNC as an interim representative body. Headed by Prince Sihanouk, the council consisted of six members from the SOC—controlled entirely by the CPP—and two members from each of the three other factions. The Paris Agreements characterized this body as the "unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined."²⁸ For its part, the SNC delegated "all powers necessary" to the United Nations to implement the agreement.²⁹ This delegation of powers placed an extraordinary amount of authority in UN hands. In practice, however, the United Nations did not exercise all of the authority that Article 6 granted to it; rather, it used the SNC as a sounding board, and the SNC met regularly (usually monthly) to endorse UNTAC proposals.

Prince Sihanouk could be a dynamic chair of these meetings, but he usually deferred to the special representative of the secretary-general (SRSG) and head of UNTAC, Yasushi Akashi. A particularly significant example of Sihanouk's ultimate influence on the process, however, could be seen at the SNC meeting in Sihanouk's palace in Siem Reap on September 10, 1992. Wanting to help the SNC prepare for the tasks that the constituent assembly would face, Akashi placed an item relating to the draft constitution on the agenda of the SNC and distributed a brief, factual analysis prepared by Professor Reginald Austin, the head of the electoral com-

ponent and himself a professor of law and former dean of the law school of the University of Zimbabwe. The Austin paper deliberately avoided any suggestion that UNTAC intended to write the constitution or propose draft texts; it merely set out generally the issues that must be addressed when drafting a constitution, such as name, flag, delimitation of territory, and form of government. The SRSG intended to suggest an SNC task force that would consider the issues and prepare the ground for the constituent assembly. Following Professor Austin's presentation, Prince Sihanouk expressed his warmest congratulations, then proceeded to formulate his preferences through a section-by-section review of what the future Cambodian constitution should contain. He would punctuate each point by addressing the SRSG with words to the effect of "that's what we should do, isn't it, Mr. Akashi?"³⁰ In this manner, he stated his positions on the name, flag, national anthem, borders, type of government, institutions of government, independence of the judiciary, requirements for the presidency, and so forth. He even proposed a senate ("for men with white hair, like on *Dallas*"),³¹ which was eventually created in 1999. Though anticipating the outcome of the work of the constituent assembly, formally Sihanouk was merely endorsing the idea of creating an SNC task force to study these issues, the importance of which was so great, he felt, that both he and Akashi should participate.

As explained above, the constitution-making process was structured around a constituent assembly. The overall transition process, of which the constitution-making process was a part, took place in seven phases:

- Cease-fire, demobilization, and creation of a neutral political environment.
- Election of the constituent assembly through a UN-run election, the outcome of which was declared free and fair by the SRSG and Security Council.
- Selection of a drafting committee from among the members of the constituent assembly.
- Adoption by the assembly of the committee's draft.
- Proclamation by the king of the constitution.
- Transformation of the constituent assembly into the national assembly.
- Winding down of the process and the departure of UNTAC.

In retrospect, although the structure of the political process set out in the Paris Agreements may have been adequate for bringing peace to the territory, perhaps more thought should have been given to the structure of the constitution-making process itself. Had the Paris Agreements provided for the appointment of an inclusive and independent constitutional commission to direct a constitution-making process that included a comprehensive program of public participation, the process itself may have been more transparent and democratic. In turn, perhaps a more democratic and transparent process would have contributed to more transparent and democratic political processes than those that exist in Cambodia today.

The Election and Functioning of the Constituent Assembly

The 120 members of the constituent assembly were elected in accordance with the Paris Agreements, Article 12 of which reads as follows:

The Cambodian people shall have the right to determine their own political future through the free and fair election of a constituent assembly, which will draft and approve a new Cambodian Constitution in accordance with Article 23 and transform itself into a legislative assembly, which will create the new Cambodian Government. This election will be held under United Nations auspices in a neutral political environment with full respect for the national sovereignty of Cambodia.

An annex set out UNTAC's mandate regarding the organization and conduct of the election, including the adoption of an electoral law and code of conduct, abrogation of existing laws where necessary, voter education, voter registration, registration of parties and candidates, fair access to the media, monitoring the campaign and balloting procedures, conducting balloting and polling, facilitating foreign observers, investigation of complaints and taking corrective action, and, in the end, "determining whether or not the election was free and fair and, if so, certification of the list of persons duly elected."³²

The election was conducted pursuant to the electoral law drafted by UNTAC and submitted to the SNC on April 1, 1992, but not adopted until August 5, 1992. The law was promulgated on August 12; registration of parties began on August 15. By January 27, 1993, twenty out of the twenty-two provisionally registered political parties applied for official registration. Voter registration began on October 5, 1992, for three months, and then was extended to January 31, 1993. In that time, 4.6 million Cambodians registered, representing nearly all estimated eligible voters in zones to which UNTAC had access. The DK did not give access to areas under its control, although hundreds of voters from those areas managed to reach polling stations and vote.

Voting took place from May 23 to May 28, 1993, in all twenty-one provinces. From May 23 to May 25, 1,400 fixed polling stations and 200 mobile teams were in operation. Some fixed stations were converted to mobile units for the final three days (May 26–28). Despite DK disruption of voting in some places and intensified political violence, 4,267,192 voters turned out—89.56 percent of those that registered—and a total of 4,011,631 valid ballots were cast. The royalist FUNCINPEC won 45.47 percent of the votes and, according to a complicated

formula of the electoral law, was accorded fifty-eight seats in the constituent assembly. The CPP, then the governing party, ran second with 38.23 percent of the votes, receiving fifty-one seats. Next was the Buddhist Liberal Democratic Party (BLDP), the party of the KPLNF, with 3.81 percent and ten seats. Finally, Mouvement de Liberation Nationale du Kampuchea (MOLINAKA), the only party elected that did not represent one of the SNC factions, came in with 1.37 percent, receiving one seat.³³

At the SNC meeting of June 10, 1993, Special Representative Akashi, on behalf of the secretary-general, declared that the election had been on the whole free and fair. On June 15, 1993, the Security Council endorsed the results.³⁴ Prince Sihanouk convened the constituent assembly on June 14 and, following tradition, chose its eldest member, Son Sann, head of the BLDP, as president. Co-prime ministers Hun Sen of the CPP and Prince Ranariddh of FUNCINPEC headed the interim government.

On June 30, 1993, the constituent assembly appointed a twelve-member drafting committee, with six members from FUNCINPEC, five from the CPP, and one from BLDP. The committee was headed by Chem Sngoun, former head of the legislative commission of the SOC national assembly, who had been designated minister of justice by the interim government. This committee developed a draft of the constitution over the course of that summer; its draft was kept secret from the 108 other assembly members, as well as from interested non-governmental organizations (NGOs), although its contents were leaked. The secrecy of the procedure was in accordance with assembly rules, which had been adopted without debate or discussion at the meeting on June 30. It has been reported that the vote on these rules was secret and not even tallied.³⁵ In the second week of September 1993, the drafting

committee released its draft, about the same time as FUNCINPEC made available its monarchical draft.

Although the drafting committee apparently worked hard and independently, the assembly as a whole did not show much independence from the two dominant parties, the CPP and FUNCINPEC, or their leaders, Hun Sen and Prince Ranariddh. Rather than present a single draft prepared by the committee to Sihanouk, who had once again removed himself to Pyongyang, the two leaders traveled to the North Korean capital carrying two constitutions, a republican version, most likely containing language proposed by the CPP, and another restoring the monarchy, drafted by FUNCINPEC. Milton Osborne describes what happened as follows: "Sihanouk commented publicly that the decision as to whether he once again became king was the Cambodian assembly's, but there was no doubt in the minds of those who had seen him that he expected to become king again. And, indeed, he is reported to have made many handwritten amendments to the monarchical constitution shown to him for his approval." He then describes how, after plans to restore monarchy were known in Phnom Penh, "Sihanouk called for the population to renounce the monarchy and his projected role as king. To further compound confusion, the prince also announced he was ending his presidency of the SNC." Osborne concludes that this "was all very much of a piece with Sihanouk's behaviour in the past. Once the members of the assembly begged him to change his mind, he graciously did so. He had shown that he was truly wanted."³⁶

Completely sidelining its own drafting committee, the assembly examined the FUNCINPEC draft edited by Sihanouk for five days, finally adopting the text on September 21, 1993, by a vote of 113 to 5, with two abstentions. On September 24, 1993, Prince Sihanouk ratified the new constitu-

tion during an elaborate ceremony in the ornate Royal Palace. Akashi's voice broke with emotion when he announced at the airport as he left two days later, "Cambodia has made a giant step on September 24 when it promulgated the new Constitution" and gave UNTAC a grade of "nine out of ten."³⁷ Other countries also gave UNTAC considerable credit for the outcome.³⁸ Charles Twinning, head of the U.S. mission to the SNC and afterward appointed ambassador to Cambodia, remarked that the adoption of the constitution "carries out completely the designs of those Cambodians and non-Cambodians who drafted the Paris Agreements."³⁹

A few days after the proclamation of the constitution, the Security Council welcomed the accession to the throne of His Majesty Samdech Preah Norodom Sihanouk and "the formation of the new Government of all Cambodia, established in accordance with the constitution and based on the recent election."⁴⁰

Control over the Process

The election of the constituent assembly appears to have been a wise precondition to the constitution-drafting process, even though the members ultimately did not exercise independent control of that process. None of the previous constitutions could be regarded as politically neutral; simply giving new life to one of them would have been unacceptable to one or more of the parties. Furthermore, each had defects unacceptable for a transition involving the United Nations, in light of the organization's standard-setting role regarding democratization and human rights. That parts of the 1947 constitution were included in the end is a result of peculiarities from Sihanouk's last-minute jockeying and shifting. It could not have been the public basis for committee deliberation, as the committee's mandate was to implement

Annex 5 of the Paris Agreement. Nevertheless, the secrecy of the process made it possible for the most influential political leaders to draw on whichever of the two earlier constitutions—1947 or 1989—reflected their political interests most, rather than allowing the drafting committee to draw on the various models and principles introduced during the transition period.

It was quite appropriate for the Paris Agreements and the electoral law to emphasize freeness and fairness in the election process and to provide for registration of all citizens, exiles, and refugees. These aspects were clearly set out in the Paris Agreements. The agreements also gave responsibility to UNTAC to draft the electoral law and to run the elections. The electoral law was thorough but perhaps excessively detailed, more in the mode of Anglo-American legal drafting than the French mode. Its qualities derive from the director of the electoral component, Reginald Austin, who drew heavily on experience with Namibian elections.⁴¹ Only a few people in UNTAC, especially in the electoral component, and some advisers to the major parties understood this fifty-six-page law thoroughly. The most disputed provision related to defining who is Cambodian for the purposes of voting eligibility. It took four months to resolve the matter, with the United Nations partially acceding to alter the language from the Paris Agreements in order to exclude ethnic Vietnamese.

The provisions of the law relating to settling disputes called for a panel of outside judges, which the SRSG refused to convene. This was unfortunate, as the disputes led to violence and loss of credibility for the United Nations, which was unable to control Prince Chakrapong's attempted secession. It is expected that losing parties challenge the procedure and that irregularities occur. Fair and impartial procedures to settle disputes, such as the ones provided for in the UNTAC

electoral law, should be applied vigorously. This was not done.

However, there was nothing basically wrong with the electoral system, nor with the fact that UNTAC was completely in charge. The United Nations failed to translate the fiction of "existing administrative structures"—a concept that was supposed to treat all four factions in the same way—into fact. Under those circumstances, the *de facto* government, in this case the SOC/CP, was positioned to influence the process unduly. The situation would have been worse had UNTAC not been in charge, as illustrated by the difficulties of the Cambodian-run election in 1998.

As mentioned above, the transition process called for the constituent assembly to become the national assembly. In Cambodia's case, this appears to have been wise. This was the first free election for almost all Cambodians, who tended to believe they were voting for peace. Had the process required them to vote twice, once for a constitutional assembly and again for parliamentary representatives, the risks would have been high that ordinary people would not understand and that the opportunities for political manipulation would multiply. The more difficult question about the process is whether an inclusive and independent constitutional commission could have been appointed to direct the nation through a phased process of constitution making. A commission of this nature could have moved the process from one that was secretive, elite driven, and opaque to one involving the public participation and transparency that has characterized other constitution-making processes. The drafting committee's sincere and independent efforts suggest that there was some potential for such an approach. However, the near-complete absence of competent jurists, to say nothing of constitutional experts, would have made selecting a commission for this purpose challenging, to say the least.

Thus, in the end, although the mandate, timetable, and rules for the election of the constituent assembly were controlled by the United Nations, UN control over the transition as a whole and the constitutional process in particular was in fact more formal than real. Constitution drafting is a fundamental act of sovereignty and should, therefore, be as free of foreign influence as possible. However, in Cambodia, effective control by political factions weakened both the sense among the population that the constitution was theirs and the constituent assembly's compliance with the requirements of the Paris Agreements. The United Nations might have exercised more influence to ensure that both the spirit and the letter of the Paris Agreements were respected, and that some degree of opportunity for public participation in the process was provided. Such a role of active referee would not have meant foreign control over how people draft their constitution—and hence a questionable interference in political self-determination—but rather an effective and efficient approach to carrying out the functions that the Cambodian parties, along with other signatories, assigned to UNTAC in the Paris Agreements.

The way the constitution-making process turned out was logical. FUNCINPEC did win the election and, in the end and with Sihanouk as ultimate arbiter, got its way regarding the constitution's content. However, it was a confused process, and the confusion occurred because the United Nations did not exercise its assigned functions and was too sensitive to the sovereignty issue.

Public Participation in the Process

Pre- and Post-Constitution Public Education and Participation

Efforts to engage the public in the constitutional process mainly consisted of information dissemination and education. The popu-

lar engagement with the constitution-making process grew out of the human rights education effort of UNTAC and its partners among indigenous NGOs. The mandate for human rights education, which was broadened to include education about constitutional principles, was extensive. The Paris Agreements obligated Cambodia “to support the right of all Cambodian citizens to undertake activities which would promote and protect human rights and fundamental freedoms.”⁴² Annex 3 referred to the rights, freedoms, and opportunities of all Cambodians to take part in the electoral process; such rights included freedoms of speech, assembly, and movement, as well as fair access to the media for registered political parties. The secretary-general's report to the Security Council on Cambodia stated that “the development and dissemination of a human rights education program is foreseen as the cornerstone of UNTAC's activities in fostering respect for human rights.”⁴³ To fulfill its human rights education mandate, the education, training, and information unit of UNTAC's human rights component developed a strategy and plan of action.⁴⁴ After determining that the mandate included all levels and types of education, the next step was to plan and implement a strategy of identifying target groups, establishing goals for each group, specifying the requisite financial resources, setting a timetable, and carrying out and evaluating the activities.

UNTAC's education and information efforts were directed at formal education at all levels and at informal education for the emerging civil society. The secretary-general's report called for UNTAC “to collaborate with non-governmental organizations (NGOs) operating in Cambodia for this purpose as well as to encourage the establishment of indigenous human rights associations.”⁴⁵ The human rights component's strategy was to work with existing

human rights and women's groups to enhance their capacity to act effectively as NGOs, and to train their trainers, who could then conduct human rights education activities throughout the provinces. The mandate stated that "UNTAC would also work closely with . . . special groups, [including] those individuals best placed to be further disseminators of information, such as teachers and community leaders."⁴⁶ The Buddhist clergy was a particularly effective vehicle to reach the public at large, especially in remote areas. The experience with human rights education for each of the targeted constituencies—law enforcement, teachers, civil servants, judges, human rights associations, monks, health professionals, and women's groups—paved the way for the shift to constitutional literacy as the election approached.

The component's strategy for NGOs was implemented in part through a trust fund project called the Human Rights Task Force for the Cambodian Elections. The task force prepared human rights activists from each of the main indigenous human rights associations to monitor human rights during the election. As a rule, these associations provided by far the largest numbers of election observers registered by the electoral component. The task force facilitated the planning and coordination of activities for these groups; it was so successful that the entity continued after the elections as the Cambodian Human Rights Task Force with additional funding from the trust fund. This project was an example of how indigenous human rights associations and women's organizations were both partners and learners in the component's human rights education effort. The component's education strategy focused particularly on women's associations because, even more than in most other countries, women are the bedrock of Cambodian society, comprising a disproportionately high 63 percent of the population. Taken together with their dependent children, the figure rises to 75 per-

cent. The component taught human rights courses in Phnom Penh and in the provinces, providing both basic education (introduction to concepts) and in-depth training of trainers for these associations. They were also provided with trust-fund grants to conduct their own human rights education activities.

It is fair to estimate that the component's education and training directly reached approximately 120,000 people. The figure for mass communication is in the millions, through the dissemination of hundreds of thousands of leaflets, brochures, stickers, balloons, comic books, and posters, as well as the broadcasting of highly popular radio and television programs.⁴⁷ The mass-communication messages disseminated through radio and television were simple, focusing on basic awareness of the significance of the constitution and its importance for the human rights of the population. Meanwhile, Cambodian human rights associations were a visible presence in virtually every province, proactively seeking to inform the population about the significance of the new constitution. The population's receptiveness to the civic education that the international community undertook in fulfilling UNTAC's human rights education mandate, including constitutional literacy efforts, demonstrated that the population would likely have been receptive to broad direct participation in the constitution-making process if it had been made available.

NGOs, the Clergy, and the Press in the Constitution-Making Process

The civic education of the population described above served concurrently to foster the development of a vibrant civil society, which eventually came to demand a role in the constitution-making process. NGOs concerned with human rights, women's issues, and economic development, organizations representing the Buddhist clergy, and journalists were courageous and significant

in both creating a popular awareness of the constitution-making process and monitoring the freeness and fairness of the constituent assembly elections.

The proliferation of NGOs independent of state and party structures has been described as the “first step towards a civil society in Cambodia after its destruction between 1975 and 1978.”⁴⁸ During the transitional period, UNTAC registered associations and was quite liberal in approving applications. Human rights NGOs were the most influential of the groups in the constitution-making process. Five human rights groups were functioning in Cambodia during the transitional period with a combined claimed membership of over 150,000. After UNTAC’s departure, seven more human rights NGOs emerged. Today, an estimated forty NGOs are active in human rights. The period of constitution making saw the founding of a coalition of fourteen Cambodian NGOs called Ponleu Khmer (Cambodian Illumination), which defined a strategy for lobbying the constituent assembly to press for strong human rights provisions, especially regarding the rights of women. The strategy was implemented with a remarkable degree of courage, initiative, and perseverance. As the election of the constituent assembly drew near, a women’s movement emerged in Cambodia, demanding a role in crafting the new constitution. During a National Women’s Summit on March 5–8, 1993, 109 women from eight provinces spoke out on this issue. Socua Mu Leiper, one of the organizers and also a founder of Ponleu Khmer, said, “We want to participate at all levels of policy-making, including drafting the new constitution.”⁴⁹

The NGOs favored detailed human rights provisions based on international standards, with effective enforcement procedures, but in the end, they were disappointed. Nevertheless, after the proclamation of the constitution and UNTAC’s departure, Ponleu

Khmer continued to educate the population about participatory democracy and push for a sense of accountability on the part of elected officials and civil servants. In June 1994, nine human rights NGOs founded the Cambodian Human Rights Coordination Committee to strengthen links and improve information exchange. In July, August, and September 1994, the Cambodian Institute of Human Rights organized four month-long constitutional workshops for professors at the law school, government leaders, members of the assembly, persons trained in law, and judges, in an effort to help them better understand the constitution and take it more seriously.

Buddhism and Buddhist monks were severely victimized under the Khmer Rouge. According to a leading authority on the period, “Khmer Rouge policy toward Buddhism constituted one of the most brutal and thoroughgoing attacks on religion in modern history.”⁵⁰ The population of monks was reduced from about 60,000 to less than 1,000.⁵¹ Under the PRK and SOC, monks were tolerated, although supervised by the National Front for Construction and Defense, an organ of the party.⁵² Buddhism flourished again after the arrival of the United Nations, and several monks who returned from exile became leaders in the human rights movement. The Venerable Maha Ghosananda, the supreme patriarch and cofounder of the Inter-Religious Mission for Peace in Cambodia, became head of Ponleu Khmer at its founding in December 1993. During this period, Buddhist clergy organized marches and teach-ins, lobbied governmental and parliamentary leaders, and provided spiritual guidance to the population, which is 90 to 95 percent Buddhist. The clergy were the principal vehicle for popularizing constitutionalism and human rights in remote areas.

Freedom of expression was generally respected during the transitional period, and there was hope that it would continue to

thrive under the new constitution, which guarantees freedom to express opinions and to publish.⁵³ By the time the constitution was adopted, some twenty newspapers were published in Khmer, English, French, and Chinese, some of which criticized the government and its leaders freely.⁵⁴ Throughout the drafting of the constitution, the media covered the issue, although most of the Khmer-language press was partisan. The United Nations Education, Scientific, and Cultural Organization (UNESCO) ran a Danish-funded program to upgrade the skills of journalists, frequently introducing human rights and constitutional themes in the training. The English-language *Phnom Penh Post* was particularly active in analyzing the background of the constitution-drafting process and reporting on otherwise secret negotiations. Soon after the election, the paper published an article by Raoul Jennar, author of the *Cambodian Chronicles*, detailing the constitutional decisions the assembly would have to make regarding a republican or monarchical system, a unicameral or bicameral parliament, the separation of powers, and similar matters.⁵⁵ The *Phnom Penh Post* also voiced concern over the secrecy of the constitution-drafting process and echoed NGO claims that certain elements, such as human rights provisions, had not been drafted by August.⁵⁶ It reported the timetable for consideration of the final draft by the drafting committee and the entire constituent assembly, and revealed that two drafts had been sent to Prince Sihanouk⁵⁷ and that Prince Ranariddh had disagreed with the committee's draft and planned to resurrect the 1947 monarchical constitution.⁵⁸

Impact of Civil Society on the Constitution-Drafting Process

Ponleu Khmer found the draft prepared in secret by the drafting committee contradictory in that it

specifies human rights fairly clearly and stipulates that there should be a separation of powers, but on the other hand it concentrates the decision-making power of the state in the hands of a few people. While the principles stipulated in the constitution are good, for example that "the power comes from the people," there is no check on the power of the president. . . . When power is concentrated in the hands of only a few people, how can human rights be protected?

Ponleu Khmer also denounced the secrecy of the drafting process as a denial of participatory democracy. In a letter to the provisional government and to Akashi, the organization complained,

We have the right to ask all the elected representatives about what they are going to include in the constitution. They should let us know openly what their intentions are. The drawing up of the constitution is not a secret thing. All citizens have the right to know about what will be written in the constitution. The people have the right to oppose what they think is inappropriate or should not be in the constitution.⁵⁹

In the end, however, there was precious little participation from either NGOs or members of the assembly in the formulation of the constitution.

Given the limited opportunities for participation, most human rights organizations focused on popular education about the constitution. The Cambodian League for the Promotion and Protection of Human Rights (LICADHO) used cartoons and presentations by monks to educate Cambodians about human rights and the constitution, and assisted other independent and nonpolitical bodies in efforts to advise the population and government on constitutional issues.⁶⁰ The Khmer Institute of Democracy, established by a former aide to Prince Sihanouk with funding from Australian and North American sources, held public seminars, workshops, and debates about democratic ideals and principles.⁶¹

NGOs such as Vigilance and Ponleu Khmer gathered the views of citizens in the

provinces through public workshops, constituent meetings with elected members of the constituent assembly, and public open houses, creating an open dialogue among Cambodians.⁶² These expressions of public attitudes were disseminated by the media and NGOs that organized the events, but do not appear to have influenced the drafters of the constitution very much. As the drafting process neared completion, word got out about the possible restoration of the monarchy, and several Khmer prodemocracy organizations opined that the draft constitution was “dangerous.” They were also concerned about reports that it might be set aside in favor of the 1947 version. In general, they felt that the constitution granted too much power to the government.⁶³

The freedom of action of NGOs and the clergy, protected by UNTAC, and the freedom of expression of the media created a high degree of public expectation that there would be opportunities to influence the drafting of the constitution. However, with only a few exceptions, the elected members of the constituent assembly took their cues from their respective parties rather than their constituents. In the end, the two issues on which NGOs were particularly vocal—strong human rights provisions and no return to the 1947 constitution—were lost causes.

One way citizen involvement could have been handled differently would have been for UNTAC to insist on a public process with verbatim records and public access to deliberations. UNTAC had proposed such practices, and several sources offered technical support, including the Inter-Parliamentary Union (IPU). The problem was that UNTAC was in complete control of the election but not of the drafting process. Without a clear mandate, Sihanouk and the parties made a good case for a hands-off approach by UNTAC, especially because that was Akashi’s inclination in any case. The Cambodian people

had, after all, elected legitimate representatives, and real sovereignty was being restored to the nation. The idea that public access to the deliberations and the creation of a public record could be invaluable to the people’s sense of their national history had little or no effect on the political class in Cambodia, despite indigenous NGO support for such transparency. Public scrutiny was simply not a feature of political behavior.

The public’s failure to gain access to the drafting sessions and influence the text is only part of the picture, however. The process of reading and hearing about the constitution, and of learning that something so significant to their future was being decided in secret may well have influenced the population’s long-term expectations. Despite subsequent consolidation of one-party domination under Hun Sen, the population and the opposition Sam Rainsy Party (SRP) have been remarkably persistent in calling for greater transparency and accountability of government. Even the role of Sihanouk, whose ultimate decisions his subjects tend to support, may not have discouraged people from believing that the political leadership should respond to their aspirations. This is much more true for educated activists than for ordinary citizens, however.

The transitional authority partially opened the constitution-making process to popular participation, but it was less successful in convincing the political parties to establish detailed records of drafts, amendments, debates, and votes. The secrecy of the Cambodian process and its final distortion were not conducive to public participation or responsible constitution making. In the end, however, the ultimate legitimacy of the constitution arguably depends on the freeness and fairness of the process that selected the constitution’s drafters and the quality of the final text, not the extent to which those entrusted with the drafting benefited from popular consultations.

In other words, as an elected body, the constituent assembly embodied a democratic process in Cambodia but, once entrusted with the responsibility of drafting the constitution, it should have provided transparency, including public access to official records, to ensure the credibility of the process. Despite this deficiency, three factors seem to have made the constitution legitimate in the eyes of the Cambodian people: the endorsement from Sihanouk, the revered national leader; the international community's recognition that the assembly election was relatively free and fair and the successful transition process; and the intrinsic merit of the constitution's provisions on human rights and the separation of powers.

From the constituent assembly's inaugural session on June 14, 1993, to the constitution's adoption on September 24, 1993, the political leadership showed no inclination to delay the drafting to allow the public to learn or participate more. Constitutional literacy projects began well before June, and NGOs, the press, and Buddhist monks kept the public informed and raised awareness of the issues. A long process of consultations with all major elements of the population may have been useful in other situations, but in Cambodia, the political violence in the runup to the election, during the voting, and especially before the interim government could be formed justified finishing the job fairly quickly—but not doing it in secrecy and without a public record.

With the benefit of hindsight and knowledge of other constitution-making processes that included comprehensive public participation programs, it would have been preferable for the Paris Agreements to set out the basic structure of the process of citizen involvement and transparency. Without unduly extending the process, the agreements could have required transcriptions of the deliberations as well as some degree of popular

consultation. Such requirements might have helped transform a closed and opaque process into a more open and democratic one.

Democratic Representation

In a democratic process, the interests of the people are advanced by elected representatives participating in government. The Paris Agreements' emphasis on pluralism and UNTAC's encouraging both the four factions to register as political parties and other politically ambitious individuals to form and register political parties were clearly openings for democratic representation in the constituent assembly. However, these openings could not wipe out the legacy of control of the state apparatus by a single party.

Communist Legacy

Superficially, the opening of political space for democratic representation in the constitution-making process was a remarkable success. However, the ultimate impact of this opening was severely limited by Cambodia's inability to cast off its communist legacy of conflating the party and the state. Although officially UNTAC was cooperating with "existing administrative structures" of all factions, throughout the transitional period, the CPP maintained the advantage of controlling the SOC—the state administration—and effectively running the government.⁶⁴ Early on, the DK criticized UNTAC for failing to exercise direct control over foreign affairs, national defense, finance, public security, and information as the Paris Agreements required⁶⁵; it stressed that there should be "no government" in Cambodia and that the SOC, which it called the Phnom Penh party, should be dismantled and the SNC given more power under UNTAC supervision.⁶⁶ While this position was a pretext to avoid compliance with the cease-fire and

cantonment phase of the peace process, the DK was correct that UNTAC was allowing the CPP to function as a government through the SOC. This situation continued throughout the electoral process. The only reason that the CPP allowed FUNCINPEC to share power after the 1993 election is that it came in second in the elections. As soon as the CPP could reassert complete power, after a few years of coalition government, it did so. No new political formation could enter the political arena, with the exception of the Sam Rainsy Party, an offshoot of FUNCINPEC, which constitutes the only real opposition today. The political compromise that the CPP was forced to make with FUNCINPEC did, however, give the latter bargaining power during the drafting of the constitution.

Participation of Political Parties

Of the twenty-two parties that registered to present candidates, twenty participated in the election.⁶⁷ However, only three really counted: the CPP, FUNCINPEC, and the BLDP, founded in 1992 by the KPNLF to contest the elections. Of those, FUNCINPEC and the CPP dominated. FUNCINPEC won fifty-eight seats to the CPP's fifty-one seats; the BDLP won ten seats; and the National Liberation Movement of Kampuchea, an offshoot of FUNCINPEC, won one seat. Surprised by the outcome, the CPP at first called for a revote in four provinces and threatened violence if their demands were not met. Prince Chakrapong, Ranariddh's half brother but nevertheless a CPP politician, left the SOC government, where he was deputy prime minister, and rallied seven provinces in the east to secede. The constituent assembly convened under this unstable situation and selected Prince Sihanouk as head of state, in charge of forming an interim government. Sihanouk appointed himself as prime minister.

Attempted Reconciliation with the Khmer Rouge

From the perspective of national reconciliation, the evolving power arrangement appears to have successfully transformed warring factions into political parties. However, the transformation was incomplete, as violent conflict continued. In particular, the DK withdrew from elections and, although still technically a member of the SNC, was not involved in the constitution-making process, despite Sihanouk's efforts to bring them in.⁶⁸ Moreover, UNTAC could not prevent the DK and other factions from violating the cease-fire and continue operations of armed forces. As Human Rights Watch explained,

UNTAC's inability to bring about the peace it had promised made the other components of the mission exponentially harder to achieve. A "neutral political environment" for the elections could not be established; in the absence of cantonment, the country continued to be rife with heavy weaponry, and armed gangs, party gunmen, common criminals and off-duty police all freely committed murders and other acts of violence.⁶⁹

There is a link between the failure of the military phase and the failure to leverage the election and constitution drafting to bring the DK into the peacebuilding process. The DK's continued war against the newly created Royal Cambodian Armed Forces (RCAF) was clearly a failure of the peace process, attributable to Akashi's calculated risk that by not confronting the DK, he could preserve the essential goal of holding the election. He was able to hold the election, but the price for Cambodians was another six years of military confrontation.

The Timing and Sequencing of the Constitution-Making Process

The timing as established in the Paris Agreements was politically wise in light of UN

peacekeeping goals. Because the parties had reached a sufficient degree of mutually painful stalemate and concluded that none could take power by military means, by the time of the Paris Conference, Sihanouk and the political parties appeared ready to accept whatever process made sense to the international community. Given Cambodia's constitutional history, incorporating into the peace agreement the formal and substantive requirements regarding constitution drafting was extremely sensible. Even with the unanticipated restoration of the monarchy, the reassertion of power politics, and domination by one party, the timing of the constitution drafting ensured for the Cambodian people a basis for the eventual consolidation of democracy, however slow and uneven that process might be.

Similar comments can be made about the sequencing of the political steps set out in the peace agreements. The constitution drafting had to come after an opportunity for political self-determination through the election of the assembly, in which Cambodians residing in the territory, refugees in camps, and exiles living abroad participated. It also had to come before the full restoration of governmental powers by any political force, and therefore had to precede the formation of a government and take place while UNTAC was asserting its transitional administrative powers. Therefore, the sequencing of the main phases of the transition laid out in the Paris Agreements—demobilization, creation of a secure environment, election of a constituent assembly, adoption of a constitution, transformation of the constituent assembly into the national assembly, and formation of a legitimate government—was logical and necessary from a peacemaking perspective. However, as noted above, the Paris Agreements failed to provide for the specific elements and sequencing of the constitution-making process itself, leaving that to the constituent assembly.

In light of the tendency of warring parties to distrust one another, there can only be an advantage to defining clear sequencing in a peace agreement. Any adjustment of the sequencing requires a high degree of diplomatic skill, by someone such as a UN mission head, as any party that sees another party gaining advantage will protest furiously. The peacemaking phase does not end when the peacebuilding and peacekeeping processes begin.

UNTAC assigned high priority to convening the constituent assembly rapidly after the 1993 election. The timing of UNTAC's mandate was limited to the period from the entry into force of the Paris Agreements to the approval of the constitution and the transformation of the constituent assembly into a legislative assembly and the creation of a government.⁷⁰ The election itself was required to be held within nine months from the commencement of voter registration.⁷¹ Work on the constitution began soon after the constituent assembly appointed the drafting committee on June 30, 1993. The committee's work was essentially completed by the second week of September 1993, when it released its draft and FUNCINPEC made available its draft based on the 1947 text. After Hun Sen and Prince Ranariddh returned from Pyongyang, with Sihanouk's decision to approve the FUNCINPEC draft, the assembly took only five days to adopt it, on September 21, 1993. Sihanouk ratified it on September 24, 1993. Akashi needed the process to be completed quickly so that the UN mission could end by autumn 1993. The five permanent Security Council members had expressed concern that the mission end quickly, as new challenges for peacekeeping were arising in El Salvador and Bosnia and donor fatigue was setting in.

In retrospect, despite the very real time pressures, it is clear that more time should have been allotted for the constitution-making process. Certainly, more time would

have had to be allotted if the process had included more civic education focused specifically on constitutional issues, followed by a phase of popular consultation—particularly in light of the time that has been required for constitution making in those countries that have appointed a constitutional commission to direct distinct phases of civic education and popular consultation.

The Role of the International Community

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 cochairs of the Paris Conference, and the UN secretariat. The SNC, especially Prince Sihanouk, its president, represented Cambodian sovereignty. 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. However, the United Nations and specific governments had roles to play in both the peace process and the constitution-making effort.

The United Nations

UNTAC's role in the overall transition was defined in the secretary-general's report of February 19, 1992, to the Security Council,⁷² which the council approved on February 28.⁷³ The report set out detailed guidelines for the seven components of the mission, especially regarding demobilization and ceasefire, assuring public security, organizing elections, and promoting and monitoring human rights. But it did not specify any particular role for UNTAC in the constitution-drafting process. This, once again, is regrettable, as it offered little or no guidance to Cambodians regarding process design and did not secure

for the United Nations a firm basis for assisting with design or managing 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 Cambodian parties to use. He presented these materials in various settings, including at the SNC meeting described above.⁷⁴ 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 to key issues of governance and constitutional structure, the seminar did not appear to have much influence on the persons who actually drafted the text.

UNTAC's human rights component redirected its human rights education program during the postelection period toward constitutional literacy, to inform Cambodian NGOs and the general public about popular participation in constitution drafting, drawing upon other Asian examples, and a basic understanding of constitutional concepts. Audiovisual materials were prepared and disseminated, discussion groups set up with NGOs, and a constitutional forum 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 ac-

tive with popular organizations during the drafting of other constitutions in the region. The audience of over one hundred 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 formed Ponleu Khmer, the abovementioned coalition of fourteen groups.

When UNTAC arrived, Cambodians held an exaggerated expectation that the United Nations would bring peace. They were bound to be let down, and they were. Akashi tended to leave the constitution-making process to the Cambodians, but Sihanouk's shifting attitude undermined the effectiveness of the process and UN ability to contribute positively to it. On August 31, 1993, Sihanouk 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."⁷⁵ It was in this context that he became furious at the United Nations, 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. He subsequently tempered his furor against UNTAC, but remained suspicious of perceived UN meddling in the constitution-drafting process.

In hindsight, the Cambodian leadership might have been less sensitive to the issue of UN meddling had UN efforts focused more on process than 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 given 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 United Nations in the transition overall must certainly be positive for having held the election and repatriated refugees, even though the United Nations can be faulted for having failed the military phase of the process. As an exercise in peacemaking, it must certainly be seen as a success. However, while UN efforts enabled the constitution to be drafted, the organization's direct role in that element of the process was negligible.

Foreign Experts

Several foreign experts, some sponsored by governments and foundations, sought to assist the drafting committee of the constituent assembly. A French lawyer was seconded from UNTAC's civil administration component—itsself headed by a French administrative judge—to the French-educated chair of the drafting committee and given an office in the Ministry of Justice. Her influence appears to have been negligible, however. Claude Gille Goure, a law professor from the University of Toulouse, was more influential; he "had an important role in drafting the version that was the closest to the one that was adopted."⁷⁶ Brown and Zasloff describe his role:

Sihanouk, through his son Ranariddh, himself a former professor of law at the University of Aix-en-Provence in France, had engaged Goure following the election to prepare a draft constitution. Goure worked in Phnom Penh until sometime in July 1993, and left the draft with Ranariddh before returning to France. One might assume that the draft conformed to the positions of Prince Sihanouk and Ranariddh. According to a source who was closely following the drafting process in late July 1993,

Ranariddh came before the drafting committee and said, in effect, "Here's the constitution. My father has agreed to it and so do I." It was substantially Goure's draft. According to this account, Ranariddh expected that a draft endorsed by Prince Sihanouk and himself would be immediately accepted. Instead, the chairman of the committee calmly thanked Ranariddh and noted that the committee would consider it, along with the draft that it had been working hard to develop.⁷⁷

This version of events is credible. The CPP clearly expected to control the constitution-drafting process and introduce language from the 1989 SOC constitution. However, FUNCINPEC's electoral victory and the high regard everyone, including Hun Sen and Chem Sngoun, had for Sihanouk resulted in the drafting of one text based on the 1989 SOC constitution and another based on the 1947 monarchical constitution, rather than the formulation of a new constitution based on Annex 5 and the advice of foreign experts. Even though Ranariddh is a law professor, it is unlikely that he could have come up with a complete text without assistance. It is also unlikely that Professor Goure relied on the 1947 text without the French government favoring this approach. The French government and experts assisting the Ministry of Justice and FUNCINPEC displayed a good deal of political realism by acknowledging Sihanouk's special role and placing themselves in a position to influence both the once and future king and the leader of the victorious party by supporting a version of the constitution favorable to the royalists.

The U.S. government was not directly involved, although it did fund expert advice from Americans through the Asia Foundation, the National Democratic Institute for International Affairs (NDI), and the International Republican Institute (IRI), the latter two organizations created under congressional mandate through the National Endowment for Democracy. Both the NDI and IRI es-

tablished presences in Phnom Penh. Among their activities was to invite the members of the new constituent assembly to a workshop they sponsored, at which elected representatives from the United States and Bangladesh advised their guests regarding what works and what does not work in constitutional drafting in democratic societies.⁷⁸ The NDI and IRI also offered information on political party training, voter education, and use of media.⁷⁹ At another seminar for the parties, they distributed the U.S. constitution in Khmer and brought in a U.S. constitutional law professor who spoke about the relevance of U.S. constitutional principles to Cambodia.

More useful was the role of two other U.S. law professors, Louis Aucoin and Dolores Donovan, who visited on behalf of the Asia Foundation. According to an interview Aucoin gave to Joseph Zasloff in April 1993, the two professors were welcomed by Chem Sngoun, the chair of the drafting committee, who gave them a desk near his office in the Ministry of Justice. Chem Sngoun "recommended to committee members that they consult the professors with questions about comparative constitutions."⁸⁰ After providing information and suggestions on certain sections of the constitution, "during the second week of August, the two professors were abruptly cut out of the advisory process, apparently due to an order from Prince Sihanouk that no foreigners (presumably other than those from whom he was drawing assistance) were to be involved in the constitution-writing process."⁸¹ This author's personal recollections of Aucoin's and Donovan's role was that unlike the French, who wanted to restore the French language and legal system in the country, they used a healthy comparative law approach, drawing on whatever legal traditions Cambodia had and the most useful elements of other Asian legal systems, as well as U.S. law, to assist in developing a legal system adapted to the needs of post-conflict Cambodia.

In retrospect, the involvement of foreign experts in Cambodia raises significant questions as to the role, ethics, and methodology that should be exercised by the international community and experts providing advice. When their efforts strengthen the hand of an already dominant political party, there is danger that their work shrinks the political space available to all political forces in society and the population at large, rendering the process less democratic.

The Role of International Law

Both the role that international law played in the constitution-making process and the role that it did not play where it might have been expected to are of interest in the Cambodian case. International law provided a foundation for the constitution's provisions on democratic governance and human rights, and could have done the same—but did not—for the issue of accountability for the Khmer Rouge's past crimes.

Legal Obligation to Establish Democratic Governance

Broad principles of democratic governance, which began to be considered in the early 1990s as an entitlement under international law,⁸² were contained in the mandate to prepare for a constitution in the Paris Agreements and in Security Council Resolution 745 (1992) of February 28, 1992. According to Article 23 of the Paris Agreements, the new constitution was required to contain “basic principles, including those regarding human rights and fundamental freedoms” as set out in Annex 5, entitled Principles for a New Constitution for Cambodia. This text is drawn from a 1982 proposal of the five-state contact group that prepared recommendations for Namibia's transition to independence. A member of the U.S. delegation to the Paris Conference on Cambodia and

the negotiations on Cambodia among the permanent five Security Council members describes this text as follows:

Like the constitutional principles prepared for Namibia, these provisions of the Agreement transcend existing international human rights instruments. They go beyond recognizing free elections as the sole process for choosing a government after internal strife, and beyond committing the elected regime to guaranteeing the human rights of its people, by identifying the path—labeled “liberal democracy, on the basis of pluralism”—it is to follow. The Agreement thereby establishes the political foundation of a government able to protect human freedom. Moreover, it incorporates this principle for internal governance in an agreement resolving a regional conflict, and thus places an international obligation on Cambodia to observe it and on other signatories to respect it.⁸³

International Law of Human Rights

The second aspect of international law relevant to the Cambodian constitution-making experience of 1993 is the set of international norms of human rights. Including a bill of rights in the constitution stems not only from Annex 5 of the Paris Agreements referred to above, but also from Article 15 (2a) of the Paris Agreements, according to which “Cambodia undertakes to take effective measures to ensure that the policies and practices of the past shall never be allowed to return.” This wording suggests that the drafters expected the new constitution to affirm human rights as a testimony to the break with the past and as an important preventive measure for the future.

The chapter of the constitution entitled The Rights and Obligations of Khmer Citizens covers twenty articles (Articles 31–50), seventeen of which relate to rights and three to duties. This chapter constitutes the declaration of fundamental rights required by Annex 5 of the Paris Agreements. At a minimum, the declaration had to contain the twelve rights enumerated in Annex 5,

namely “the rights to [1] life, [2] personal liberty, [3] security, [4] freedom of movement, [5] freedom of religion, [6] assembly and [7] association including political parties and trade unions, [8] due process and [9] equality before the law, [10] protection from arbitrary deprivation of property or deprivation of private property without just compensation, and [11] freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the [12] retroactive application of criminal law.” The text basically meets these requirements, though by borrowing from older constitutions, it often protects the rights to a lesser degree than do the international texts.⁸⁴ Clearly, the drafters did not choose to draw from the language or normative richness of relevant international instruments. It is a sad commentary on the entire process that most of the rights and duties are expressed in wording similar to that of the SOC constitution of 1989. In some cases, the constitutional and international standards are both quite general and differ only in drafting. On the whole, the new constitution enumerates the same rights and duties as the 1989 constitution, with minor adjustments—and without having taken advantage of the extensive drafting suggestions from NGOs and various advisers nor given due consideration to the requirements of the Paris Agreements or international treaties to which Cambodia is a party.

International Law Relating to Impunity

The third dimension of international law relevant to the constitution-making process in Cambodia concerns norms of accountability for the past. In recent years, numerous countries have faced the need to balance reconciliation and stability with responsibility for gross violations of human rights.⁸⁵ Given the magnitude of the crimes that the Khmer Rouge committed, the fact that Cambodia is a party to the Genocide Convention, and the

degree of the international community’s involvement in Cambodia’s affairs, one might have expected the constitution to deal with the issue. After all, the principal explanation for the reference to human rights in the Paris Agreements is universal condemnation of the atrocities of the Khmer Rouge. Nevertheless, the Paris Agreements did not go as far as the peace agreement in El Salvador, which explicitly called for prosecutions for past abuses.⁸⁶ The absence of a similar reference may be explained by the diplomatic necessity of keeping China and the DK in the process. In this sense, the Cambodian case is an example of how the nature of a constitution-making process and the participants in it affect the content of the constitution, even for issues on which international law provides clear guidance.

The human rights provisions of the 1993 constitution contain no explicit references to genocide,⁸⁷ the Genocide Convention, the actions of the DK, or prosecutions for gross violations of human rights. There are also no references to such prosecutions in the eight articles on the judicial power.⁸⁸ One of the provisions in the section on political regime stipulates that “the Royal Government of Cambodia is committed to . . . implement the policy of national reconciliation.”⁸⁹ Conceivably, this article could be invoked to avoid prosecutions for genocide, but such an interpretation would contradict the principle that unless the text expressly stipulates otherwise, it should be construed so as not to conflict with Cambodia’s international obligations, including its obligations under the Genocide Convention. Therefore, while the constitution does not address the issue of accountability or criminal responsibility for acts of genocide and crimes against humanity, it does not cast any doubt on Cambodia’s obligations under Articles IV, V, and VI of the Genocide Convention to “punish,” “provide effective penalties,” and “try” persons charged with genocide.

The prevailing impunity for genocidal crimes in Cambodia has been denounced from various quarters⁹⁰ and was the object of intense negotiations over ten years between the Royal Government and the United Nations, leading the national assembly to adopt a Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, which was promulgated in October 2004.⁹¹ In June 2007, the Extraordinary Chambers in the Courts of Cambodia (ECCC) held its inaugural session. On July 18, 2007, the co-prosecutors filed introductory submissions with the investigating judges for five unnamed individuals. On July 31, 2007, charges were laid against Kaing Guek Eav, otherwise known as Duch, the former head of Toul Sleng, and later in 2007, four other individuals were arrested and placed in the ECCC's custody.⁹² In 2008, the ECCC held pretrial proceedings for all five defendants. The prosecution of Duch began in March 2009. The entire process is expected to end in early 2011. Among the ECCC's major challenges are the independence and impartiality of the judiciary and other organs of the court, especially from government pressure and interference; compliance with due process and fair-trial standards; transparency and public access to documents; and resources to ensure the capacity and effectiveness of the court's operations.⁹³ One observer explained that "questions of corruption have already slowed the proceedings, as have restrictions on investigations and procedures that other courts would have never have accepted," concluding that it "is dubious that the tribunal can really set the historical record straight."⁹⁴ NGOs, especially the Documentation Center of Cambodia (DC-Cam), have been providing detailed documentation and analysis and reaching out to young Cambodians to know this dark period of their nation's history.⁹⁵

Essential Issues of Substance

Several substantive issues were crucial to the development of the final constitutional text. Without a record of the deliberations of the drafting committee, and given the lack of transparency in the ultimate decision-making process, we can review only in general terms the restoration of monarchy, structure of government, and provisions for promoting and protecting human rights.

The Restoration of Monarchy and Structure of Government

Monarchy in Asia (as elsewhere) tends to be autocratic, and considering Cambodia's previous experience, one might wonder whether the constitutional provisions on the monarchical nature of the government diminish its liberal democratic character or the prospects for implementing constitutionally guaranteed human rights. During the drafting of the Paris Agreements and the transitional period, there was no hint that the task of establishing a "liberal democracy, on the basis of pluralism" would entail the restoration of the king. During the SNC session described above, when Prince Sihanouk outlined his vision of the constitution, he noted that the name of the country as set out in the constitution could be neither the Kingdom of Cambodia ("which would not please certain parties") nor the Khmer Republic ("which would not please my son [Prince Ranariddh, head of the royalist FUNCINPEC] and, in truth, would not please me either"). He suggested that the country simply be called Cambodia.⁹⁶ He did see a special role for himself, but not as king; he felt that the "president" should be someone who is above parties and brings the nation together. Using the example of François Mitterrand (and, oddly, Danielle Mitterrand), he said that their affiliation with the Socialist Party exemplified a partisan type of presidency that

would not work in Cambodia.⁹⁷ He said that the Cambodian president could be a man or a woman, but there is little doubt that the person above parties whom he had in mind was none other than himself. He may have been deliberately misleading the members of the SNC, the senior staff of UNTAC, and the diplomatic corps in the room, intending all along that the process lead to restoration of the Kingdom of Cambodia with his return to the throne. It may also have been his view at the time that the surest road to power for him was to be elected under a constitution with a strong presidential regime. Alternatively, the relative victory of his son's FUNCINPEC party may have opened the way for a restoration of the monarchy that Sihanouk had not envisaged before the constituent assembly began meeting.

Whatever may have been the expectations of the palace or of FUNCINPEC, the United Nations did not seriously consider that the Kingdom of Cambodia would be the framework for the liberal democracy it was mandated to help establish. From a historical and sociological perspective, however, one might doubt whether any other form of government than monarchy could have emerged in Cambodia from a process of political self-determination, in which opposing factions needed to compromise and the general population obviously supported the royal family and monarchical tradition. In traditional Khmer society, the king occupies an exalted position, and Sihanouk's personality fit that traditional model. Popular support, for FUNCINPEC, reflecting veneration for Sihanouk, proved greater than that for the CPP, despite the latter's control over the propaganda and security apparatus.

Politically, influential foreign governments and the United Nations had always recognized that Sihanouk was the only person capable of holding the SNC and the peace process together, however capricious he might be. No one doubted that he would be

accorded a special place in the constitution to allow him to continue to play his unique role. Restoring him to the throne was not the expected way of maintaining his supreme authority, but it was consistent with what all perceived as a political necessity. It was also the result of the "idealization of the pre-1970 past the defect of which had been erased by subsequent atrocities."⁹⁸

Despite the short-term imperative to accord Sihanouk a special role, the question remains whether the provisions of the 1993 constitution relating to the status, powers, and duties of the king are compatible with the functioning of a liberal democracy that safeguards human rights. Akashi and his staff were well aware that constitutional monarchy need not be incompatible with liberal democracy and respect for human rights, considering the examples of the United Kingdom, Denmark, the Netherlands, Spain, and Sweden. The essential characteristic of those constitutional systems is that power is legally and effectively exercised by duly elected representatives of the people who are accountable to their constituents and respectful of the rule of law and separation of powers. On its face, the 1993 constitution of Cambodia provides that "all powers belong to the people. The people exercise these powers through the National Assembly, the Royal Government and the Judiciary."⁹⁹ The same article stipulates that the three branches of government shall be separate. Democracy is reconciled with monarchy in the first article of the constitution, which reads, "Cambodia is a kingdom with a King who shall rule according to the Constitution and to the principles of liberal democracy and pluralism." If one accepts that a constitutional monarchy can establish a liberal democracy—which seems acceptable—then this provision contains the essential guarantees of it by subordinating the king to the constitution and the principles of liberal democracy and pluralism. Article 1 also constitutes formal

compliance with a clear requirement of Annex 5.¹⁰⁰ The formal limitations on the king are reinforced by Article 7, according to which “the king of Cambodia shall reign but shall not govern.”¹⁰¹ The members of the constituent assembly attached particular importance to this limitation because they added that it “absolutely shall not be amended.”¹⁰²

Nevertheless, the king is given considerable authority and a few real powers. He “shall assume the august role of arbitrator to ensure the faithful execution of public powers”¹⁰³, and he appoints the prime minister.¹⁰⁴ He also appoints, transfers, and removes high officials, ambassadors, and judges, the last group on the advice of the Supreme Council of the Magistracy.¹⁰⁵ He can declare war,¹⁰⁶ proclaim a national emergency,¹⁰⁷ and sign and ratify international treaties.¹⁰⁸ He also must sign royal acts and decrees to promulgate the constitution and laws.¹⁰⁹ Finally, the king is the supreme commander of the Royal Khmer Armed Forces¹¹⁰ and president of the Supreme Council of National Defense.¹¹¹ Vesting these powers in the ailing father of modern Cambodia, who spent most of his time in Beijing and Pyongyang and was revered by most of the population, may have been appropriate for the prestige of the office and insignificant in practice. However, full use of them by his successor could easily jeopardize the democratic institutions provided for elsewhere. The king cannot appoint his successor¹¹²; the Royal Council of the Throne—consisting of the president of the assembly, the prime minister, two head monks, and the first and second vice presidents of the assembly—must elect a new king from among the royal family members.¹¹³ Sihanouk abdicated in 2004, and his eldest son, Norodom Sihamoni, was named by the nine-member throne council to become the next king.

Democracy is doubly fragile under Cambodia’s political system. First, the impoverished population has too little education and experience with democracy to influence party

platforms and the choice of party candidates. Second, the constitution does not provide for other levels of democratic participation apart from electing members of the assembly, such as directly voting candidates into offices in the local and provincial governments. Rather than belonging to the people, real powers belong to the king and the politicians who control the royal government, consisting of the Council of Ministers, normally headed by one prime minister assisted by two deputy prime ministers.¹¹⁴ The prime minister is appointed by the king from the representatives of the winning party in the assembly, on the recommendation of the president and with the assent of the two vice presidents of the assembly.¹¹⁵ The executive continues to be the dominant political force, with the king having considerably more than ceremonial functions. These are the structures of government that are supposed to establish democracy—that is, empower the people and their representatives to decide on behalf of the people. Despite constitutional incantations of the supremacy of the people and the king’s frequent reference to it, in practice, the parliament appears weak.

Constitutional Provisions for Promoting and Protecting Human Rights

In large part, the constitution’s liberal character is a function of the bill of rights and related enforcement procedures set out in it. Incorporating human rights provisions was a critical element of compliance with the Paris Agreements in the constitution-making process, although it is uncertain whether and to what extent the drafters focused on this aspect of the constitution. In addition to affirming human rights consistent with the Universal Declaration of Human Rights and other relevant instruments, Annex 5 required the constituent assembly to provide that “aggrieved individuals will be entitled to have the courts adjudicate and enforce these

rights”¹¹⁶; as the annex states, “An independent judiciary will be established, empowered to enforce the rights provided under the constitution.”¹¹⁷ Formal declarations of rights are of little value unless the law and political culture permit an effective remedy against abuses, as required by Article 8 of the Universal Declaration and Article 2(3)(a) of the International Covenant on Civil and Political Rights, to which Cambodia is a party.¹¹⁸ An effective remedy assumes that the rule of law and trained judicial and administrative officials are in place. Cambodia has neither. Nevertheless, the constitution does stipulate that

Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by State and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall reside under the competence of the courts.¹¹⁹

Regarding the existence of effective remedies under the new constitution, Justice Michael Kirby, the first special representative of the secretary-general for human rights in Cambodia, did not hesitate to conclude that the above-quoted provision notwithstanding, “no effective criminal or civil remedies exist in law for the prosecution of persons who engage in violations of rights recognized in the Constitution.”¹²⁰ The constitution could not declare such prerequisites of justice into existence. It could, however, establish in law an array of organs and procedures that would make it difficult if not impossible for the new government to deny an effective remedy to aggrieved individuals without disregarding the constitution. However, the constituent assembly only provided the most superficial guarantees of such remedies. It was, therefore, a wise precaution to provide, in Article 17 of the Paris Agreements, for the ongoing UN supervision,¹²¹ which has been exercised by the Commission on Human Rights and

the Human Rights Council since February 1993,¹²² through the SRSGs.¹²³

The principal mechanism for promoting and protecting human rights that a constitution can appropriately establish is an independent judiciary, which the Paris Agreements stress as the privileged means to enforce human rights. Due to a paucity of people with any legal training at all, however, it has not yet been possible to establish a fully trained judiciary. A court system is meaningless if judges and prosecutors lack even a minimal degree of training and independence. Before the constitution was drafted, the head of the investigation unit of the Human Rights Component of UNTAC wrote that under new constitutional provisions on independence of the judiciary, “it would be necessary to abolish the judiciary as it exists now, completely.”¹²⁴ He also found that for Cambodian judges with whom he had discussed the matter, “the whole concept of independence of the judiciary was alien to them.”¹²⁵

Constitutionally requiring the independence of the judiciary was a necessary but insufficient step to allow the justice system to function as an effective means of enforcing constitutional rights and protections. While the constitutional affirmation of an independent judiciary and provision for a Supreme Council of the Magistracy are welcome, it is illusory to think that the constitution will produce, in the near term, anything approaching effective means of adjudicating and enforcing rights through the courts, as the Paris Agreements require.

Conclusion

Adopting Cambodia’s 1993 constitution was the defining event in implementing the Paris Agreements’ commitment to establish a “liberal democracy on the basis of pluralism.” The United Nations deployed over twenty thousand civilian and military personnel and spent \$2 billion to assist Cambodia through a tran-

sitional 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. The Cambodian operation made constitutional reform an integral part of the comprehensive political settlement, with the United Nations keeping the process on course. The ultimate question addressed in this chapter is whether and to what extent the process of constitution drafting contributed to national reconciliation and establishment of the foundations for a stable and peaceful society. The constitution-making process can best be assessed as an element of intervention from above rather than intervention from below.¹²⁶

Political and military arrangements among fighting factions are the most visible elements of UN peacemaking, peacekeeping, and post-conflict peacebuilding, and require high-level intervention from above by the international community. Such intervention and the resultant political arrangements are accepted by those who seek political power only as long as they have no choice. Once they feel empowered enough, they will exclude the international community and dismantle those aspects of the political arrangements that do not suit them. In Cambodia, this has meant the concentration of power in the CPP and in the person of Hun Sen. Support for civil society, human rights, democratic participation, and community-based development efforts tends to be a less visible form of intervention from below. Intervention from below involves a partnership among human rights and development components of the international community, interacting with elements of the population in a process of societal transformation through democratic empowerment, enhancing citizens' capacity to participate effectively in society and government. Such

participation requires a vibrant civil society benefiting from freedom of expression and association. Political parties, trade unions, religious organizations, public interest, and similar groups must function free of undue government control. Democratic empowerment requires that democratic laws, policies, and institutions be in place, including electoral laws and commissions, genuine and periodic elections, an independent judiciary and bar, a professional police separate from the military, and accountability and transparency in public service. Working to put these elements in place during a transition holds the potential for long-term social transformation as the population, made aware of its rights to democratic governance, constantly seeks to occupy and expand the political space available to it.

The constitution-drafting process falls in between interventions from above and below. It is an essential component of elite-level arrangements, standing on the fragile ground of a formal agreement by previously warring parties, who would have preferred military victory but have had to settle for a political role under the constitution. But it can also be a feature of democratic empowerment, both as a process and foundation for future expansion. The massive participation in the Cambodian election of the constituent assembly in 1993 clearly contributed to democratic empowerment. People's expectations of what a peaceful Cambodia could be like were altered, probably irrevocably. To the extent that the population is informed and feels its views are reflected in the constitution-drafting phase, democratic participation is enhanced. However, in Cambodia, that phase was to a large extent a manifestation of intervention from above because the drafting process was not transparent and civil society was given few opportunities to be heard. At the same time, the demands of the Paris Agreements and the governments that sought to influ-

ence the process, as well as the minimal expectations of the parties represented on the drafting committee, resulted in the constitution's adoption of many essential features of a liberal democracy. Such a legal basis for human rights and democratic governance contributes to democratic empowerment.

In other words, national dialogue and consolidation of peace receive a necessary but temporary boost from the military and political aspects of intervention from above, but their longer-term prospects depend on democratic empowerment, to which constitution drafting may contribute. In Cambodia, the drafting process belonged more to the power struggle among the political factions than it did to the democratic empowerment function of UNTAC's peacebuilding mandate. That is why it is necessary to monitor carefully how the subsequent societal development and application of the constitution have filled the empowerment gap created by the politicization of the constitution-drafting process.

It should be clear that formally including in the constitution the key language of the Paris Agreement and its Annex 5 regarding liberal democracy and human rights did not change Cambodia's power structure. It is evident that "the 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."¹²⁷ Cambodia is an example of Nelson Kasfir's sharp observation that "no 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."¹²⁸ According to Shahid

Qadir, 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."¹²⁹

The question that arises, however—and that will remain unanswered here—is whether a more democratic and transparent constitution-making process might have fostered a more genuinely democratic result. The question leads to speculation as to what might have happened had the demands for participation by the vibrant civil society that took shape in the course of the process actually been met. If so, perhaps the process itself would have been a capacity-building exercise, strengthening the role of civil society and the population at large in the political destiny of the country. As it stands, the new constitution is democratic to the extent that the people's interests were genuinely reflected by their elected representatives in the constituent assembly. That a coalition of human rights and development NGOs attempted to pressure the assembly during the drafting phase is a promising sign of the potential for deeper democratization, as is the continued effort of these activists to see in the constitution a source of protection of their human rights, 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. We have seen that the drafters did little more than graft the monarchical provisions of the 1947 constitution onto a liberalized version of the 1989 constitution, without incorporating international standards except for a general—and potentially significant—reference to them. Nevertheless, the continuing applicability of those portions of the transitional provisions that have not been replaced and the legal authority for interpreting the consti-

tutional 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, however. The constitution's text is disappointing in this regard, but gives a legal basis for a broad program of reform. The Cambodia Office of the High Commissioner for Human Rights, and the constant vigilance of the successive special representatives for human rights in Cambodia (Michael Kirby, Thomas Hammarberg, Peter Leuprecht, Yash Ghai, and Surya Subedi) as well as key bilateral donors, all contribute to consolidating adherence to constitutional rights and freedoms.

Thus, Cambodia's 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 Cambodia's significance as a strategic zone of conflict, by which the United States sought to contain and push back Soviet influence through the latter's Vietnamese proxy. That strategic interest was seen to be so great that the United States bombed Cambodia during the Vietnam War and supported the Khmer Rouge diplomatically after the Vietnamese invasion. Without these strategic interests, stability and democracy in Cambodia are desirable but not vital: to the West, Cambodia is now another poor country that deserves aid but is unlikely to turn against Western interests. Under these circumstances, the concern of powerful nations during transition was to complete the mission on time and within budget, even if the constitution—its principal product—was not as good as it might have been.

The CPP today, as heir to a communist-type party and state structure but without the Marxist ideology, continues to dominate

political and administrative life despite a constitution purporting to establish a liberal democracy based on pluralism. As one member of the constituent assembly remarked when the constitution was adopted, the public and near-unanimous voting on limited matters in the assembly was "just like under communism."¹³⁰ Nevertheless, the constitution has provided the legal basis for power sharing between the previously warring FUNCINPEC (and KPLNF) and the CPP; it has also allowed the Sam Rainsy Party to emerge as genuine opposition, frequently harassed by the government but persevering.

The constitutional text makes it the policy of the royal government of Cambodia to advocate "a national reconciliation policy in defense of national unity."¹³¹ At the ceremony following the constitution's promulgation, 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."¹³² The king's preference for accommodation with the DK to achieve reconciliation seemed at first to hold promise, especially when, soon after the constitution's adoption, Khieu Samphan, nominal head of the DK, came to Phnom Penh to pay homage to King Sihanouk and declare his group's support for the new constitution¹³³ even as defections multiplied among the ranks of the Khmer Rouge armed forces (NADK).¹³⁴ The prospects for reconciliation as conceived by the king changed, however, with the 1994 assembly vote to outlaw the DK, with the support of the first prime minister, Prince Ranariddh, who had originally supported his father's policy of accommodation, and the DK's establishment of a so-called Provisional Government of National Union and National Salvation. Eventually, the NADK defections and Pol Pot's death ended the threat to reconciliation that the DK represented, and Khieu Samphan sits to-

day (May 2009) in the docket of the ECCC. The constitution-making process did not achieve reconciliation among the four Cambodian parties to the Paris Agreements, but it was a critical first step toward that end.

The long-term viability of a constitution depends not so much on how it is drafted as on conditions that allow for the consolidation of democracy, including overcoming the lack of historical experience with democracy, sustaining a growing economy, avoiding political violence, and ensuring separation of powers and a professional and independent civil service and judiciary. 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. Cambodia's poverty¹³⁵ is slowly being offset by substantial aid,¹³⁶ some international investment,¹³⁷ and modest economic growth.¹³⁸ Regarding a peaceful transition to democracy, political and ethnic violence continued during the 1993, 1998, 2002, and 2003 elections, but all were relatively free and fair under the circumstances. Commune elections were held in April 2007 and National Assembly elections in July 2008, but with less violence than the 2002 and 2003 elections. The Cambodian People's Party emerged victorious, with the Sam Rainsy Party (SRP) increasing its representation in the assembly as the main opposition party. The armed conflict with the DK did not end until 1998. But since transition began, the scale of political violence has not threatened democracy fatally. Progress in maintaining the separation of powers and independence of the civil service and judiciary is painfully slow but the constant vigilance and denunciation of backsliding by the SRSGs, local and international NGOs, and the political opposition have sustained pressure on the regime. Thus, judging by the presence of these four con-

ditions, consolidation of democracy appears difficult in Cambodia, but not hopeless.

The current CPP, FUNCINPEC, and SRP leaderships and the relatively weak king, Norodom Sihamoni (who replaced the ailing and absentee Sihanouk in October 2004), do not possess the requisite qualities to breathe life from the top into the potentially democratic provisions of the constitution. But prospects may be brighter for the long-term advance toward democratization from below, through the empowerment of people to participate in government. Democratization requires unfettered development of civil society, through genuine freedom of association and expression, political space being given to diverse segments of the community, respect for privacy, and development of 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, both citizens and noncitizens; and access to official information, members of parliament, and public officials. At least limited popular involvement in politics first appeared during the May 1993 elections and the constitutional-drafting process, and continued during the five more recent elections. Democratization has thus had a spectacular beginning, but will take generations to become embedded in Cambodia's political culture.

Cambodia has emerged from chaos and destruction with many unsolved problems. In the final analysis, the 1993 constitution is not much better than previous communist, monarchical, or republican versions on which it is largely based. Power is beginning to be exercised more broadly through the political opposition and civil society, and certain checks are being placed on the dominant leadership. Cambodia has not yet entirely emerged from civil strife, and its democratic foundations are fragile. But the 1993 consti-

tution, for all its defects, has cemented that foundation.

Acronyms

BLDP — Buddhist Liberal Democratic Party.
 CGDK — the Coalition Government of Democratic Kampuchea.
 CPP — the Cambodian People's Party, the pro-Vietnam faction. Previously named the PRPK. Controlled the PRK, renamed SOC in 1989.
 DK — the Party of Democratic Kampuchea, also called PDK. Popularly known as Khmer Rouge.
 FUNCINPEC — National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia, the royalist faction headed by Prince Norodom Ranariddh.
 IRI — International Republican Institute, U.S.-based democratization assistance organization.
 KPLNF — Khmer People's National Liberation Front, also known as the BLDP — Buddhist Liberal Democratic Party.
 KR — Khmer Rouge, name given to the DK (also called PDK) by Sihanouk and generally used by the media.
 LICADHO — Cambodian League for the Promotion and Protection of Human Rights.
 MOLINAKA — Mouvement de Liberation Nationale du Kampuchea (National Liberation Movement of Kampuchea).
 NDI — National Democratic Institute for International Affairs, U.S.-based democratization assistance organization.
 PICC — the Paris International Conference on Cambodia.
 PRK — People's Republic of Kampuchea, controlled by the PRPK (later renamed the CPP).
 PRPK — People's Revolutionary Party of Kampuchea, previous name of the CPP.
 SNC — Supreme National Council, the interim representative body created in the Paris Agreements.
 SOC — State of Cambodia, name of PRK since 1989, controlled by the CPP.
 SRP — Sam Rainsy Party.
 SRSG — Special Representative of the Secretary-General of the United Nations (during the Cambodian transition, Yasushi Akashi held this position). Since the UNTAC period, it refers to the

Special Representative of the Secretary-General for human rights in Cambodia.

UNTAC — United Nations Transitional Authority in Cambodia.

Notes

1. Agreements on a Comprehensive Political Settlement of the Cambodian Conflict, signed in Paris on October 23, 1991, at the final meeting of the Paris Conference on Cambodia. The comprehensive settlement comprises four documents: the Final Act of the Paris Conference; the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, with five annexes (Annex 5 contains constitutional principles); the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia; and the Declaration on the Rehabilitation and Reconstruction of Cambodia. Reprinted in 31 I.L.M. 174 (1992). This compilation will be referred to below in the plural as the Paris Agreements; the singular Paris Agreement will refer to the second of the four documents.

2. Among the books written about the Cambodian transition are Grant Curtis, *Cambodia Reborn? The Transition to Democracy and Development* (Washington, DC: Brookings Institution Press, and Geneva: The United Nations Research Institute for Social Development, 1998); M.H. Lao, *The Unfinished Settlement of the Cambodia Conflict* (Phnom Penh: Khmer Institute of Democracy, 1994); William Shawcross, *Cambodia's New Deal* (Washington, DC: Carnegie Endowment for International Peace, 1994); Janet E. Heininger, *Peacekeeping in Transition: The United Nations in Cambodia* (New York: The Twentieth-Century Fund Press, 1994); Steve R. Heder and Judy Ledgerwood, eds., *Propaganda, Politics, and Violence in Cambodia: Democratic Transition under United Nations Peace-Keeping* (Armonk, NY: M.E. Sharpe, 1996); Henry Kamm, *Cambodia: Report from a Stricken Land* (New York: Arcade Publishing, 1998); MacAlister Brown and Joseph J. Zasloff, *Cambodia Confounds the Peacemakers: 1979–1998* (Ithaca, NY: Cornell University Press, 1998); David W. Roberts, *Political Transition in Cambodia: Power, Elitism, and Democracy* (New York: St. Martin's Press, 2001).

3. Among the numerous books about this period, see Elizabeth Becker, *When the War Was Over: The Voices of Cambodia's Revolution and Its People* (New York: Simon and Schuster, 1986); Mi-

chael Vickery, *Cambodia 1975–1982* (Cambridge, MA: South End Press, 1984); David Chandler and Ben Kiernan, eds., *Revolution and Its Aftermath in Kampuchea: Eight Essays*, Yale University Southeast Asia Studies, Monograph Series no. 25, 1983; Ben Kiernan, ed., *Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations, and the International Community*, Yale University Southeast Asia Studies, Monograph Series no. 41, 1993; Karl D. Jackson, ed., *Cambodia 1975–1978: Rendezvous with Death* (Princeton, NJ: Princeton University Press, 1989).

4. 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, as the party controlled the state.

5. The eighteen other signatories are Australia, Brunei, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand, the USSR, the United Kingdom, the United States, Vietnam, and Yugoslavia.

6. On the background of the agreements, see Steven R. Ratner, "The Cambodia Settlement Agreements," *American Journal of International Law*, vol. 87, no. 1, pp. 2–8. See also Steven R. Ratner, "The United Nations in Cambodia: A Model for Resolution of Internal Conflicts?" in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, ed. Lori Damrosch (New York: Council on Foreign Relations Press, 1993), p. 241.

7. 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."

8. See note 2.

9. See Maurice Gaillard, *Démocratie Cambodgienne. La Constitution du 24 septembre 1993* (Paris: L'Harmattan, 1994); Siphana Sok and De-nora Sarin, *Legal System of Cambodia* (Phnom Penh: Cambodian Legal Resources Development Center, 1998); Koy Neam, *Introduction to the Cambodian Judicial Process* (Washington, DC: 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 (Fall 1994), pp. 45–110.

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

11. David Chandler, *A History of Cambodia*, 2nd ed. (Chiang Mai, Thailand: Silkworm Books, 1993), p. 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, CO: Lynne Rienner, 1986).

12. Chandler, *History*, p. 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" (112).

13. François Ponchaud, "Social Change in the Vortex of Revolution," in *Rendezvous with Death*, p. 176, quoting Alain Forest, *Le Cambodge et la colonisation française: Histoire d'une colonisation sans heurts (1897–1920)* (Paris: L'Harmattan, 1980).

14. Chandler, *History*, p. 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 Gaillard, *Démocratie Cambodgienne*, p. 25.

15. Chandler, *History*, p. 111.

16. 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, "points of dispute, however trifling, are taken to the ruler." When two men have a dispute over a matter,

“each 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*, 2nd ed. (Bangkok: The Siam Society, 1992), p. 33.

17. Gaillard, *Démocratie Cambodgienne*, p. 25.
18. Constitution of September 23, 1993, art. 1, para. 2.
19. Lao, *The Unfinished Settlement*, pp. 169–97.
20. *Ibid.*, pp. 203–04.
21. See note 1.
22. Paris Agreement, annex 5, para. 4.
23. Nayan Chanda, quoted by Ratner, “The Cambodia Settlement Agreements,” p. 27, note 163.
24. For example, Milton Osborne reports that “time and again Sihanouk had made clear his distrust of radical politics within Cambodia and his readiness to sanction the repressive measures used by his security services.” Milton Osborne, *Sihanouk: Prince of Light, Prince of Darkness* (Honolulu: University of Hawaii Press, 1994), p. 121.
25. Lao Mong Hay affirms, “At the PICC the Khmer Rouge had fought hard to remove that word from all conference documents, and had succeeded.” Lao, *The Unfinished Settlement*, p. 199.
26. Stephen P. Marks, “Forgetting ‘The Policies and Practices of the Past’: Impunity in Cambodia,” *Fletcher Forum*, vol. 8, no. 2 (1994), pp. 25–26, 28–30, 36–38.
27. Text on file with the author.
28. Paris Agreement, art. 3.
29. Paris Agreement, art. 6.
30. Personal recollection of the author.
31. Personal recollection of the author.

32. Paris Agreements, annex 1, section D.

33. Formed by armed groups on the Thai-Cambodian border in August 1979, the Mouvement de Liberation Nationale du Kampuchea (National Liberation Movement of Kampuchea, or MOLINAKA) was supported mainly by French-based Cambodian exiles. The party under the MOLINAKA name that won a seat in the 1993 elections was formed in 1992 from members of FUNCINPEC and was dissolved in 1998.

34. UN Security Council Resolution 840 (1993).

35. John C. Brown, “Khmer Democracy: Where’s the Participation?” *Phnom Penh Post*, August 27–September 9, 1993, p. 8.

36. Osborne, *Sihanouk*, pp. 261–62.

37. Isabelle Hourcade, “M. Akashi ‘profondément satisfait’ de la mission de l’ONU au Cambodge,” Agence France Presse, September 26, 1993 (LEXIS-NEXIS, September 27, 1993).

38. Francis Curta, “La France salue l’adoption de la nouvelle constitution,” Agence France Presse, September 21, 1993 (LEXIS-NEXIS, September 21, 1993). See also “EC Welcomes New Constitution in Cambodia,” European Report, European Information Service, October 6, 1993, section I, Institutions and Policy Coordination no. 1891 (LEXIS-NEXIS, October 6, 1993).

39. Associated Press, AP Online, VO155, September 24, 1993.

40. UN Security Council Resolution 880 (1993).

41. Brown and Zasloff, *Cambodia Confounds the Peacemakers*, pp. 132–33.

42. Paris Agreement, art. 15(2)(a). See also the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, art. 3(2).

43. *Report of the Secretary-General*, UN Document S/23613, para. 12. This document is the principal source, after the text of the Paris Agreements, of UNTAC’s mandate.

44. Stephen P. Marks, “Human Rights Education in UN Peace-Building: From Theory to Practice,” in *Human Rights Education for the Twenty-First Century*, ed. George J. Andreopoulos and Richard Pierre Claude (Philadelphia: University of Pennsylvania Press, 1997), pp. 36–39.

45. UN Document S/23613, para. 13.

46. UN Document S/23613, para. 13.

47. Marks, "Human Rights Education in UN Peace-Building," p. 47.

48. *Report of the Special Representative of the Secretary-General, Mr. Michael Kirby (Australia), on the Situation of Human Rights in Cambodia, Submitted in Accordance with Commission Resolution 1993/6*, UN Doc. E/CN.4/1994/73, February 24, 1994, para. 165, p. 42.

49. "Women's Rights Movement Starts," *Cambodia Times*, March 15–21, 1993, p. 11.

50. David Hawk, "The Photographic Record," in *Rendezvous with Death*, p. 212.

51. *Ibid.*, p. 212.

52. Eva Mysliwicz, *Punishing the Poor: The International Isolation of Kampuchea* (Oxford: Oxfam, 1988), p. 47.

53. 1993 Constitution, art 41.

54. *Report of the Special Representative of the Secretary-General, Mr. Michael Kirby*, para. 159, p. 41.

55. "Monarchy or Republic?" *Phnom Penh Post*, June 18–July 1, 1993, p. 8.

56. "The U.N. Says It Is Not Worried at This Point. Charter: Out of Sight, Out of Mind," *Phnom Penh Post*, August 13–26, 1993, p. 1.

57. "Sihanouk Backs Royalist Charter," *Phnom Penh Post*, September 10–23, 1993, p. 1.

58. John C. Brown, "NGOs Express Concern over Draft Constitution," *Phnom Penh Post*, August 27–September 9, 1993, p. 1.

59. Brown, "Khmer Democracy: Where's the Participation?" at p. 7. In Akashi's reply, he supported their "democratic right to lobby the members of the Constituent Assembly and the political parties to which they belong, on any matters of concern relating to the Constitution," but noted that the process was the responsibility and prerogative of the assembly.

60. "Comics, Monks Spread Human Rights Message," *Phnom Penh Post*, September 25, 1992, p. 8.

61. "Former Royal Aide Opens Think Tank," *Phnom Penh Post*, November 20–December 3, 1992.

62. "Taking It to the People," *Phnom Penh Post*, September 10–23, 1993, p. 7. "What Do You Think of the Constitution?" *Phnom Penh Post*, September 24–October 7, 1993, p. 6.

63. "NGOs Express Concern over Draft Constitution," *Phnom Penh Post*, August 27–September 9, 1993, p. 1.

64. See note 4.

65. Paris Agreements, annex 1, section B, para. 1, and S/23613, February 19, 1992, para. 94.

66. Letter dated June 27, 1992, from Mr. Khieu Samphan, transmitting proposal of the Party of Democratic Kampuchea (PDK) on cooperation between UNTAC and the Supreme National Council, in United Nations, *The United Nations and Cambodia, 1991–1994*, document 38, pp. 198–99; and proposal dated July 12, 1992, of the Party of Democratic Kampuchea on the implementation of phase II of the cease-fire and the regroupment and cantonment of the forces of the PDK, United Nations, *The United Nations and Cambodia*, document 40, pp. 200–01.

67. A description of nine of the twenty parties was published in Phnom Penh on the eve of the election. "Party Profiles," *Phnom Penh Post*, May 21–June 3, 1993, p. 10.

68. During his brief attempt to form a coalition government, Sihanouk had invited the DK to join in "national reconciliation and national union" and offered Khieu Samphan and Son Sen, the nominal leaders of the DK, "official recognition." Brown and Zasloff, *Cambodia Confounds the Peacemakers*.

69. Human Rights Watch, *The Lost Agenda: Human Rights and UN Field Operations* (New York: Human Rights Watch, 1993), p. 46. The reference to a "neutral political environment" is from the requirement of Article 12 of the Paris Agreement that such an environment exist for the elections.

70. Paris Agreement, art. 1.

71. Paris Agreement, annex 1, sec. D, para. 5.

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

73. S/RES/745 (1992) of February 28, 1992.

74. See note 32 and accompanying text.

75. Shawcross, *Cambodia's New Deal*, p. 33.

76. Brown and Zasloff, *Cambodia Confounds the Peacemakers*, p. 195.

77. *Ibid.*, pp. 195–96.

78. "Assemblymen in Workshop," *Phnom Penh Post*, July 2–15, 1993, p. 5.

79. Later in 1993, NDI and IRI brought experts from Bangladesh, Thailand, the Philippines, and the United States to share experiences on law-

making, policy development, public accountability, parliamentary procedures, and the role of political parties. "Parliamentary Training for MPs," *Phnom Penh Post*, Oct. 8–21, 1993, p. 2.

80. Brown and Zasloff, *Cambodia Confounds the Peacemakers*, p. 195.

81. *Ibid.*, p. 195.

82. See Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000); Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law*, vol. 86 (1992), pp. 46–91.

83. Ratner, "The Cambodia Settlement Agreements," pp. 27–28. Footnotes omitted.

84. See Stephen P. Marks, "The New Cambodian Constitution: From Civil War to a Fragile Democracy," *Columbia Human Rights Law Review*, vol. 26, no. 1 (Fall 1994), pp. 74–76.

85. Among the growing literature on this topic, see Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal*, vol. 100 (1991), p. 2537; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Geoffrey Robertson, *Crimes against Humanity. The Struggle for Global Justice* (New York: The New Press, 1999); "Seeking International Justice: The Role of Institutions," *Journal of International Affairs*, vol. 52, no. 2 (Spring 1999).

86. The peace agreement of January 16, 1992, provides as follows: "5. End to Impunity. The Parties recognize the need to clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardized. To that end, the Parties refer this issue to the Commission on the Truth for consideration and resolution. All of this shall be without prejudice to the principle, which the Parties also recognize, that acts of this nature, regardless of the sector to which their perpetrators belong, must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible."

87. The term *genocide* was deliberately avoided to keep the DK in the peace process but was clearly understood by the references to "policies and practices of the past." In his testimony before the House Foreign Affairs Subcommittee on Asian and Pacific Affairs, Assistant Secretary of State Richard H. Solomon stated, in the view of the administration,

"the bottom line is that the peace process is the one promising way of bringing security and justice to the Cambodian people. Its successful completion cannot be held back over the issue of including or not including the word 'genocide.' The Khmer Rouge would be the only beneficiary if discord over this issue blocks moving forward to conclude a political settlement." 102nd Congress, Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs, House of Representatives, *Review of Proposed Economic and Security Assistance Requests for Asia and the Pacific*, March 6, 7, 22, and April 10, 17, 1991, p. 391 (1992).

88. Constitution of September 21, 1993, arts. 109–16.

89. Constitution of September 21, 1993, art. 52.

90. See Marks, "Forgetting 'The Policies and Practices of the Past,'" pp. 37–38; Stephen P. Marks, "Elusive Justice for the Victims of the Khmer Rouge," *Journal of International Affairs*, vol. 52, no. 2 (Spring 1999), pp. 691–718. The 1994 law outlawing the DK refers to "crimes of murder, rape, robbery of private property, destruction of public and private property," as well as "acts of secession" and "incitement of the population to take up arms against the state authority," but does not refer to international crimes of genocide or crimes against humanity. The problem has been regularly raised by the special representatives of the secretary-general for human rights in Cambodia. See *Situation of Human Rights in Cambodia. Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Peter Leuprecht*, UN Doc. E/CN.4/2005/116, December 20, 2004, para. 36; *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Yash Ghai*, UN Doc. E/CN.4/2006/110, January 24, 2006, para. 26.

91. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea with amendments as promulgated on October 27, 2004 (NS/RKM/1004/006).

92. These defendants are: Khieu Samphan, Nuon Chea, Ieng Sary, and Ieng Thirith. Official information is provided on the Cambodian government's Web site for the ECCC, available at <http://www.eccc.gov.kh/english/default.aspx> (accessed May 21, 2009). The Open Society Justice Initiative maintains an ongoing monitoring of progress, priorities, and challenges at the ECCC, with monthly

updates available at http://www.justiceinitiative.org/db/resource2?res_id=103899/.

93. The Open Society Justice Initiative, *Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia* (New York: Open Society Institute, 2007). See also Open Society Justice Initiative, *The Extraordinary Chambers* (New York: Open Society Institute, 2006); Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: October 2008 Update* (New York: Open Society Institute, 2008), and monthly updates cited *supra* note 93.

94. Elizabeth Becker, "When justice is delayed," *International Herald Tribune*, March 13, 2009.

95. DC-Cam's Web site is at <http://www.dccam.org/>.

96. Personal recollections of the author.

97. Personal recollections of the author.

98. Gaillard, *Démocratie Cambodgienne*, p. 25.

99. Constitution, art. 51.

100. Annex 5 of the Paris Agreements requires that the words "liberal democracy and pluralism" appear in the constitution. In addition to the provision of Article 1 noted above, Article 51 of the constitution satisfies this requirement by providing that "The Kingdom of Cambodia adopts a policy of Liberal Democracy and Pluralism."

101. The second sentence of this article reads "The king shall be the Head of State for life." Sihanouk's propensity for reigning rather than ruling has been identified as a reason for his failures in the 1950s. Michael Leifer wrote that Sihanouk's record "suggests a greater facility for reigning than for ruling. He is more at home with the pomp and circumstances of government than with its good practice. His neglect of the latter when in power is part of the tragedy of modern Cambodia." Quoted by Osborne, *Sihanouk*, p. 268.

102. Constitution, art. 17.

103. Constitution, art. 9.

104. Constitution, art. 19.

105. Constitution, art. 21.

106. Constitution, art. 24. The consent of the parliament is required before he can declare war.

107. Constitution, art. 22.

108. Constitution, art. 26. Treaties must first be adopted by the national assembly.

109. Constitution, art. 28.

110. Constitution, art. 23.

111. Constitution, art. 24.

112. Constitution, art. 10.

113. Constitution, art. 123.

114. Constitution, art. 99.

115. Constitution, art. 100.

116. Paris Agreement, annex 5, para. 2.

117. Paris Agreement, annex 5, para. 5.

118. Cambodia acceded to the International Covenant on Civil and Political Rights on August 26, 1992, as one of the human rights treaties ratified by the SNC during the administration of UNTAC.

119. Constitution of September 21, 1993, art. 39.

120. *Report of the Special Representative of the Secretary-General, Mr. Michael Kirby*, para. 137, p. 36. Louis Aucoin has informed the author that the drafters intended to adopt the German model of judicial review in Article 39, allowing the court to refer any constitutional challenge to the constitutional court. Communication of January 24, 2002.

121. "After the end of the transitional period, the United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a special Rapporteur who would report his findings annually to the Commission and to the General Assembly."

122. Commission on Human Rights Resolution 1993/6, adopted on February 19, 1993.

123. Twenty-seven reports had been issued by the SRSGs between February 1994 and February 2008. See http://cambodia.ohchr.org/EN/report_srsg.htm.

124. J. Basil Fernando, *The Inability to Prosecute: Courts and Human Rights in Cambodia and Sri Lanka* (Hong Kong: Future Asia Link, 1993), p. 9.

125. Fernando, *The Inability to Prosecute*, p. 10.

126. This distinction was suggested to the author by Professor Richard Falk.

127. Gene Sharp, *Social Power and Political Freedom* (Boston: Porter Sargent Publishers, 1980), p. 322.

128. Nelson Kasfir, "Popular Sovereignty and Popular Participation: Mixed Constitutional Democracy in the Third World," *Third World Quarterly*, vol. 13, no. 4 (1992), p. 595.

129. Shahid Qadir, Christopher Clapham, and Barry Gills, "Sustainable Democracy: Formalism vs. Substance," *Third World Quarterly*, vol. 14, no. 3 (1993), p. 416.

130. Osborne, *Sihanouk*, p. 8.

131. Constitution of September 21, 1993, art. 52.

132. 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) (this author’s translation from the French).

133. Sheila McNulty, “Khmer Rouge ‘for King and Country,’” *The Independent*, October 2, 1993, p. 13.

134. Jean-Claude Pomonti, “Cambodge: Les Khmer Rouge connaissent de nombreuses défections,” *Le Monde*, September 20, 1993 (LEXIS-NEXIS, September 21, 1993).

135. Cambodia ranks 131 out of 177 in UNDP’s Human Development Index and 85 out of 108 developing countries on the Human Poverty Index. UNDP, *Human Development Report 2007/08*, pp. 231 and 240.

136. Cambodia received \$537.8 million in foreign aid in 2005, which is 8.7 percent of its GDP. These figures show an increase in aid received

compared to 2003 (\$508 million, or 12 percent of GDP) and 2004 (\$478 million, or 9.8 percent of GDP). UNDP, *Human Development Report 2007/08*, p. 292; UNDP, *Human Development Report 2006*, p. 345; and UNDP, *Human Development Report 2005*, p. 282.

137. Net foreign direct investment was 6.1 percent of GDP in 2005 (up from 2.7 percent of GDP in 2004, 2.1 percent in 2003, and 3.3 percent in 2001). UNDP, *Human Development Report 2007/08*, p. 292, UNDP, *Human Development Report 2006*, p. 345, UNDP, *Human Development Report 2005*, p. 282, and UNDP, *Human Development Report 2003*, p. 293.

138. The Economic Institute of Cambodia (EIC), which is supported by the World Bank, calculated Cambodia’s 2008 economic growth rate at 5.2 percent in 2008, down from a growth rate of 10.2 percent in 2007. The global economic crisis is expected to bring Cambodia’s economic growth rate down to about 2 percent in 2009. Economic Institute of Cambodia, *Cambodia Economic Watch—April 2009* (Phnom Penh, 2009), p. vii.