

Post-conflict Human Rights and their Constitutional Implications: The Cambodian Experience over the Last Ten Years

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Since World War II Cambodia has experimented with all major systems of government: absolute monarchy, constitutional monarchy with parliamentary democracy, republic with an army general as president Maoist communist republic, soviet communist republic, and now back to constitutional monarchy with parliamentary democracy. Cambodia's recent tragic history led to its re-adoption of the system it had abandoned in 1970.

In 1970 the constitutional monarchy was overthrown when the ruling elite led by an army general decided to go to war to rid Cambodia of the communist Vietnamese sanctuaries in the regions bordering Vietnam, at the end of the Ho Chi Minh Trail. Cambodia was then engulfed in the Vietnam War. A communist group, commonly known as the Khmer Rouge, seized power in April 1975 at the end of that war and imposed a harsh communist rule. Under the Khmer Rouge rule well over one million Cambodians were killed or died of starvation or diseases. Cambodians then had neither rights nor rice. The United Kingdom intervened at the United Nations High Commission for Human Rights, only to be resisted by the Khmer Rouge regime and by the Soviet Union. The American President called the Khmer Rouge then the world's worst violators of human rights. An American Senator called for the dispatch of troops to attack the Khmer Rouge. At the end of 1978, following protracted border conflicts, Vietnam sent its troops to oust the Khmer Rouge. These troops occupied Cambodia and installed another, less harsh communist regime to rule it.

An armed conflict ensued when the Khmer Rouge and two non-communist groups were fighting side by side against the Vietnamese occupation. The Cambodian conflict had gone on for some ten years. At the initiative of Indonesia, a peace process started in 1988 in Jakarta and, with Australia's final push, concluded at an international conference in Paris with the signing in October 1991 of the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict. Four Cambodian warring factions¹ representing Cambodia and 18 other countries² including the five big powers participated in that international conference and signed those agreements.

It was recognized in those agreements that "Cambodia's tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past." Provisions were then specified to assure such protection. They included undertakings by Cambodia itself, the other state signatories and the United Nations to protect human rights in Cambodia.

It was perhaps the first time in the history of international treaty that the signatories' undertakings to assure protection of human rights were a key part of an international agreement³: All persons in Cambodia including all returnees "shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments."

To this end, Cambodia undertakes:

1. To ensure respect for human rights and fundamental freedoms in Cambodia; to support the right of all Cambodian citizens to undertake activities which would

- promote and protect human rights and fundamental freedoms
2. to take effective measures to ensure that the policies and practices of the past shall never be allowed to return
 3. to adhere to relevant international human rights instruments.

For their part, the other signatories undertake to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia. The United Nations Transitional Authority in Cambodia (UNTAC) shall be responsible for fostering an environment in which respect for human rights shall be ensured. 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.

No less a key part was the determination of a set of principles for a new constitution for Cambodia including those regarding human rights and fundamental freedoms, Cambodia's status of neutrality, and the pluralistic liberal democratic system of government and the rule of law with an independent judiciary as its core⁴.

Under the same peace agreements the UN dispatched a peacekeeping force called the United Nations Transitional Authority in Cambodia, commonly known as UNTAC, to maintain peace, rule Cambodia and organise election of a new Cambodian government. At the beginning of 1992 UNTAC began to deploy its force. As part of its organisation of the election, UNTAC launched a nation-wide programme of education in human rights. A few human rights NGOs began to emerge to participate in that programme and also to monitor the electoral process⁵. The Supreme National Council of Cambodia (SNC), which embodied Cambodia's sovereignty during the transitional period, began to discharge Cambodia's obligations by signing all relevant international human rights instruments, including the Convention on the Rights of the Child.⁶

The election took place in May 1993, and later on in September Cambodia adopted a new constitution. This constitution reflects fully Cambodia's human rights undertakings, affirming its adherence to all relevant international human rights instruments and its guarantee and protection of human rights, woman's rights and the rights of the child. The UN Centre for Human Rights opened an office in Phnom Penh to monitor the human rights situation and assist the government and NGOs in the human rights and human rights-related fields. Furthermore, the UN Secretary-General has since appointed his Special Representative for Human Rights in Cambodia⁷. More human rights NGOs were created. The old and new NGOs have ever since been engaged in education and training in human rights, and in monitoring their violations.

Since its creation in 1993 the National Assembly, the Lower House of the Parliament, has created a Commission for Human Rights and Reception of Complaints. Likewise the Senate, the Upper House, also created the same Commission when this house was created in 1999. For its part, the Cambodian government has set up its own National Commission for Human Rights since 1997.

The constitutional guarantee, those state institutions and those human rights NGOs have contributed to the improvement of the human rights situation in Cambodia. However, they have not been effective in protecting human rights when those commissions are political institutions and are subject to control by powerful politicians

and when NGOs do not have any power to enforce human rights. Violations have continued, through to a lesser extent than before UNTAC times. Two particular rights have been violated continuously:(1) the right to decent wages to live on, as now government officials are paid below-survival salaries; (2) the right to security or freedom from fear as now many people, especially in the countryside, do not dare exercise their freedom of expression, especially during election times.

The ineffectiveness in the enforcement of human rights seems to come from the powerlessness of the institutions of the rule of law that have constitutional duties to protect human rights. The Paris Peace Agreements have spelled out clearly that “Aggrieved individuals will be entitled to have the courts adjudicate and enforce these human rights” and that “An independent judiciary will be established, empowered to enforce the rights provided under the constitution.”

In fact, Cambodia’s Constitution has provided for the separation of powers and the independence of the Judiciary. It has further specified that the “King shall be ...the guarantor of the respect for the rights and freedoms of the citizens..”⁸ and that the “Judiciary shall...protect the rights and freedoms of the citizens.”⁹

Actually the King cannot provide such a guarantee however much he might want to, as he does not have executive powers and institutions under his command to help him ensure respect for the rights and freedoms of Cambodian citizens. As to the Judiciary, whose organisation and practices have been inherited from the communist days, it has neither independence nor human rights expertise yet. Furthermore, the Cambodian judicial system is a civil law system and courts can adjudicate only on the basis of the laws and legal procedures in force. And thus far those legal procedures and laws are still lacking, especially the ones for the protection of human rights, redress for violations and punishment of violators.

Recently there have been talks about the creation of an independent human rights commission for protection of human rights. It is doubtful whether that commission, even if it can be made independent, could do its job when the courts are not independent and lack human rights expertise, and when legal procedures and laws are insufficient to ensure the protection of each of the human rights Cambodia’s constitution has guaranteed. Furthermore there would be a need to amend the constitution for that commission to have the power to prosecute human rights violators, as at the moment only the Public Prosecution Office has the exclusive constitutional powers to prosecute.

Considering Cambodia’s present Constitution and based on past experience, the effectiveness of the protection of human rights require a number of contributing factors:

A. Direct Contributing Factors:

1. All constitutional institutions are created and discharge fully their constitutional duties, which is not the case up to now, as the leadership, system and practices are still very much there;
2. A clear cut adoption of either the principle of the supremacy of international law or the principle of the supremacy of constitutional law for the incorporation of international law, in this case, the international human rights law, into municipal law;
3. Enactment of legal provisions for the enforcement and protection of each of the human rights guaranteed by that constitution and also of the procedure for cases

of human rights violations;

4. Empowerment of the Public Prosecution Office to take up cases of human rights violations directly;

5. Actual independence of the same Office and the courts of law and the provision of expertise and resources to deal with human rights cases;

6. Continued education in human rights for the whole of the population, and compulsory training in human rights for all government officials, especially members of the army and security forces.

B. Continued External Pressure:

7. The UN, international and national human rights organisations, continued to assist and monitor the human rights situation in Cambodia.

8. The discharge of their international obligations under the Paris Peace Agreements of 1991 were to discharge their obligations under those Agreements and did not hesitate to raise their legitimate concern over the human rights situation in Cambodia;

9. Donor countries' tying of human rights conditionality to their aid to Cambodia.

C. International Environment Favourable to Human Rights:

10. Recognition of and actual respect for all human rights including the rights of ethnic minorities and indigenous peoples by donor countries and state signatories to the Paris Peace Agreements of 1991;

11. Adoption of a human rights charter for Asia or the Asia-Pacific region and creation of mechanisms including a regional human rights court to enforce human rights, and better still,

12. Compulsory ratification of all international human rights instruments and provision of proof of good human rights records by all permanent and other members of the UN Security Council.

Factors 3, 4 and 5 would fit in very well with the King's constitutional duty to guarantee respect for human rights when He is constitutionally the guarantor of human rights and of the independence of the Judiciary, and when, at the same time, according to the Constitution, He is the Chairman of the Supreme Council of the Magistracy. This Council is the supreme judicial body whose responsibilities include assistance to the King to guarantee the independence of the Judiciary, selection of judges and public prosecutors for appointment by the King and the supervision of the work of both judges and public prosecutors.

It would be more cost-effective and easier to build on what the constitution has provided for, instead of creating a new institution whose independence from political control cannot be assured for the foreseeable future. Considering the limited resources of the country, there is no need to proliferate public institutions when there are so many human rights institutions around already. As has been said, when the responsibility is shared among so many, no one is responsible in the end.

It would be better to get the existing institutions to function and fulfill their constitutional duties first and foremost. If they were proven inadequate to protect human rights, then the creation of another institution to complement them would be justified.

As to contributing factors 7 to 12, like-minded states, together with their academic institutions and NGOs, or these academic institutions and these NGOs alone to start off with, could join forces and work together to attain the objectives set forth above.

¹ The State of Cambodia (SOC) (communist), the Khmer Rouge (communist), Front Uni pour un Cambodge Neutre, Pacifique et Cooperatif (FUNCINPEC) (non-communist), and the Khmer People's National Liberation Front (KPNLF)(non-communist).

² Australia, Brunei, Canada, China, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, the Soviet Union, Thailand, United Kingdom, USA, Vietnam, and Yugoslavia (representing the Non-Aligned Movement)

³ Agreement on a Comprehensive Settlement of the Cambodia Conflict: Part II: Human Rights, and Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia: Article 3.

⁴ Agreement on a Comprehensive Settlement of the Cambodia Conflict: Annex 5.

⁵ The Khmer Institute of Democracy was among the first founded at that time (1992)

⁶ To date Cambodia has ratified the following international human rights instruments:

1. The Charter of the United Nations;
2. The Universal Declaration of Human Rights;
3. International Covenant on Economic, Social and Cultural Rights;
4. International Covenant on Civil and Political Rights;
5. International Convention on the Elimination of All Forms of Racial Discrimination;
6. International Convention on the Suppression and Punishment of the Crime of Apartheid;
7. ILO Convention (No.100) concerning Equal Remuneration for Men and Women Workers for Work of equal Value;
8. ILO Convention (No.111) concerning Discrimination in Respect of Employment and Occupation;
9. Convention on the Prevention and Punishment of the Crime of Genocide;
10. Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment;
11. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
12. ILO Convention (No.29) Concerning Forced Labour;
13. ILO Convention (no.105) concerning the Abolition of Forced Labour;
14. Convention relating to the Status of Refugees;
15. protocol relating to the Status of Refugees;
16. ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize;
17. ILO Convention (No.98) concerning the Application of the Principles of the Right to Organize and Bargain Collectively;
18. ILO Convention (No.122) concerning Employment Policy;
19. Convention on the Elimination of All Forms of Discrimination against Women;
20. Convention on the Rights of the Child;
21. ILO Convention (No.138) concerning Minimum Age for Admission to Employment;
22. Geneva Convention for the Amelioration of the Convention of the Wounded and Sick in Armed Forces in the Field;
23. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea;
24. Geneva Convention relative to the treatment of prisoners of War;
25. Geneva Convention relative to the Protection of Civilian Persons in Time of War;
26. Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection of Victims of International Armed Conflicts (Protocol I);
27. Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection

of Victims to non-international Armed Conflicts (Protocol II).

Source: UNESCO, *Human Rights, Major International Instruments, Status as at 31 May 2001*.

Last Month, November 2001, the Cambodian Lower House, the National Assembly, ratified the International Criminal Treaty.

⁷ The first was Justice Michael Kirby of Australia, the second was Ambassador Thomas Hammaberg of Sweden, and the third and current Special Representative is Prof. Peter Leuprecht of Austria now Professor at McGill University in Canada. All have had tenuous relations with the two successive Cambodian governments and especially with their prime ministers.

⁸ Art.8

⁹ Art 128 New.